

CORPORATE LIABILITY FOR FOREIGN CORRUPT PRACTICES UNDER CANADIAN LAW

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Compliance with, and risk management in respect of, foreign anti-corruption law has quickly become a priority for Canadian corporations with international operations or assets. This article tracks this rapid evolution in Canadian corporate culture and compliance through a broad examination of corporate liability for foreign corrupt practices under Canadian law. Rather than merely conduct a review of the law governing corporate liability for foreign corrupt practices under Canadian law, however, this article also highlights a number of unresolved, problematic, or more complex areas of such law. This review does not purport to be exhaustive; nor does it presume offer definitive answers to the numerous questions posed. Rather, given the recent acceleration of the enforcement of the *CFPOA* by Canadian authorities, the aim of this article is to contribute novel legal analysis to an increasingly important area of corporate law and practice.

La conformité avec les lois concernant la lutte à la corruption à l'étranger et la gestion des risques associés à cette problématique sont rapidement devenues des priorités pour les sociétés canadiennes qui opèrent à l'étranger ou qui y détiennent des actifs. Le présent article retrace cette évolution rapide dans la culture d'entreprise canadienne en se penchant sur le droit de la responsabilité des personnes morales pour la corruption à l'étranger. En plus d'exposer l'état du droit canadien, cet article identifie plusieurs questions irrésolues et aspects problématiques et complexes de ce domaine de droit. L'analyse ne se veut pas exhaustive et l'auteur ne prétend pas apporter de réponses définitives aux questions soulevées. L'article vise plutôt à contribuer à l'analyse juridique d'un domaine du droit canadien des sociétés qui prend rapidement de l'expansion, notamment par la récente accélération de la mise en œuvre de la *Loi sur la corruption d'agents publics étrangers* par les autorités canadiennes.

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Introduction

Compliance with, and risk management in respect of, foreign anti-corruption law has quickly become a priority for Canadian corporations with international operations or assets. Although enacted in 1999, the *Corruption of Foreign Public Officials Act* (“CFPOA”)¹ sat largely ignored by Canadian federal officials for over a decade until growing international criticism prompted a revision of policy.² Federal action has been swift since this time, with details of new arrests and prosecutions regularly making the news, and approximately thirty-five investigations reportedly underway in 2013.³ The watershed moment was the guilty plea of Niko Resources Ltd. to the bribery of a Bangladeshi energy minister in June 2011.⁴ Since that time, other highly recognizable tribulations have likely been those of Griffiths International Energy Inc. and SNC-Lavalin.⁵

Faced with this sea change in the Canadian enforcement landscape, Canadian corporations with international operations have rushed to ensure compliance with the CFPOA and its prohibitions, including through the adoption of anti-corruption policies and procedures. These typically

¹ *Corruption of Foreign Public Officials Act*, SC 1998, c 34 [CFPOA].

² See Julian Sher, “OECD slams Canada’s lack of prosecution of bribery offences” *The Globe and Mail* (28 March 2011) online: The Globe and Mail <www.theglobeandmail.com/report-on-business/economy/oeed-slams-canadas-lack-of-prosecution-of-bribery-offences/article580736/>.

³ See Theresa Tedesco, “OECD praises Canada’s anti-corruption efforts” *Financial Post* (27 May 2013) online: Financial Post <business.financialpost.com/2013/05/27/oeed-praises-canadas-anti-corruption-efforts/>.

⁴ See Greg McArthur, “Niko Resources: Ottawa’s corruption test case” *The Globe and Mail* (25 August 2011) online: The Globe and Mail <www.theglobeandmail.com/report-on-business/rob-magazine/niko-resources-ottawas-corruption-test-case/article542842/>.

⁵ On 25 January 2013, Griffiths International Energy Inc. was convicted of bribing the Chadian Ambassador to Canada in connection with Griffiths’ pursuit of oil and gas assets in that country. See Carrie Tait, “Griffiths to pay millions in African bribery case” *The Globe and Mail* (22 January 2013) online: The Globe and Mail <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/griffiths-to-pay-millions-in-african-bribery-case/article7622364/>. SNC-Lavalin has, since 2012, been under investigation by Canadian and other international authorities in connection with its operations in numerous jurisdictions, including Libya and Bangladesh. See Greg McArthur & Claudio Gatti, “SNC bribery probe widens to Algeria” *The Globe and Mail* (21 February 2013) online: The Globe and Mail <www.theglobeandmail.com/report-on-business/snc-bribery-probe-widens-to-algeria/article8907906/>. SNC-Lavalin is also defending a class action against investors in connection with alleged non-compliance with securities law. See “SNC-Lavalin Group Inc. Securities Class Actions”, *CNW* (7 February 2013) online: <www.newswire.ca/en/story/1110773/snc-lavalin-group-inc-securities-class-actions>. As of 7 January 2014, however, only individuals at SNC-Lavalin have been charged.

include the appointment of officers charged with the oversight and enforcement of such policies and procedures, mandatory employee training, and special purpose audit and accounting practices and reviews. The result has been a rapid evolution in the corporate culture of Canadian companies previously unaccustomed to conducting business in the shadow of vigorously enforced anti-corruption legislation.⁶

This evolution remains ongoing. In June 2013, Bill S-14 became law, amending the *CFPOA* to significantly expand the reach of the *CFPOA* by replacing the stricter standard of “territorial jurisdiction” with that of “nationality jurisdiction”; and to impose a “books and records” provision prohibiting accounting practices intended to conceal corrupt practices.⁷ The prosecution of foreign corrupt practices by Canadian authorities is also being supported by complementary efforts in related legal regimes, including in securities law.⁸

This article tracks this rapid evolution in Canadian corporate culture and compliance through a broad examination of corporate liability for foreign corrupt practices under Canadian law. Rather than merely conduct a review of the law governing corporate liability for foreign corrupt practices under Canadian law, this article also highlights a number of unresolved, problematic, or more complex areas of such law. Following a brief review of the prohibitions of the *CFPOA* (Part I), this paper moves to a multi-tiered consideration of section 22.2 of the *Criminal Code*,⁹ which is the provision controlling those circumstances in which a Canadian corporation may be held criminally liable for the acts of its human agents (Part II). This Part includes a review of the legislative purpose of section 22.2, as well as an examination of the three separate avenues pursuant to which a corporation may attract *CFPOA* liability based on the actions or inactions of one or more of its “senior officers”. Part III offers an analysis of the interaction of the doctrine of “wilful blindness”—the doctrine pursuant to which persons may be held criminally liable for acts committed

⁶ Note that Canadian companies with US subsidiaries that have international operations, as well as companies that are either listed or dual-listed on a US stock exchange, will likely be far more familiar with such considerations due to the comparatively long-standing active enforcement by US federal officials of the *Foreign Corrupt Practices Act* (15 USC § 78dd-1 (2012) [*FCPA*]). Note also that British companies have been experiencing a similar learning curve thanks to the recent passage of the *Bribery Act 2010* ((UK), c 23).

⁷ Bill S-14, *An Act to amend the Corruption of Foreign Public Officials Act*, 1st Sess, 41st Parl, 2013 (assented to 19 June 2013), SC 2013, c 26 [Bill S-14].

⁸ See John W Boscarior, Brenda C Swick & Zachary Masoud, “Canada Announces New Initiative for Disclosure of Payments to Governments” (13 June 2013) online: McCarthy Tétrault <www.mccarthy.ca/article_detail.aspx?id=6334>.

⁹ RSC 1985, c C-46 [*Criminal Code*].

on their behalf with their passive approval, that is, in circumstances in which the person suspected the intended activity but consciously side-stepped additional investigation out of fear of what would be discovered—with the prescriptions of section 22.2 of the *Criminal Code*. Finally, in Part IV, this article considers corporate liability for foreign corrupt practices in the context of other business transactions and structures, including corporate liability for the acts of acquisition targets and for the acts of foreign subsidiaries.

This review does not purport to be exhaustive; nor does it presume to offer definitive answers to the numerous questions posed. Rather, given the recent acceleration of the enforcement of the *CFPOA* by Canadian authorities, the aim of this article is to contribute novel legal analysis to an increasingly important area of corporate law and practice.

I. The *CFPOA* and its Prohibitions

Generally speaking, the *CFPOA* imposes criminal and civil liability on individuals and entities that engage in bribery or other corruption of foreign public officials. Section 3(1) is the “centrepiece” of the Act.¹⁰ It provides that:

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

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

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.¹¹

In addition, Bill S-14, enacted and effective as of 19 June 2013, adds a corresponding “books and records” offence to the *CFPOA*.¹² This enactment makes it a criminal offence for an individual or entity to, “for the purpose of bribing a foreign public official ... or for the purpose of hiding that bribery,” engage in any of the following accounting practices:

¹⁰ Canada, Department of Justice, *The Corruption of Foreign Public Officials Act: A Guide* (Ottawa: Department of Justice, May 1999) [*CFPOA Guide*] at 3.

¹¹ *CFPOA*, *supra* note 1, s 3(1).

¹² Bill S-14, *supra* note 7, cl 4.

- (a) establish[ing] or maintain[ing] accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
- (b) mak[ing] transactions that are not recorded in those books and records or that are inadequately identified in them;
- (c) record[ing] non-existent expenditures in those books and records;
- (d) enter[ing] liabilities with incorrect identification of their object in those books and records;
- (e) knowingly us[ing] false documents; or
- (f) intentionally destroy[ing] accounting books and records earlier than permitted by law.¹³

Therefore, generally speaking, a corporation may be liable for corrupt practices under the *CFPOA* both where the corporation provides, offers to provide, or agrees to provide something of value to a foreign public official to induce that official to use the her authority or influence to obtain or retain a business advantage for the corporation; and where the corporation engages in accounting practices designed to disguise such corrupt activity.

II. Bill C-45 and Section 22.2 of the *Criminal Code*

What does it mean for a corporation—rather than an individual—to be liable for corrupt practices under the *CFPOA*? Pursuant to section 22.2 of the *Criminal Code*, enacted in 2004 by Bill C-45,¹⁴ a corporation may only be held criminally liable in certain prescribed circumstances. Specifically, section 22.2 provides that:

In respect of an offence that requires the prosecution to prove fault—other than negligence—an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its *senior officers*

- (a) acting within the scope of their authority, *is a party to the offence*;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, *directs the work of other representatives of the organization* so that they do the act or make the omission specified in the offence; or

¹³ *CFPOA*, *supra* note 1, s 4(1). Note that a violation of the books and records provision of the *CFPOA* may also attract liability under substantively similar provisions of the *Criminal Code*, *supra* note 9, including sections 361 (false pretences), 380 (fraud), and 397 (falsification of books and documents).

¹⁴ Bill C-45, *An Act to amend the Criminal Code (criminal liability of organizations)*, 2d Sess, 37th Parl, 2003, cl 22.2 (assented to 7 November 2003), SC 2003, c 21.

(c) *knowing* that a representative of the organization *is or is about to be a party to the offence, does not take all reasonable measures* to stop them from being a party to the offence.¹⁵

Prior to Bill C-45 and section 22.2, the common law provided that a corporation could only be held criminally liable if illicit acts were committed by an individual held to be the “directing mind and will” of the entity.¹⁶ Although this inquiry took into account “the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case,”¹⁷ this approach set a relatively arduous standard to satisfy. As discussed by Justice Iacobucci in *Rhone v. Widener*, at least a modicum of executive control over the policies and operational practices of the corporation would be required:

[O]ne must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.¹⁸

Bill C-45 and section 22.2 were intended, in part, to replace this standard, as well as to generally “modernize the law with respect to the criminal liability of corporations.”¹⁹ As acknowledged by the *Plain Language Guide* to Bill C-45 published by the Department of Justice, however, section 22.2 does not entirely dispose of the directing mind concept.²⁰ Given section 22.2’s introductory language, the concept remains relevant to the analysis in that it is a “senior officer” who must participate in the commission of the crime in one or more of the three avenues outlined by subsections (a), (b), and (c). The *Guide* explains that the term “senior of-

¹⁵ *Criminal Code*, *supra* note 9, s 22.2 [emphasis added].

¹⁶ See Kent Roach, *Criminal Law*, 5th ed (Toronto: Irwin Law, 2012) at 231–32; see also Halsbury’s Laws of Canada—Business Corporations (McGuinness) (2013 Reissue, LexisNexis) [Halsbury’s] at HBC-32.

¹⁷ *Ibid* at HBC-32. See also Roach, *supra* note 16 at 232; Canada, Department of Justice, *A Plain Language Guide: Bill C-45—Amendments to the Criminal Code Affecting the Criminal Liability of Organizations*, online: Department of Justice <www.justice.gc.ca/eng/rp-pr/other-autre/c45/c45.pdf> at 3 [*Bill C-45 Guide*].

¹⁸ *Rhone (The) v Peter AB Widener (The)*, [1993] 1 SCR 497 at 521, 101 DLR (4th) 188 [*Rhone*]. See also *Canadian Dredge & Dock Co v The Queen*, [1985] 1 SCR 662, 19 DLR (4th) 314 [*Dredge & Dock*].

¹⁹ *Bill C-45 Guide*, *supra* note 17 at 2. See also Norm Keith, *Corporate Crime and Accountability in Canada: From Prosecutions to Corporate Social Responsibility* (Markham, ON: LexisNexis Canada, 2011) (“a growing consensus determined that the identification theory was inadequate to address the modern, complex corporation” at 46); Roach, *supra* note 16 at 232–33.

²⁰ *Bill C-45 Guide*, *supra* note 17 at 5.

ficer” captures every individual who plays an important role in setting a corporation’s policies or managing an important part of a corporation’s activities; and that it is the latter limb which represents the true extension of potential corporate criminal liability under section 22.2.²¹ Significantly, this modification “focuses on the function of the individual, rather than on any particular title.”²² In addition, the definition of “senior officer” eliminates any inquiry into the managerial function or authority of certain specified individuals, namely a corporation’s directors, chief executive officer, and chief financial officer. Stated differently, regardless of the managerial function or authority of these individuals, they will be *automatically* deemed to be a senior officer based merely on their titles.²³

III. Corporate Liability under the *CFPOA* and *Criminal Code* Sections 22.2(a) and 22.2(b)

Much about the marriage of section 22.2 with the *CFPOA* is relatively clear. The most straightforward manner for a corporation to attract criminal liability for corrupt practices is for a senior officer to be a direct party to the corrupt act pursuant to section 22.2(a):²⁴ for example, for the officer to either offer or pay a bribe to a foreign public official himself or herself, either directly or through a third party agent.²⁵ Here, the required criminal intent or *mens rea* is attributed to the senior officer, either due to his or her actual knowledge, or through imputed knowledge under the doc-

²¹ *Ibid* at 5. See also Roach, *supra* note 16 at 235–36; *R v Tri-Tex Sales & Services Ltd.*, [2006] NJ No 230 (QL) at para 42, 70 WCB (2d) 512 (NL Prov Ct) [*Tri-Tex*], in which the court describes Bill C-45 and section 22 of the *Criminal Code* as having effected “a fundamental change, if not a revolution, in corporate criminal liability” (quoting The Hon Todd L Archibald, Kenneth E Jull & Kent W Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management*, looseleaf (consulted on 31 January 2014), (Toronto: Canada Law Book, 2013) vol 1 at 5:10 [Archibald et al]).

²² *Bill C-45 Guide*, *supra* note 17 at 5.

²³ *Ibid.*

²⁴ *Ibid* at 7. Section 22.2(a) has been called a “codification of the common law identification theory” (*ibid*). See also Keith, *supra* note 19 at 72; Paul Dusome, “Criminal Liability under Bill C-45: Paradigms, Prosecutors, Predicaments” (2008) 53 *Crim LQ* 98 at 128.

²⁵ Note also that under section 22.2(a) the “senior officer does not necessarily have to [be] the person who actually commits the offence.” This is because section 22.2(a) only requires that the senior officer “is a party to the offence,” which may include aiding and abetting under sections 21(b) and 21(c), common unlawful intent under section 21(2), and counselling the commission of an offence under section 22. Therefore, a corporation may be “liable for a subjective intent offence under section 22.2(a) on the basis that its senior officer intentionally assisted or counselled a representative of the corporation to commit the offence” (Roach, *supra* note 16 at 240). Note also that section 3(1) of the *CFPOA*, *supra* note 1, captures both direct and indirect corrupt practices.

trine of wilful blindness.²⁶ Similarly, a senior officer will attract criminal liability to his or her corporation under section 22.2(b) if that officer instructs or directs another representative of the corporation to engage in corrupt practices; for example, if the officer directs another representative of the corporation to bribe a foreign official, direct a third party agent to bribe a foreign official in the representative's stead, or engage in accounting practices designed to disguise such corrupt acts.²⁷ Again, the required *mens rea* springs from the mind of the senior officer, and no comparable criminal intent in the mind of the representative is required.²⁸

The most significant analysis in each case would likely be whether the relevant individual in fact qualifies as a senior officer of the corporation under the *Criminal Code*—whether because the individual plays an important role in determining the corporation's policies, the individual manages an important part of the corporation's activities, or the individual is a director or the CEO or CFO of the corporation. To this end, recent case law indicates that courts are inclined to interpret the definition of “senior officer” expansively. In *Tri-Tex*, for example, the court held that the bookkeeper of a small company involved in supplying and servicing electronic equipment for fishing vessels clearly constituted a senior officer given that finances are an “important aspect” of a company's activities.²⁹ In *R. v. Metron Construction Corp.*, on the other hand, the Ontario Court of Justice noted that Bill C-45 “clearly extends the attribution of the criminal corporate liability to the actions of mid-level managers.”³⁰ In this case, a small Toronto construction company was held criminally liable for the negligent actions of its site supervisor after four men (including the supervisor) died, and another was seriously injured, when a swing stage carrying the men down from a fourteenth floor concrete balcony collapsed.³¹

²⁶ For further discussion of the doctrine of wilful blindness, see Part VI, below.

²⁷ Note that it has been argued that section 22.2(b) is largely redundant, as it essentially duplicates what is already achieved by section 22(1) of the *Criminal Code*. See *supra* note 25; Roach, *supra* note 16 at 240–41; Darcy L MacPherson, “Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45” (2003) 30:1 *Man LJ* 253 at 261.

²⁸ See *Bill C-45 Guide*, *supra* note 17 at 7; Dusome, *supra* note 24 at 128.

²⁹ *Tri-Tex*, *supra* note 21 at para 39. Note, however, that the allegation that a bookkeeper qualified as a senior officer was not contested by the company.

³⁰ *R v Metron Construction Corp.*, 2012 ONCJ 506 at para 15, 1 CCEL (4th) 266, *aff'd* 2013 ONCA 541 (available on CanLII) [*Metron*], citing MacPherson, *supra* note 27 at 259.

³¹ *Metron*, *supra* note 30 at para 2. Note, however, that whether the site supervisor qualified as a senior official was not contested and that the Crown and the defendant had agreed that this standard was satisfied by the facts at hand. See *ibid* at para 7.

R. v. Pétroles Global Inc. provides the most thorough consideration to date of the scope of the *Criminal Code*'s new standard for classifying someone as a senior officer.³² The judgment follows an investigation by the Competition Bureau into allegations of retail gasoline price-fixing committed by the company in eastern Quebec. The alleged senior officers were two territorial managers, as well as the general manager for Quebec, who together were responsible for managing various service stations in the province. Their responsibilities included hiring and training station operators, overseeing maintenance and repairs, and implementing various corporate policies. The Quebec Superior Court began by recognizing that Bill C-45 has the effect of displacing the requirement that a senior officer have decision-making authority in the adoption of policies.³³ Importantly, the court then proceeded to reject the company's assertion that the term "senior" requires that the individual have some autonomy in exercising his or her decision-making authority. Applying this reasoning to the facts at hand, the court did not hesitate in holding that the general manager was responsible for an important aspect of the company's activities and therefore qualified as a senior officer, particularly given that he supervised more than 200 service stations in Quebec, he was the third-highest pay earner within the company, and he was authorized to approve expenses exceeding \$1,000 before recommending them to senior management.³⁴ Furthermore, he was authorized to approve these expenses regardless of the fact that various other expenses required the prior approval of the company's vice-president.

What will be the most important considerations in the application of this broadened standard of corporate liability to foreign corrupt practices? One will likely be the degree to which an allegedly senior officer's responsibilities include interacting with foreign public officials on the corporation's behalf. In the case leading to the conviction of Niko Resources Ltd., for example, at issue were the improper gifts and hospitality provided to the Bangladeshi energy minister by the company and several of its (and its subsidiary's) high-ranking officers in the form of a luxury vehicle and an international vacation.³⁵ Niko provided these gifts following an explosion at one of its drill sites which resulted in significant property damage.

³² *R v Pétroles Global Inc.*, 2013 QCCS 4262 (available on Azimut), leave to appeal to CA granted, 2013 QCCA 1604.

³³ *Ibid* at paras 42–43.

³⁴ Note that the Quebec Court of Appeal did not go on to determine whether the two territorial managers also qualified as senior officers (see *ibid* at para 211).

³⁵ *R v Niko Resources Ltd.*, 2011 CarswellAlta 2521, 101 WCB (2d) 118 (Alta QB) [*Niko Resources*]. Note that the guilty plea and conviction does not expressly address which individuals within the company constituted senior officers for the purposes of the company's criminal liability.

Presumably, the gifts were granted in order to obtain favourable government treatment following this incident, as well as favourable government treatment in the context of ongoing contractual negotiations between the company and a state-owned energy company. The conviction of Niko for these activities indicates, then, that where a company operates in an industry that is heavily regulated or heavily dependent on government concessions, permits or licences, or both, it may be difficult to argue that an official charged with regulatory matters or government relations does not manage an important aspect of the corporation's activities. The same may also be held in the case of an individual charged with international customs and clearance matters in an industry heavily dependent on the import or export of heavy equipment machinery or goods (for example, drilling service providers); or an individual charged with ensuring operational compliance in an industry in which government inspections or certification, or both, are a common occurrence or material requirement (for example, an individual involved in the manufacturing, processing, or disposal of hazardous substances).

That said, it would be incorrect to assume that an individual's responsibilities will always be required to expressly include interaction with foreign public officials in order for that person to attract corporate liability for foreign corrupt practices as a senior officer. Rather, all that may be required is either that the corporate policies over which the individual has important discretion, or the important corporate activities that the individual manages, bring the individual into a position to interact with one or more foreign public officials in the course of his or her duties. Griffiths Energy International Inc., for example, pled guilty to a violation of the *CFPOA* over a series of illicit consulting agreements executed by the company at the direction of its former management in pursuit of oil and gas production sharing contracts in Chad.³⁶ In these circumstances, what may have been important is less that these individuals came to interact with Chadian public officials, and more that such interaction was a direct result of these individuals' important managerial responsibilities at the company, namely material business development in the form of soliciting oil and gas exploration and development opportunities. The same may be true in the case of a regional or divisional sales manager of a product or service provider whose customers or clients include foreign government bodies or agencies or state-owned entities. Stated differently, while responsibility for interacting with foreign public officials at some level may be an indicator that an individual plays an important role in corporate

³⁶ *R v Griffiths Energy International*, [2013] AJ No 412 (QL), Action No 130057425Q1 (AB QB). As in *Niko Resources*, neither the agreed statement of facts nor the conviction deal in any meaningful detail with which individuals qualified as senior officers of the company for the purposes of the company's criminal liability.

policy setting or manages an important part of a corporation's activities, the absence of such responsibility may not disqualify the person from constituting a senior officer. Instead, what is likely of importance is the significance of the role and authority of the individual, considered in light of the corporation's wider business operations and structure.

IV. Corporate Liability under the *CFPOA* and *Criminal Code* Section 22.2(c)

The relationship between the *CFPOA* and section 22.2(c) of the *Criminal Code* is slightly more ambiguous than the *CFPOA*'s relationship with *Criminal Code* sections 22.2(a) and 22.2(b). The term "representative" is defined by the *Criminal Code*, in respect of a corporation, to include "a director, partner, employee, member, agent or contractor" of the corporation.³⁷ Therefore, a plain language reading of section 22.2(c) provides that a corporation will attract criminal liability for corrupt practices where one of its senior officers "knows" that a "partner, employee, member, agent or contractor" of the entity "is or is about to" engage in a violation of *CFPOA* section 3(1), and the senior officer does not take all reasonable measures to prevent the representative from doing so. In many instances, this formula will not present any difficulties in application. For example, a corporation will likely be criminally liable if its CEO, CFO, or one of its directors knew that a low-level foreign worker intended to bribe a foreign official in connection with the corporation's efforts to secure a government contract or licence, and the CEO, CFO, or director took no action to prevent this from occurring.

This is an important development in the evolution of corporate criminal liability in Canadian law. Unlike the previous common law "identification theory", as explored and defined by the Supreme Court in *Rhone v. Widener* and *R. v. Canadian Dredge & Dock Co.*,³⁸ section 22.2(c) "requires no active participation in the offence by anyone acting in any sort of managerial capacity or control position."³⁹ Stated differently, whereas under the identification theory a corporation would only attract criminal liability if a directing mind of the corporation was *actively involved* in the offence, pursuant to section 22.2(c), liability may accrue where any senior officer is merely passively involved in an offence through inaction or omission. Furthermore, the result is the same regardless of the position of the repre-

³⁷ *Criminal Code*, *supra* note 9, s 2.

³⁸ *Rhone*, *supra* note 18; *Dredge & Dock*, *supra* note 18.

³⁹ MacPherson, *supra* note 27 at 262. See also *Tri-Tex*, *supra* note 21 at para 43.

sentative, that is, whether the position is that of an “administrative assistant” or “member of the janitorial staff”.⁴⁰

However, section 22.2(c) also poses a number of “complex organizational questions” when paired with a contravention of the *CFPOA* committed by a non-senior officer or remote corporation representative.⁴¹ Similar to the analysis conducted with respect to *Criminal Code* sections 22.2(a) and 22.2(b), 22(c) first requires confirmation that the individual, who was allegedly aware of the relevant corrupt acts, qualifies as a senior officer of the corporation. As Archibald, Jull, and Roach highlight, while there will “obviously” be knowledge of the corrupt acts “at some level” of the corporation, the real question remains “how far up the organizational chain this knowledge goes.”⁴² However, two additional, and potentially more problematic, criteria must also be met. First, it must be proven that the senior officer *knew* that the representative *was or was about to* engage in the corrupt acts. It must also be proven that the senior officer *did not take all reasonable measures* to prevent the representative from engaging in the corrupt acts.

At what point can a senior officer be said to have knowledge that a bribe or other corrupt practice “is or is about to be” committed by a representative of a corporation for the purposes of section 22.2(c)? Archibald, Jull, and Roach suggest that the corrupt act must be at least reasonably foreseeable.⁴³ But it is difficult to pinpoint exactly what this means in real world, practical terms in the context of foreign corrupt practices. Does it mean that the senior officer must have knowledge of *specific corrupt acts* to be performed by *a specific representative* targeting *a specific foreign public official*? Or does it merely mean that the senior officer must have *general knowledge* that any number or class of representatives may be in a position to engage in corrupt practices of some kind targeting any number or class of foreign public officials? Or is it something in between these very widely placed goal posts? Prudence dictates that Canadian corporations with overseas operations would assume that the latter, more liberal standard is operative, and is the standard that Canadian courts would apply. However, reason also dictates that this standard goes well beyond the plain wording of section 22.2(c) by extending the requirement of *a pending or highly probable violation* by a representative of the corporation to *a merely potential or possible violation* by the representative.

⁴⁰ MacPherson, *supra* note 7 at 262.

⁴¹ Archibald et al, *supra* note 21 at 17:30:70. See also Keith, *supra* note 19 at 74.

⁴² Archibald et al, *supra* note 21 at 17:30:70.

⁴³ *Ibid* at 17:30:20. MacPherson, for his part, suggests that the standard should, at the very least, be greater than that of recklessness, but also recognizes judicial authority to support the contrary position (*supra* note 27 at 267).

Uncertainty also surrounds the application and effect of the language of “all reasonable measures” in section 22.2(c). In particular, it is unclear whether Parliament intended this terminology to establish a type of quasi due diligence defence in favour of corporate entities charged with criminal liability. As noted by Archibald, Jull, and Roach, the reference to “all reasonable measures” leaves section 22.2(c) a “curious combination” of the subjective *mens rea* standard and the “objective standard” of fault, in which the senior officer does not take all reasonable measures to prevent the corporation’s representative from engaging in corrupt acts.⁴⁴ Archibald, Jull, and Roach conclude that “systems of due diligence system based on civil negligence law *may be useful in building potential defences*, keeping in mind that the onus always remains on the prosecution to show knowledge and an absence of reasonable measures.”⁴⁵ They further stress that the “more fulsome” a corporation’s efforts to avoid engaging in corrupt acts, the “easier it will be to argue that there were no alternative solutions available to prevent the particular [corrupt practices which have] occurred.”⁴⁶ However, the authors stop short of expressly asserting that if a corporation has, with diligence and in good faith, instituted and enforced robust anti-corruption policies and procedures, the corporation will be protected from criminal liability under section 22.2(c) regardless of any potential contravention by a rogue representative. This analytical restraint may only be reasonable. Section 22.2(c) speaks of all reasonable measures taken by a *senior officer*, not by the corporation itself. Moreover, section 22.2(c) refers to such reasonable measures taken in the context of knowledge of an offence that is being or is about to be committed by a corporate representative, not reasonable measures taken in the context of a generally anticipated, but not yet specifically identified compliance risk.

These are potentially weighty questions. As jurisprudence under the United States’ *Foreign Corrupt Practices Act* (“FCPA”)⁴⁷ teaches us, there are many instances in which corrupt practices and corrupt agendas stretch far up the corporate hierarchy.⁴⁸ When this is the case, there

⁴⁴ Archibald et al, *supra* note 21 at 17:20:20. See also *ibid* at 17:30:70 and Roach, *supra* note 16 at 242.

⁴⁵ Archibald et al, *supra* note 21 at 17:20:10 [emphasis added]. See also 17:30:20. Similarly, Roach notes that the “reasonable measures” element of section 22.2(c) is “quite close to the due diligence requirement for strict liability offences[,] and courts may well look to the multiple factors that are relevant in determining due diligence in order to determine whether a senior officer took all reasonable steps to prevent a representative from committing or continuing to commit the offence” (*supra* note 16 at 242).

⁴⁶ Archibald et al, *supra* note 21 at 17:30:30.

⁴⁷ *FCPA*, *supra* note 6.

⁴⁸ In 2009, for example, Halliburton and Kellogg Brown & Root agreed to pay US\$579 million in combined penalties, which was one of the largest *FCPA* settlements to date. The

should be little difficulty in establishing corporate criminal liability under section 22.2 and one of its three subsections. However, *FCPA* precedent also teaches us that there may be instances in which corrupt practices are initiated by remote representatives, potentially far from the watchful eye of any senior officer.⁴⁹ Here, the proper application of section 22.2(c) is more difficult to decipher, particularly in the current absence of robust judicial interpretation or application of section 22.2 to varied contexts.⁵⁰ That said, it is likely only a matter of time before these questions receive judicial treatment.

A primary response by Canadian corporations to *CFPOA* enforcement efforts has been the adoption of anti-corruption policies and procedures. When instituted prudently, such policies and procedures will reflect a cor-

companies' transgressions related to US\$6 billion in liquefied natural gas construction contracts in Nigeria. According to the United States Securities and Exchange Commission, the "bribery scheme" included both senior corporate executives and senior Nigerian officials "who took actions to insulate themselves from the reach of U.S. law enforcement." The companies entered into "sham contracts with two agents" to "conceal the illicit payments" and "funnel money to Nigerian public officials." Other records were deliberately falsified. The companies had also formed a "cultural committee" to decide how to carry out the bribery scheme." This included payments to two agents in excess of US\$180 million, payments to high-ranking Nigerian officials funnelled through a United Kingdom agent, and payments to lower-ranking Nigerian officials funnelled through a Japanese agent (United States Securities and Exchange Commission, Press Release, 2009-23, "SEC Charges KBR and Halliburton for FCPA Violations" (11 February 2009) online: US Securities and Exchange Commission <www.sec.gov/news/press/2009/2009-23.htm>).

⁴⁹ In 2006, the Securities and Exchange Commission brought cease and desist proceedings against Oil States International, Inc. in connection with alleged violations of the books and records provisions of the *FCPA* relating to certain payments made by a wholly owned subsidiary of the company to Petróleos de Venezuela, SA (PDVSA), the state-owned Venezuelan oil and gas company. In 2000, the subsidiary, an operator of specially designed oil and gas rigs, hired a Venezuelan consultant to "interface with employees of PDVSA" on its behalf "in the field and at the office level" and to "follow up on daily operations, translate information into Spanish, write up tickets in accordance with PDVSA requirements and submit [the subsidiary's] invoices to PDVSA for payment." Although the consultant "was not involved in the solicitation to obtain business on behalf of [the subsidiary], and only worked on the [referenced] operational matters", in late 2003 the consultant "was approached by three PDVSA employees about a proposed 'kickback' scheme" pursuant to which the consultant would "submit inflated bills to [the subsidiary] for his services and kickback the excess to the PDVSA employees." Should the consultant not agree to the proposed scheme, the PDVSA employees threatened to stop or delay the subsidiary's work. "After learning of the proposed scheme from the Consultant," employees of the subsidiary "acceded to and facilitated the improper activity" (*Re Oil States International, Inc* (27 April 2006), File No 3-12280, online: <www.sec.gov/litigation/admin/2006/34-53732.pdf> (Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order pursuant to Section 21C of the *Securities Exchange Act of 1934*) at 2-3).

⁵⁰ See Keith, *supra* note 19 at 41, 59, 63, 78.

rupt practices risk assessment focused on the particular management structure and business operations of a corporation.⁵¹ Such an assessment would consider the corporation's areas of greatest risk exposure to corrupt practices, including but not limited to the corporation's current provision for anti-corruption policies and procedures from a corporate governance and training standpoint; the geographic, political, and legal circumstances of the corporation's operations; and the corporation's various contact points with government throughout all levels of its business operations.⁵² The results of a risk assessment would then inform the development of reasonably customized anti-corruption policies and procedures designed to mitigate against corrupt practices by the corporation's representatives and expose any corrupt practices the corporation's representatives nonetheless engaged in. The policies and procedures would include, but not be limited to, clear, visible, and vocal commitment by senior management; training all personnel directly or indirectly exposed to foreign public officials; "whistle-blower" provisions allowing for confidential reporting of suspected violations; and regular compliance monitoring and review.⁵³ Less fulsome risk identification and mitigation strategies for corrupt practices would lack one or more of these qualities or components.

Therefore, depending on the circumstances, Canadian courts could be faced with complicated questions regarding the appropriate application of *Criminal Code's* section 22.2(c) to the corrupt acts of rogue lower-level employees. When a senior officer is actually aware of specific corrupt practices proposed or planned by a representative of the corporation, it is likely that swift preventative action would be required of the senior official to satisfy the "all reasonable measures" standard instituted by section 22.2(c). Thus, prophylactic action generally targeted at the scheme might fall short of this mark.⁵⁴ However, where the specific details of potential

⁵¹ Archibald, *supra* note 21 at 17:10, 17:60, referring to, inter alia, *Niko Resources*, *supra* note 35. See also John Boscariol, "Anti-Corruption Compliance Message Received?: Risk Assessment Is Your Next Step" Mining Prospects Law Blog (13 August 2012), online: McCarthy Tétrault <www.miningprospectslawblog.com/2012/08/13/anti-corruption-compliance-message-received-risk-assessment-is-your-next-step>.

⁵² *Ibid.*

⁵³ See Archibald, *supra* note 21 at 17:60:10. Other important components of anti-corruption policies and procedures may include compensation schemes that reward compliance or strictly discipline non-compliance (*ibid.* at 17:60:20). See also the probation order of the Court in *Niko Resources*, *supra* note 35 at para 21.

⁵⁴ See Archibald, *supra* note 21 at 17:30:10, referring to the Ontario Court of Appeal decision in *R v Brampton Brick Ltd* (2004), 189 OAC 44 at para 28, 62 WCB (2d) 501 (Ont CA) [*Brampton*], where, further to an appeal of the conviction of Brampton Brick under the Ontario *Occupational Health and Safety Act*, RSO 1990, c O.1 (for the failure to "take every precaution reasonable in the circumstances for the protection of a worker," *ibid.*, s 25(2)(h)), the court held that "[t]he employer must show it acted reasonably with

corrupt practices by a representative or class of representatives of a corporation remain unknown or unclear to a senior officer (and to the degree such circumstances may produce corporate liability under section 22.2(c)), it is only reasonable that more general preventative measures would be sufficient to satisfy the “all reasonable measures” standard. As noted by Archibald, Jull, and Roach, a pertinent inquiry would likely be whether “sufficient due diligence [has] been taken to avoid the *type* or *category* of particular event that has happened.”⁵⁵ This may include, among other factors, a comparison of any preventative system implemented to industry standards or best practices, as well as a consideration of the adequacy of the personnel, time, and resources dedicated to that preventative system.⁵⁶ However, this analysis should also be undertaken in appreciation of the fact that anti-corruption compliance efforts are very often both costly and complicated, and are only one of many governance issues facing compliance departments or personnel.

To this end, Archibald, Jull, and Roach warn of the potential injustices that may result, in the context of corrupt practices, from too little prosecutorial or judicial resistance to that “logical flaw” referred to by psychologists as the “representative heuristic”, namely the “tendency of people to jump to conclusions without considering a statistical baseline.”⁵⁷ In its most basic interpretation, this caveat draws attention to the possibility that, just because an event ordinarily occurs in the absence of adequate preventative measures, the occurrence of the event does not necessarily mean that adequate preventative measures have been absent.⁵⁸ Archibald, Jull, and Roach therefore caution as follows:

Applied to the area of anti-corruption, if an improper payment has been made, it must be asked whether senior officers were aware of the payment and failed to take reasonable [steps] to attempt to prevent it. Applying benchmarks, it is appropriate to ask context and

regard to the prohibited act alleged in the particulars [and] not some broader notion of acting reasonably: *R. v. Kurtzman* (1991), 50 O.A.C. 20; 66 C.C.C. (3d) 161 (C.A.)” (*Brampton*, *supra* note 54 at para 28).

⁵⁵ Archibald, *supra* note 21 at 17:30:10 [emphasis in original]. Compare the approach of the Court in *Ontario (Ministry of Labour and Ministry of the Environment) v Sunrise Propane Energy Group Inc.*, 2013 ONCJ 358 at paras 363–68, 77 CELR (3d) 1, in which it was held that, in the case of an inherently dangerous activity, a successful due diligence defence must demonstrate that a preventative system was in place to guard against harm, whether or not it was possible to predict the exact manner in which the harm would occur.

⁵⁶ Archibald, *supra* note 21 at 17:20:20, 17:30:10.

⁵⁷ *Ibid* at 17:30:10, referring to Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, “Inside the Judicial Mind” (2001) 86:4 Cornell L Rev 777 at 811.

⁵⁸ Archibald, *supra* note 21 at 17:30:10, referring also to *R v Roks*, 2011 ONCA 526 at paras 135–37, 274 CCC (3d) 1.

time horizons. Is this the first improper payment made in 10 years?
Or is the payment part of a more systemic problem?⁵⁹

Of course, leniency shown by courts or enforcement authorities toward corrupt practices committed by representatives in the application of section 22.2(c), based on the “all reasonable measures” standard, may hinge on the implementation and enforcement of such preventative measures with diligence and good faith.⁶⁰ While a number of very strong policy arguments have been advanced in support of “affirmative compliance” defences to corporate corrupt practices,⁶¹ a lingering danger presented by this approach remains encouraging a false sense of security among corporations that may result in the failure to adequately customize anti-corruption policies and procedures to the corporation’s particular circumstances (presumably in reliance instead on generic policies and procedures), and/or in the less-than-diligent and good faith implementation and enforcement of whatever policies and procedures have been adopted, whether customized, generic, or otherwise.

V. Corporate Liability for the Corrupt Practices of Third Party Agents

A. *Third Party Agents and Foreign Corrupt Practices Risk*

The use of third party agents is often unavoidable in international business transactions. First, many foreign countries require the engagement of a local agent or a local sponsor as a matter of law.⁶² Second, even

⁵⁹ Archibald, *supra* note 21 at 17:30:10.

⁶⁰ See Eileen Skinnider, “Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response” (March 2012), online: International Centre for Criminal Law Reform and Criminal Justice Policy <icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Final%20Paper%20Corruption-09%20May%202012.pdf> at 15–17, discussing the “affirmative compliance” defence available in certain jurisdictions and referring, inter alia, to Ellen S Podgor, “A New Corporate World Mandates a ‘Good Faith’ Affirmative Defence” (2007) 44:4 Am Crim L Rev 1537; Mike Koehler, “Revisiting a Foreign Corrupt Practices Act Compliance Defense” (2012) 2 Wis L Rev 609.

⁶¹ Generally speaking, an “affirmative compliance” defence provides that a corporation will not be held liable for a contravention of anti-corruption law by an employee or agent if the corporation established procedures reasonably designed to prevent and detect such contraventions by its employees and agents. Arguments supportive of such a defence include that it provides incentives for corporate compliance; “contributes to a more consistent, transparent, and predictable application of the defence ... [;] can increase public confidence in enforcement actions ... [;] and allow[s] enforcement authorities to better allocate its [investigative and prosecutorial] resources” (Skinnider, *supra* note 60 at 16–17).

⁶² See Mike Koehler, “The FCPA, Foreign Agents, and Lessons from the Halliburton Enforcement Action” (2010) 36:2 Ohio NUL Rev 457 at 459 [Koehler, “Foreign Agents”]

where this is not the case, foreign representation is often necessary to address deficiencies in an international corporation's capabilities, including by providing an in-depth understanding of the local market and business culture, as well as connections and contacts with relevant businesses and business people.⁶³ Foreign agents may also offer valuable expertise in navigating local bureaucracies, regulatory hurdles, and general government relations.⁶⁴

To this end, while it is one matter to ensure that one's own house is in order, it is an entirely different matter to ensure that one's agents and representatives are strictly adhering to the same anti-corruption principles. Engaging third party agents or consultants in connection with business development or operations can therefore at times be fraught with uncertainty and can represent the greatest anti-corruption risk faced by corporations, Canadian or otherwise.⁶⁵

B. R. v. Briscoe and the Doctrine of Wilful Blindness

Assuming that the great majority Canadian corporations and their senior officers will not deliberately engage in corrupt practices involving third party agents, the question becomes at what point a corporation may incur liability as the result of the conduct of its agents, even when the corporation does not direct such behaviour. This requires close consideration of the doctrine of wilful blindness under Canadian law, namely the principle pursuant to which persons may be held criminally liable for "actions taken by others where the person had near knowledge of the intended activity but deliberately avoided further inquiry in order to claim ignorance."⁶⁶

Notably absent from section 3(1) of the *CFPOA* is the mental element, or *mens rea*, required for conviction. This is at least in part because it was "intended that the offence ... be interpreted in accordance with common

(citing Lisa Middlekauff, "To Capitalize on a Burgeoning Market?: Issues to Consider before Doing Business in the Middle East" (2008) 7:2 *Rich J Global L & Bus* 159 at 170).

⁶³ See Koehler, "Foreign Agents", *supra* note 62 at 459; Michael Hwang & Kevin Lim, "Corruption in Arbitration—Law and Reality" (2012) 8:1 *Asian International Arbitration Journal* 1 at 26, 39–44.

⁶⁴ See Koehler, "Foreign Agents", *supra* note 62 at 459.

⁶⁵ *Ibid* at 459–60, 470–71.

⁶⁶ Paul Michael Blyschak & John W Boscariol, "Understanding and Mitigating Your Third Party Corruption Risk Under Canada's *Corruption of Foreign Public Officials Act*" (22 January 2013), online: McCarthy Tetrault <www.mccarthy.ca/article_detail.aspx?id=6146>.

law principles of criminal culpability,” that is, that the courts “will be expected to read in the *mens rea* of intention and knowledge.”⁶⁷

Reference must therefore be made to Canadian common law on criminal culpability. The Supreme Court of Canada in *R. v. Sault Ste. Marie* established the *mens rea* standard for criminal culpability where no threshold is specified within the governing statute. Justice Dickson (as he then was) stated:

Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them.⁶⁸

The scope and substance of the wilful blindness doctrine was recently revisited in detail by the Alberta Court of Appeal⁶⁹ and the Supreme Court⁷⁰ in *R. v. Briscoe*. At issue was whether wilful blindness could be used to determine whether a person who was present during the planning and execution of a murder had the requisite knowledge and intent to be convicted of the same crime.

The Alberta Court of Appeal confirmed that the doctrine of wilful blindness “is well established in Canadian law.”⁷¹ Justice Martin cited to the 1976 Supreme Court ruling in *R. v. Sansregret*,⁷² which lays out the doctrine as follows:

[W]ilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability ... in wilful blindness ... is justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry.⁷³

Justice Martin went on to explain that wilful blindness “is not premised on what a reasonable person would have done, but requires a finding that the accused, with actual suspicion, deliberately refrained from mak-

⁶⁷ *CFPOA Guide*, *supra* note 10 at 3.

⁶⁸ *R v Sault Ste Marie*, [1978] 2 SCR 1299 at 1309, 85 DLR (3d) 161.

⁶⁹ *R v Briscoe*, 2008 ABCA 327, 437 AR 301 [*Briscoe* ABCA].

⁷⁰ *R v Briscoe*, 2010 SCC 13, [2010] 1 SCR 411 [*Briscoe* SCC].

⁷¹ *Briscoe* ABCA, *supra* note 69 at para 16.

⁷² *Ibid* at para 16, citing *R v Sansregret*, [1985] 1 SCR 570, 17 DLR (4th) 577 [*Sansregret* cited to SCR].

⁷³ *Ibid* at 570.

ing inquiries because he or she did not want his or her suspicions confirmed.”⁷⁴

To this end, the Alberta Court of Appeal importantly clarified that the knowledge attributed to the accused in determining wilful blindness is subjective rather than objective in nature and that, as such, wilful blindness “is distinct from criminal negligence, which is based on an objective component that requires a ‘marked departure’ from the standard of care expected of a reasonable person in the circumstances of the accused.”⁷⁵ The court cited with approval the decision *R. v. Duong*, where the Ontario Court of Appeal explained that “[a]ctual suspicion, combined with a conscious decision not to make inquiries which could confirm that suspicion, is equated in the eyes of the criminal law with actual knowledge. Both are subjective and both are sufficiently blameworthy to justify the imposition of criminal liability.”⁷⁶

The Supreme Court upheld the decision of the Alberta Court of Appeal. In so doing, the Court summarized the doctrine of wilful blindness as follows:

Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries... As Sopinka J. succinctly put it in *Jorgensen* ..., “[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?”⁷⁷

The Court further stated:

A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.⁷⁸

⁷⁴ *Briscoe* ABCA, *supra* note 69 at para 21.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, citing *R v Duong* (1998), 39 OR (3d) 161 at para 23, 108 OAC 378 (CA).

⁷⁷ *Briscoe* SCC, *supra* note 70 at para 21.

⁷⁸ *Ibid* at para 23, citing Glanville Williams, *Criminal Law: The General Part*, 2d ed (London: Stevens & Sons, 1961) at 159 [emphasis in *Briscoe* SCC, added by the Court].

The Supreme Court, following in the steps of the Court of Appeal, also emphasized that wilful blindness, “correctly delineated, is distinct from recklessness” and does not involve “departure from the subjective inquiry into the accused’s state of mind.”⁷⁹ The Court cited to the proposition in *Sansregret* that, “while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur,” wilful blindness occurs

where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry.⁸⁰

As such, the Court stated that, to prevent confusion with recklessness, wilful blindness may be more accurately described as a “deliberate ignorance”, wherein the act of being wilfully blind is akin to an “actual process of suppressing a suspicion.”⁸¹

C. “Conscious Avoidance” and *United States v. Kozeny*

How will this standard of wilful blindness be applied in the context of corrupt practices perpetrated on a corporation’s behalf by a third party agent? While this question has not yet been considered by Canadian jurisprudence, some insight is nonetheless available from US case law examining the knowledge requirement under the *FCPA* pursuant to a substantively similar doctrine American courts refer to as “conscious avoidance”.

In *United States v. Kozeny*,⁸² the defendant, Bourke, appealed his conviction of conspiring to violate the *FCPA*. Bourke was a business investor who met with Viktor Kozeny in the mid-1990s; Kozeny was an entrepreneur known as the “Pirate of Prague” due to his reputation for engaging in suspect business dealings.⁸³ At the time, Azerbaijan was privatizing many of its state industries, and one of the assets being considered for

⁷⁹ *Briscoe SCC*, *supra* note 70 at para 20 [emphasis in original].

⁸⁰ *Ibid* at para 22, citing *Sansregret*, *supra* note 72 at 584 [emphasis in *Briscoe SCC*, added by the Court].

⁸¹ *Briscoe SCC*, *supra* note 70 at para 24, citing Don Stuart, *Canadian Criminal Law: A Treatise* (5th ed) (Toronto: Carswell, 2007) at 241.

⁸² *United States v Kozeny*, 667 F (3d) 122 (2011), 87 Fed R Evid Serv 104 [*Kozeny* cited to F].

⁸³ *Ibid* at 127.

privatization was the state-owned oil company SOCAR.⁸⁴ Pursuant to the privatization process, the Azerbaijani government issued every citizen a voucher booklet worth \$12. These vouchers could be traded and were used to bid for shares of the state-owned enterprises being privatized. Foreigners who wanted to participate in the privatization auction had to pair the vouchers with special options issued by the Azerbaijani government.

Bourke and Kozeny agreed to establish two entities to purchase approximately \$200 million in vouchers.⁸⁵ Kozeny met with Azerbaijani officials who stated that an “entry fee” ranging from \$8 to \$12 million would have to be paid to encourage the Azerbaijani President to privatize SOCAR.⁸⁶ In addition, the officials requested that two-thirds of the vouchers acquired by the special-purpose entities be transferred to the officials so that they could receive two-thirds of SOCAR’s profit following privatization.⁸⁷ Bourke recruited investors to raise funds for the entities to purchase the vouchers.⁸⁸ He was aware that Azerbaijan was plagued with corrupt practices at the time and had specifically discussed *FCPA* liability with his attorneys.⁸⁹ Following these discussions, Bourke established a separate US company to act as an intermediary with the special-purpose entities in an effort to shield investors from potential *FCPA* liability.⁹⁰ Although SOCAR was never privatized, Bourke was convicted for conspiracy to violate the *FCPA* on the basis that he had knowledge, pursuant to the doctrine of conscious avoidance, of the bribes to be paid to the Azerbaijani officials.⁹¹ One of the grounds of Bourke’s appeal was that the district court improperly charged the jury on the doctrine of conscious avoidance.⁹²

The Second Circuit court reviewed the doctrine of conscious avoidance and determined that the instructions made to the jury at trial were appropriate. The court found that a conscious avoidance instruction may be given if the defendant asserts the lack of some specific aspect of knowledge required for conviction, and if the appropriate factual predicate for the charge exists, that is, that “the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defend-

⁸⁴ *Ibid* at 126.

⁸⁵ *Ibid* at 127.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* at 127–28.

⁸⁸ *Ibid* at 128.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* at 128–29.

⁹¹ *Ibid* at 130.

⁹² *Ibid*.

ant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.”⁹³ The Second Circuit further stated that a conscious avoidance instruction permits a jury to find that a defendant intentionally avoided confirming the fact: in other words, a finding of knowledge can be made even where there is no evidence that the defendant had actual knowledge.⁹⁴

On the facts of Bourke’s appeal, the Second Circuit held that there was ample evidence to support a conviction based on the doctrine of conscious avoidance. Bourke was aware of the high level of corruption in Azerbaijan generally, he knew of Kozeny’s reputation as the “Pirate of Prague”, he had created companies as an attempt to shield investors from *FCPA* liability, and he had joined the board of the American entity rather than of the special-purpose entities.⁹⁵ The court also placed great weight on tape recordings of a conversation between Bourke and another investor in which Bourke voiced concerns regarding the possibility that Kozeny was paying bribes to officials in Azerbaijan and other countries. These statements included the following:

I mean, they’re talking about doing a deal in Iran ... Maybe they ... bribed them, ... with ... ten million bucks. I, I mean, I’m not saying that’s what they’re going to do, but suppose they do that. ...

I don’t know how you conduct business in Kazakhstan or Georgia or Iran, or Azerbaijan, and if they’re bribing officials and that comes out ... Let’s say ... one of the guys at [our special purpose entity] says to you, Dick, you know, we know we’re going to get this deal. We’ve taken care of the minister of finance, or this minister of this or that. What are you going to do with that information?

...

What happens if they break a law in ... Kazakhstan, or they bribe somebody in Kazakhstan and we’re at dinner and ... one of the guys says, ‘Well, you know, we paid some guy ten million bucks to get this now.’ I don’t know, you know, if somebody says that to you, I’m not part of it ... I didn’t endorse it. But let’s say [] they tell you that. You got knowledge of it. What do you do with that? ... I’m just saying to you in general ... do you think business is done at arm’s length in this part of the world.⁹⁶

In addition, the court highlighted that potential investors in the special-purpose entities who had access to the same information as Bourke had determined from their due diligence that investment in these entities

⁹³ *Ibid* at 132.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* at 133.

⁹⁶ *Ibid*.

entailed too high a level of corruption and *FCPA* risk.⁹⁷ The court held that this constituted evidence that Bourke had refrained from conducting the same basic due diligence inquiries because he preferred to consciously avoid confirming his suspicions.⁹⁸

D. Wilful Blindness and Criminal Code Section 22.2

What are the lessons from *R. v. Briscoe* and *Kozeny* for Canadian corporations looking to guard against liability under the *CFPOA* in connection with the engagement of third party agents or consultants? Several possibilities are discussed below.

First, due diligence with respect to all third party foreign agents is of great importance. Liability under the doctrine of wilful blindness “flows directly from the deliberate refusal to actively pursue additional knowledge and information when one is troubled by or fearful of the revelations such additional knowledge or information may entail.”⁹⁹ Therefore, in the context of foreign corrupt practices, liability under the doctrine of wilful blindness may be rooted in a deliberate decision not to consider the degree of corrupt practices risk associated with the engagement of a particular third party agent, not to respond to concerns regarding the potential of a third party agent to engage in corrupt practices on one’s behalf, or both. Stated somewhat differently, in order to avoid criminal liability under the *CFPOA* for actions undertaken by a third party agent, Canadian corporations and their senior officers should arguably be careful to always conduct due diligence with respect to all third party agents being considered for a particular mandate, whether related to business development or otherwise, to ascertain the degree to which corrupt practices may present a risk; and they must take preventative measures to mitigate against the risk of corrupt practices if such risk has been identified.

Due diligence with respect to third party engagement in corrupt practices would likely include a number of different inquiries.¹⁰⁰ General considerations would include the jurisdiction and industry in respect of which the agent would be engaged, as it is well understood that corrupt practices are more prevalent in certain countries and industries than in others.¹⁰¹

⁹⁷ *Ibid* at 134.

⁹⁸ *Ibid* at 135.

⁹⁹ Blyschak & Boscarior, *supra* note 66.

¹⁰⁰ *Ibid*.

¹⁰¹ Transparency International, for example, is a well-regarded non-governmental organization that publishes an annual corruption perception index rating and ranking countries based on their responses to questionnaires completed by individuals and companies operating in their subject jurisdictions. See Transparency International Canada,

Perhaps chief among the individualized inquiries to be conducted would be confirming that an agent has the requisite resources, qualifications, and credentials to perform the services being offered. This may include consideration of the agent's educational and professional background as well as of other clients for whom the agent had performed the same or similar work. It may also include scrutiny of the proposed fees to be charged by the agent, including comparison of the proposed fees with those being charged by agents of similar qualifications in the same industry and market. Verification of the government affiliations of the agent, as well as the agent's ownership structure, may also be essential. Should the agent be partly or wholly staffed or owned by current public officials, the very engagement of the agent could constitute a violation of the *CFPOA*. It may also be important to verify that the engagement of the agent does not violate any local laws, as certain jurisdictions actually prohibit certain contractual arrangements involving government relations or negotiation.¹⁰² Lastly, if it is difficult for a Canadian corporation to conduct these inquiries itself or through its legal counsel, it may be prudent to engage the services of specialized due diligence agents in the relevant jurisdiction.¹⁰³

Corporations may take a variety of preventative measures in the face of third party corrupt practices risk, including various contractual obligations and rights in favour of the corporation, as may be reasonable in the circumstances.¹⁰⁴ Corporations should avoid success-based fees or lump sums linked with the receipt of government business, contracts, licences, or concessions, in favour of monthly fees or other reasonable payment schedules. They should require agents to make detailed representations and warranties regarding the agent's resources, credentials, and qualifications, as well as a disclaimer of any affiliations with government or public officials except those specifically disclosed to the corporation. An agent can be asked agree to fulsome covenants not to engage in corrupt practices, not to engage any sub-contractors in connection with the corporate en-

Inc, online: <transparency.ca/1-Overview/index.htm>. Industries in which corruption practices are generally considered to be of greater prevalence, include mining and resources, energy, telecommunications, defence, healthcare, and pharmaceuticals. See also Blyschak & Boscarior, *supra* note 66.

¹⁰² See Hwang & Lim, *supra* note 63.

¹⁰³ See Blyschak & Boscarior, *supra* note 66. Potential advantages offered by such agents include, but are not limited to, proficiency in applicable local languages and the ability to conduct in-person interviews or on-site visits.

¹⁰⁴ See *ibid.* For an example of a model international consultant agreement with robust anti-corruption representations, warranties, rights and covenants, see the Association of International Petroleum Negotiators, *2008 Consultant Agreement for Business Development in a Host Country*, online: AIPN <www.aipn.org>.

gement without the corporation's prior written consent, and to strictly comply with all applicable laws. Such covenants may also include the obligation to promptly inform the corporation should any of the agent's circumstances change in a manner that could affect the accuracy of any of the agent's representations and warranties, including, in particular, those pertaining to the agent's government affiliations. The corporation can also insist on termination rights should any of the agent's representations or warranties be discovered to be untrue or misleading, or should the agent breach any of its covenants. Additionally, the corporation may impose on the agent the obligation to keep detailed financial records in respect of all monies received by the corporation and the manner in which such monies have been disbursed or distributed, along with a corresponding right in favour of the corporation to audit the agent's books and records upon notice. Lastly, the corporation can reserve the right to withhold payments to the agent upon the advice of legal counsel.¹⁰⁵

That said, it should be appreciated that not all third party engagements will either afford or warrant the same anti-corruption risk mitigation opportunities. Put another way, the list of contractual risk mitigation mechanisms canvassed above represents more of an ideal than a template of mechanisms that can reasonably be expected to be imposed on third party representatives in *all* situations. For instance, simpler engagements may not customarily be heavily papered, relying instead on simple purchase orders, service orders, or even email correspondence (for example, in the case of low-level customs or import and export facilitation services). Other engagements may come with only relatively modest anti-corruption risk (for example, domestic transportation services faced with the risk of illegal "tolls" imposed by the police or military at road blocks). On the other hand, the more important or expensive the service being provided, as well as the greater the attendant anti-corruption risk, the better leverage a corporation will have in requiring robust written anti-corruption risk mitigation mechanisms.

However, corporations must appreciate that the appropriate due diligence and monitoring of agents will not, in and of itself, provide immunity from liability under the *CFPOA* for an indirect violation of section 3(1). A corporation must also abort any engagement of a third party agent in respect of which significant corruption *risk* has been identified, so that it cannot be argued that the corporation or its senior officers were wilfully blind to any corrupt practices *actually* engaged in on their behalf by the agent. The difficulty here, however, is determining with confidence at what point this threshold is crossed. That is, at what point could it rea-

¹⁰⁵ *Ibid.*

sonably be argued that a corporation and one or more of its senior officers were complicit in corrupt practices engaged in by an agent under the doctrine of wilful blindness, either by failing to reject the prospective engagement or by failing to terminate an existing engagement?

This determination will involve difficult questions regarding the amount, frequency, and degree of due diligence and monitoring conducted. The fact that initial due diligence with respect to an agent does not raise any concerns does not necessarily mean that further investigation will not be warranted. On the other hand, business realities limit the amount, frequency, and degree of due diligence and continued monitoring that can reasonably be expected of a corporation and its senior officers: as mentioned above, anti-corruption compliance efforts are often neither simple nor without significant costs. This determination will also likely be complicated by other, more opaque considerations, including significant cultural and linguistic barriers, which can at times make it very difficult to interpret or assess the intentions or motivations of a prospective or current third party agent.¹⁰⁶

In *Kozeny*, the Second Circuit highlighted a number of concerning facts relating to the corruption risk of which Bourke was aware, including the high level of corruption in Azerbaijan generally, that Bourke knew of Kozeny's reputation as the "Pirate of Prague", that Bourke had purposefully devised a corporate structure designed to help evade liability for corrupt practices, and that Bourke had decided to refrain from further investigating his suspicions regarding the possibility that his business associates would engage in corrupt practices.¹⁰⁷ Collectively, these facts constitute a damning portrait of Bourke's state of mind, pointing to his own clear understanding that Kozeny would likely engage in corrupt practices on Bourke's behalf. In fact, the Second Circuit essentially acknowledged that this was the case, stating that the evidence could also be used "to infer that Bourke *actually* knew about the crimes."¹⁰⁸ However, the reality is that "[n]ot all potential agent engagements will present such blatant 'deal breakers'."¹⁰⁹

Consequently, legal commentators have reached a consensus on a set of facts or circumstances that constitute "red flags" that an agent may be likely to engage in corrupt practices involving foreign public officials.¹¹⁰

¹⁰⁶ See Skinnider, *supra* note 60 at 17.

¹⁰⁷ *Kozeny*, *supra* note 82 at 133.

¹⁰⁸ *Ibid.*

¹⁰⁹ Blyschak & Boscarior, *supra* note 66.

¹¹⁰ *Ibid.* See also Robert W Tarun, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar*

For example, has the agent requested large upfront payments, unusually high commissions, or success-based payments tied to securing government business, licences, concessions, or permits? Has the agent been specifically recommended to the corporation by a public official or government body related to the corporation's business in a foreign jurisdiction? Has the agent resisted providing information regarding its ownership structure, credentials, or resources, or cooperating in the corporation's due diligence? Has the agent resisted providing contractual representations, warranties, or covenants regarding corrupt practices, or agreeing to contractual audit rights entitling the corporation to inspect the agent's books and records on an ongoing basis? Has the agent requested any unusual financial documentation or payment mechanisms, such as payments to be made to bank accounts in unrelated jurisdictions or offshore accounts? Should it later be discovered that the agent did in fact engage in corrupt practices involving a foreign public official, the greater the number of these or other red flags identified prior to, or during the course of, the engagement, the more difficult it will be to argue that the corporation and its senior officers were not complicit in such corrupt practices under the doctrine of wilful blindness.

That said, some red flags are more complicated than others, requiring greater scrutiny and consideration. Stated differently, what may at first appear to be a significant red flag may, in fairness, require a more balanced interpretation and treatment. For example, the fact that a prospective third party agent is a former government employee or foreign public official may at first blush appear to be a red flag, given that the agent would have ties to government that could serve as the conduit for an illicit payment or other unlawful influence. However, it is very common for international consultants and business development agents—both in emerging markets and in advanced industrialized markets—to be former government officials, as it is this former government employment that often serves as the very basis of their expertise. Put another way, the value of the services offered by foreign consultants is often grounded in their previous experience in government, given that this provides them with both inside knowledge of regulatory systems and practices, as well as their networks of government contacts with whom they enjoy good standing and credibility. From a business perspective, it is therefore very often desirable that a prospective foreign agent have previous government experience in the subject jurisdiction, making it inappropriate to automatically interpret the existence of such an affiliation as either evidence of a lack of

Criminal Practitioners, 2d ed (United States: American Bar Association, 2012) at 91–92.

due diligence or prudence on the part of a corporation, or evidence of the corporation's possible illicit intent.

Overall, while wilful blindness is sometimes considered a relatively high threshold for the Crown to meet,¹¹¹ Canadian corporations faced with the risk of foreign corrupt practices “should never continue a suspect third-party agent engagement in reliance on such a premise.”¹¹² Moreover, the fact that “[c]riminal liability (as contrasted with civil liability) for agents and representatives [has to date been] a [foreign] concept ... to Canadian executives”¹¹³ does not affect this calculation.¹¹⁴ Canadian corporate compliance in international operations has entered a new age, and the widespread engagement of third party agents, coupled with the prescriptions of the doctrine of wilful blindness, represent the front lines of risk exposure. Yet Canadian prosecutors and courts should not take too severe or unsympathetic an approach in their application of the doctrine of wilful blindness in this context. It is reasonable to expect that, when a concern regarding corrupt practices is raised, that concern will be investigated and, if the risk is not too great, available risk mitigation measures will be employed. However, it is unreasonable to expect that all third party agent engagements that present some corrupt practices risk would be automatically abandoned or aborted. It is also unreasonable to expect that robust anti-corruption risk mitigation mechanisms will be employed to counter all identifiable anti-corruption risk. Lastly, it is unreasonable to presume that, where a third party agent actually engages in corrupt practices on a corporation's behalf in the face of identifiable corrupt practices risk, such practices occurred as a result of the wilful blindness of the corporation and one or more of its senior officers. Rather, the analysis should always include consideration of the substance of a senior officer's efforts or omissions to guard against corrupt practices risk, as contextualized by the cultural and business realities in which such efforts or omissions occurred, including, but not being limited to, the reasonable costs of associated risk mitigation strategies.

VI. Corporate Liability for the Corrupt Practices of Acquisition Targets

Although it is not always widely appreciated, mergers and acquisitions activity has played an important role in the development of anti-corruption practices. In particular, mergers and acquisitions transactions, and the due diligence of target entities conducted during such transac-

¹¹¹ Archibald et al, *supra* note 21 at 17:20:20.

¹¹² Blyschak & Boscarior, *supra* note 66.

¹¹³ Archibald et al, *supra* note 21 at 17:30:70.

¹¹⁴ Blyschak & Boscarior, *supra* note 66.

tions, are a common way for suspected anti-corruption transgressions to first come to light.¹¹⁵ These proven or suspected transgressions may be relatively minor, and may be met chiefly with bolstered representations, warranties, covenants, and indemnities, as well as a grinding down of the acquisition price. Yet sometimes such transgressions may be significant enough to undermine an entire transaction, collapsing the deal.¹¹⁶

The critical importance of conducting thorough due diligence of targets pre-acquisition or pre-merger is therefore unquestionable. However, the analysis does not necessarily end there. Not all acquisitions merit the same considerations. On the one hand, amendments to the jurisdictional reach of the *CFPOA*, effected by Bill S-14 in June of 2013, create a potentially important distinction among the corrupt practices for which Canadian target entities may be held liable. Furthermore, whether and to what degree liability might follow acquirers in asset acquisition transactions, as opposed to share acquisition transactions, appears to remain an open question in Canadian law.

A. Share Acquisitions and Nationality Jurisdiction Versus Territorial Jurisdiction

It is a fundamental principle of corporate law that when one corporation acquires another through a share purchase, the purchasing corporation indirectly acquires the liabilities of the target which arose prior to the acquisition. This was the case, for example, in *Sherwood Design Services v. 872935 Ontario Ltd.* In this case, the purchaser of (what the purchaser thought was) a shell corporation to which certain desired assets had been assigned was held liable for unrelated and long-forgotten liabilities also attached to the shell corporation.¹¹⁷

The situation is no different in the context of *CFPOA* liability. A change in ownership of the target corporation will not affect anti-corruption liability it incurred prior to the acquisition. Amalgamations present the same result. Corporate legislation across Canada explicitly states that the amalgamated corporation continues to be liable for the ob-

¹¹⁵ See Daniel J Grimm, “The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences” (2010) 7:1 NYU JL & Bus 247 at 305–22.

¹¹⁶ See *ibid*; see also Jeff Gray, “Bribery concerns scupper resource mergers” *The Globe and Mail* (27 June 2013), online: The Globe and Mail <www.theglobeandmail.com/report-on-business/industry-news/the-law-page/bribery-concerns-scuppering-resource-mergers/article12831990>.

¹¹⁷ See Christopher C Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (Toronto: Irwin Law, 2007) at 56. The law firm used by the purchaser was in the practice of incorporating and holding shelf corporations that could be easily offered to clients when needed on an expedited basis.

ligations of each amalgamating corporation. In other words, an existing liability is unaffected by the amalgamation, and a civil, criminal, or administrative action or proceeding pending against an amalgamating corporation may continue to be prosecuted against the amalgamated corporation.¹¹⁸ However, the passage of Bill S-14 adds a theoretically significant wrinkle to this equation by imposing different jurisdictional standards to the corrupt practices of prospective Canadian targets occurring before and after the date of passage of the bill. As a result of Bill S-14, section 5(1) to the *CFPOA* now provides, as follows:

Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 or 4—or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under that section—is deemed to have committed that act or omission in Canada if the person is: ...

(c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.¹¹⁹

Importantly, this additional section has the effect of making Canadian corporations that engage in corrupt practices involving foreign public officials subject to the *CFPOA* regardless of whether such activities take place inside or outside Canada, and based simply on the fact that the corporation is organized under federal or provincial statute.¹²⁰ In the context of a prospective acquisition of a Canadian corporation, the *CFPOA*'s newly applicable “nationality jurisdiction” standard therefore means that acquirers should be acutely aware of any suspected or established corrupt practices occurring after June 13, 2013 which are linked with their Canadian acquisition target, regardless of where such corrupt practices occurred. By contrast, whether corrupt practices engaged in by a Canadian acquisition target prior to June 13, 2013 can be reasonably framed as having taken place in Canada is a question of genuine legal significance.¹²¹

As noted by Archibald, Jull, and Roach, prior to the passage of Bill S-14, “[b]y definition, the bribing of foreign officials involve[d] conduct that

¹¹⁸ See e.g. Alberta *Business Corporations Act*, RSA 2000, c B-9, s 186; Ontario *Business Corporations Act*, RSO 1990, c B.16, s 179.

¹¹⁹ *CFPOA*, *supra* note 1, s 5(1).

¹²⁰ See Parliamentary Information and Research Service, *Legislative Summary of Bill S-14: An Act to amend the Corruption of Foreign Public Officials Act* by Robin MacKay (Ottawa: Library of Parliament, 2013) [*Legislative Summary*].

¹²¹ The jurisdictional amendments effected to the *CFPOA* by Bill S-14 are not retrospective in application. See *R v Karigar*, 2013 ONSC 5199 (available on CanLII) at para 35 [*Karigar*].

occurs outside of Canada and raise[d] jurisdictional issues about the scope of Canadian law.”¹²² To this end, while prior to Bill S-14’s passage the *CFPOA* itself did not directly address issues relating to extraterritorial jurisdiction, the official guide to the *CFPOA* explained that a “real and substantial link” between the offence and Canada would be required in order for Canadian courts to assume jurisdiction over the matter. In particular, the guide provided that:

Canada has jurisdiction over the bribery of foreign public officials when the offence is committed in whole or in part in its territory. To be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting the offence must take place in Canada. There is a sufficient basis for jurisdiction where there is a real and substantial link between the offence and Canada. In making this assessment, the court must consider all relevant facts that happened in Canada that may legitimately give Canada an interest in prosecuting the offence. Subsequently, the court must then determine whether there is anything in those facts that offends international comity.¹²³

This now-outdated explanation of the jurisdictional limits of the *CFPOA* was informed primarily by the decision of the Supreme Court of Canada in *R v. Libman* and its progeny. The appellant in *Libman* was charged with fraud and conspiracy in connection with an investment scam whereby sales personnel located in Toronto telephoned US residents to induce them, by a number of material misrepresentations, to purchase essentially worthless shares in two Central American mining companies.¹²⁴ The US purchasers had sent their money to Central America, and Libman therefore challenged his conviction on the basis that the alleged offences occurred outside Canada.¹²⁵ After an extensive review of the history and evolution of English and Canadian precedent on extraterritorial criminal jurisdiction, the Supreme Court dismissed Libman’s appeal. Justice La Forest articulated the modern Canadian approach to the issue as follows:

I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to

¹²² Archibald et al, *supra* note 21 at 17:30:90. See also Neil Campbell, Elisabeth Preston & Jonathan O’Hara, “Foreign Corrupt Practices—The Growth and Limitations of Canadian Enforcement Activity” (2013) 23:1 *Int’l & Comp L Rev* 35 at 43, where the authors note that “[f]oreign corrupt practices inherently involve cross-border activity [Campbell et al].

¹²³ *CFPOA Guide*, *supra* note 10 at 7, citing *R v Libman*, [1985] 2 SCR 178, 21 DLR (4th) 174 [*Libman*]. As Campbell et al note, section 6(2) of the *Criminal Code* “expresses the default position that Canada will not assert jurisdiction over an offense which occurs outside Canada” (*supra* note 122 at 45).

¹²⁴ *Libman*, *supra* note 123 at 181.

¹²⁵ *Ibid* at 182.

the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a ‘real and substantial link’ between an offence and this country, a test well-known in public and private international law.¹²⁶

Turning to the facts of the case at hand, the Court did not have trouble concluding that the “real and substantial link” standard had been satisfied. It noted that the scheme was “devised” in Canada, that “the whole operation that made it function” was located in Canada, and that the “directing minds” of the operation were situated in Canada.¹²⁷

Given the effect of Bill S-14 on the jurisdictional reach of the *CFPOA*, a different risk analysis may therefore be applied by corporations considering the acquisition of a Canadian target with suspected or established liability for corrupt practices, depending on whether such activities took place before or after June 13, 2013. In particular, while it can be assumed without further analysis that corrupt practices engaged in by the Canadian target after June 13, 2013 would attract *CFPOA* liability regardless of where the corrupt behaviour occurred, the same assumption is not automatically warranted for corrupt practices the target engaged in at an earlier date. Rather, here the degree to which such corrupt practices can be reasonably described as having a “real and substantial link” to Canada will be of material consequence, potentially warranting further consideration and legal analysis.

Of course, a potential acquirer’s appetite to engage in such a “second stage” of *CFPOA* risk analysis will greatly depend on the risk tolerance of the potential acquirer. As noted by Campbell, Preston, and O’Hara, the “*Libman* test can result in a reasonably expansive approach to territoriality.”¹²⁸ In this regard, even if a prospective acquirer’s detailed investigation and legal analysis of suspected or established corrupt practices by a Canadian target—practices that occurred prior to June 13, 2013—reveal minimal or no connections to Canada, a number of factors would caution

¹²⁶ *Ibid* at 212–13.

¹²⁷ *Ibid* at 211.

¹²⁸ Campbell et al, *supra* note 122 at 46. Evidence assembled by the authors in support of this proposition includes that the Canadian Competition Bureau “regularly asserts jurisdiction over international cartels that involve direct or even indirect sales to Canadian customers on the basis that such transactions have a real and substantial link to Canada; Canadian courts have accepted numerous guilty pleas on this basis” (*ibid*). See also Gerald Chan & Nader R Hasan, “The *Corruption of Foreign Public Officials Act* and Canada’s Expanding Jurisdiction Under the ‘Real and Substantial Link’ Test” (2012) 1:4 *Commercial Litigation and Arbitration Review* 57 (“[t]he Supreme Court of Canada’s definition of ‘real and substantial link’ has evolved to the point where it is virtually coterminous with nationality jurisdiction” at 58).

the putative acquirer against relying on such an assessment. First, it cannot be guaranteed that further facts will not later come to light that alter the geographical matrix of the target's corrupt practices. Second, it may be difficult to establish with certainty the exact period of time over which the corrupt practices transpired (and to therefore conclude that such corrupt practices did not occur in part after June 13, 2013). Finally, and perhaps most importantly, it cannot be guaranteed that Canadian prosecutors or judges will interpret the jurisdictional characteristics of the target's practices in the same manner as does the prospective acquirer.

The recent conviction of Nazir Karigar by the Ontario Superior Court in August 2013—the sole instance to date of a judicial application of “territorial jurisdiction” to the *CFPOA*—should serve as a signal of caution in this regard. Karigar was charged with a violation of section 3(1)(b) of the *CFPOA* for offering or agreeing to offer bribes to Air India officials and to India's then-Minister of Civil Aviation in an attempt to influence the awarding of a security services contract by the airline to Cryptometrics Canada. Cryptometrics Canada is a company based in Ontario, but also a subsidiary of Cryptometrics Corporation, which is based in the United States.¹²⁹ In 2005, Karigar had reached out to a senior business development officer at Cryptometrics Canada, stating that he had contacts at Air India and advising the officer that the airline was interested in the company's services. After this initial contact, a series of meetings and correspondence took place between Karigar and various senior Cryptometrics executives, as well as meetings between Cryptometrics executives and Air Indian representatives, and a series of payments by Cryptometrics to Karigar and a second intermediary.

In his defence, Karigar highlighted a number of elements of the case against him which bore little connection to Canada. These included that the “directing minds” of the Cryptometrics scheme—including those individuals who authorized the release of transferred funds—were based in New York, and that all dealings between Karigar, Air India officials, and Cryptometrics representatives, with the exception of two brief meetings in Ontario, took place in India.¹³⁰ The Ontario Superior Court disagreed, holding that “territorial jurisdiction is clearly established in this case.”¹³¹ In particular, the court noted a number of significant connections between Karigar's activities and Canada, including that, at all material times during the pursuit of the Air India contract, Karigar was “employed by or/and acted as an agent” of Cryptometrics Canada; that Cryptometrics Canada

¹²⁹ *Karigar*, *supra* note 121 at paras 40–42.

¹³⁰ *Ibid* at para 38.

¹³¹ *Ibid* at para 39.

was the contracting party to the agency agreement with Karigar; and that had the Air India contract been secured, Cryptometrics Canada stood to enjoy the greatest benefit within the Cryptometrics group of companies.¹³²

Importantly, however, the court also stated that the “substantial connection test is not limited to the essential elements of the offence,”¹³³ and that it would be incorrect to “segregate or otherwise deal with the bribery as a separate and discrete issue” to the exclusion of other “legitimate aspects of the transaction.”¹³⁴ These are not immaterial pronouncements. The Supreme Court of Canada in *Libman* had stated that “to make an offence subject to the jurisdiction of our courts ... [it is only necessary] that a significant portion of *the activities constituting that offence* took place in Canada.”¹³⁵ As noted above, in *Libman*, the Court proceeded to conclude that a “real and substantial link” had been established, given that the scheme was “devised” in Canada, that “the whole operation that made it function” was located in Canada, and that its “directing minds” were situated in Canada.¹³⁶ As such, the focus of the Court’s attention in *Libman* was primarily on the location of “the activities constituting that offence.”¹³⁷

The Ontario Superior Court in *Karigar* was less concerned with such an emphasis. Rather, by stating that “the substantial connection test is not limited to the essential elements of the offence” and emphasizing the fact that Karigar’s corrupt activities were committed on behalf of and for the benefit of a Canadian corporation,¹³⁸ the ruling of the court in *Karigar* implies that all that may be required to contravene the *CFPOA* under the “territorial jurisdiction” standard is to *act in furtherance of Canadian interests* when engaging in foreign corrupt practices, regardless of the actual location where the corrupt practices occurred. Leaving aside for a moment whether such a formulation constitutes an unpermitted expansion of the “territorial jurisdiction” standard instituted by *Libman*, the implications of this approach to territoriality should serve as a stark warning to a prospective acquirer of a Canadian corporation with suspected or established foreign corrupt practices occurring prior to June 13, 2013, as it suggests that the application of “territorial jurisdiction”—compared to “nationality

¹³² *Ibid* at para 40.

¹³³ *Ibid* at para 39.

¹³⁴ *Ibid*.

¹³⁵ *Libman*, *supra* note 123 at 213 [emphasis added].

¹³⁶ *Ibid* at 211.

¹³⁷ *Ibid* at 213.

¹³⁸ *Karigar*, *supra* note 121 at para 39.

jurisdiction”—in the context of foreign corrupt practices might not yield significant differences.

“Nationality jurisdiction” will allow Canadian authorities to “exercise jurisdiction over all ... companies that [have engaged in the corruption of foreign public officials that are incorporated] in Canada, regardless of where the alleged bribery has taken place.”¹³⁹ However, taken to its logical (and arguably unreasonable) extreme, the holding by the Ontario Superior Court in *Karigar* that the “substantial connection test is not limited to the essential elements of an offence,” and that courts should not treat the bribe “as a separate and discrete issue” to the exclusion of other “legitimate aspects of the transaction,”¹⁴⁰ does not arrive at a destination very distant from the result of the nationality jurisdiction analysis. Consider the example of a corporate senior officer of a Canadian corporation engaging in corrupt practices in a foreign jurisdiction where the senior officer is at all times (including the time at which the senior officer devises the corrupt scheme) located in the foreign jurisdiction, the relevant public official is at all times located in the foreign jurisdiction, and all communication (including the offer of illicit benefit) between the senior officer and the public official occurs in the foreign jurisdiction. Pursuant to the ruling in *Karigar*, the corporation is arguably liable for corrupt practices under the *CFPOA* and section 22.2 of the *Criminal Code* simply on the basis that the senior officer is acting further to the interests of a Canadian corporation, and regardless of the fact that none of the actual elements of the offence occurred in Canada.

This conclusion is also supported by certain case law and commentary considering the “real and substantial link” standard in the context of civil proceedings. The Supreme Court of Canada has previously stated that there exists a “close parallel” between the *Libman* formulation of the “real and substantial link” test at criminal law and the test as applied in private law.¹⁴¹ Furthermore, in outlining the substance of the “real and substantial link” test in the civil context in *Club Resorts Ltd. v. Van Breda*, the Supreme Court established four “presumptive” factors, the satisfaction of any one of which will result in a rebuttable presumption in favour of a court accepting jurisdiction in the matter.¹⁴² These factors are that: (i) the defendant is domiciled or resident in the province; (ii) the defendant carries on business in the province; (iii) the alleged tort was committed in the province; or (iv) a contract connected with the dispute was made in

¹³⁹ *Legislative Summary*, *supra* note 120 at 7.

¹⁴⁰ *Karigar*, *supra* note 121 at para 39.

¹⁴¹ *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1107, 76 DLR (4th) 256.

¹⁴² 2012 SCC 17 at para 90, [2012] 1 SCR 572.

the province. As Chan and Hasan note, if applied in the context of *CFPOA* liability, “the first two presumptive factors may be sufficient to do away with any territorial limits to jurisdiction for Canadian companies operating abroad” under the “real and substantial link” standard.¹⁴³

On the other hand, it seems relatively easy to mount a strong argument that the ruling in *Karigar* constitutes an illegitimate expansion of the “territorial jurisdiction” standard instituted by *Libman*, as well as effectively a judicial repeal of section 6 of the *Criminal Code*, which states that “no person shall be convicted or discharged ... of an offence committed outside Canada.”¹⁴⁴ Simply put, how might an offence be legitimately argued, using the *Van Breda* presumptive factors, to have been committed in Canada so as to give a Canadian court jurisdiction, if none of the actual elements of the offence have a territorial nexus with Canada? Similarly, if Canadian prosecutors had good cause to assume and expect that the “territorial jurisdiction” standard could be legitimately applied in the expansive fashion described above, what was the motivation for Bill S-14 and the imposition of the “nationality jurisdiction” standard? While it might be unfortunate that lawmakers failed to fully appreciate the enforcement difficulties that would follow from not attaching the “nationality jurisdiction” standard to *CFPOA* offences from the *Act’s* inception, this does not mean that the appropriate remedy is a creative judicial rewrite of section 6 of the *Criminal Code* with respect to the *CFPOA* for the application of the “territorial jurisdiction” standard.

B. Asset Acquisitions and the Doctrine of Successor Liability

When a corporation is purchasing the assets of another corporation, the general rule is that the purchasing corporation is not liable for any of the debts and liabilities of the selling company, unless they have been specifically assumed or bargained for in the asset purchase and sale agreement.¹⁴⁵ This segregation of assets from liabilities incurred in connection with the business operation of those assets motivates acquirers’ pursuit, in many circumstances, of specific assets rather than the entities that own them.¹⁴⁶

¹⁴³ Chan & Hasan, *supra* note 128 at 60. The authors also make a number of policy-based arguments that the “real and substantial link” test “should be applied less restrictively in the anti-bribery context than in other contexts” (*ibid.*).

¹⁴⁴ *Criminal Code*, *supra* note 9, s 6 [emphasis added].

¹⁴⁵ See *Central Sun Mining Inc v Vector Engineering Inc*, 2011 ONSC 1439 at para 27 (available on CanLII) [*Central Sun*]. See also *Cominco Ltd v Westinghouse Canada* (1981), 33 BCLR 202, 1 WWR 640 (SC).

¹⁴⁶ See Nicholls, *supra* note 117 at 55.

In the context of liability for corrupt practices, pursuing an asset acquisition rather than the acquisition of the relevant entity therefore represents a risk mitigation strategy employed by potential acquirers; that is, acquirers can choose to acquire only the desired assets and not the entity that currently owns and operates those assets, and which may have attracted an unacceptable amount of actual or potential liability for corrupt practices. Whether or not such a risk mitigation strategy is viable or practical will, of course, depend on the particular circumstances, including the nature of the assets. It should also be noted that, just as purchasers may prefer asset acquisitions, most targets of mergers and acquisitions prefer share dispositions, so pushback on this particular risk mitigation strategy from vendors and targets should therefore be expected.¹⁴⁷

Importantly, however, the law of successor liability with respect to asset acquisitions in Canada remains an open question.¹⁴⁸ Stated differently, there is at present no guarantee that an asset acquisition taken in place of a share acquisition would successfully evade liability previously attracted by the vendor in connection with the operation of the assets. Rather, there is relatively good indication that Canadian courts would consider conducting a fact-dependent, quasi equity-based investigation to determine whether liability, including anti-corruption liability, should in fact follow the assets to which the liability relates, rather than remaining strictly with the offending party.

The first Canadian court asked to decide whether liabilities may follow assets was the Alberta Court of Queen's Bench in *Suncor Inc. v. Canada Wire & Cable Ltd.*¹⁴⁹ In *Suncor*, a fire had occurred at a Suncor facility, leading Suncor to file a civil claim against a number of the engineers and suppliers involved in its construction. Associated Engineering Group Ltd. ("AEG"), one of the defendants in the claim, applied for summary judgment on the basis that it had not yet been incorporated at the time the alleged contractual breaches and tortious acts had occurred, and that it could not therefore be held liable for these actions.¹⁵⁰ Suncor and two other defendants opposed the application, essentially arguing that a pre-meditated series of corporate and assets transactions "driven by the desire

¹⁴⁷ *Ibid.*

¹⁴⁸ See Wayne D Gray, "Creditors, Losers Under CBCA Reform but Winners in Judge-Made Corporate Law" (2003) 39 Can Bus LJ 92 at 135, n 166.

¹⁴⁹ *Suncor Inc v Canada Wire & Cable Ltd*, [1993] 3 WWR 630, 15 CPC (3d) 201 (AB QB) [*Suncor* cited to WWR].

¹⁵⁰ *Ibid* at para 7.

to avoid liability rather than for various legitimate business reasons” should not be allowed to protect AEGL from liability for wrongdoing.¹⁵¹

Unable to rely on substantial Canadian jurisprudence for their position, the respondents turned instead to US case law, particularly the decision of the New Jersey Supreme Court in *Ramirez v. Amsted Industries Inc.*¹⁵² Discussing what has become known as the doctrine of “successor liability”, the court in *Ramirez* stated that there are four exceptions to the general rule precluding liability for companies who have acquired all of the assets of another corporation. Specifically, the court stated that a company will be liable for the selling corporation’s liabilities if the purchasing corporation expressly or impliedly agreed to assume such liabilities, the transaction amounts to a consolidation or merger of the seller and purchaser, the purchasing corporation is merely a continuation of the selling corporation, or the transaction is entered into fraudulently to escape the debts or liabilities of the selling corporation.¹⁵³

The Court of Queen’s Bench in *Suncor* reviewed *Ramirez* favourably. It held that the *Ramirez* court’s reasoning was “persuasive” and that it was correct to recognize that “the traditional approach [to liability in respect of asset transfers] narrowly emphasized the form rather than the practical effect of a particular corporate transaction.”¹⁵⁴ The *Suncor* court further embraced the holding in *Ramirez*, reiterating the New Jersey court’s summary of US precedent that:

The successor corporation, having reaped the benefits of continuing its predecessor’s product line, exploiting its accumulated good will and enjoying the patronage of its established customers, should be made to bear some of the burdens of continuity, namely, liability for injuries caused by its defective products.¹⁵⁵

Where “such benefits [are] reaped”, the *Suncor* court stated, it would be “improper to allow the form of a transaction to control questions of liability in tort.”¹⁵⁶ The court therefore denied AEGL’s application, finding that “the corporate liability of successor corporations ... remains an open question in this country” and that “there exists a real possibility that courts in Canada will adopt the reasoning of the successor liability cases in the U.S.”¹⁵⁷ Neither was the court convinced by AEGL’s argument that the

¹⁵¹ *Ibid* at para 17.

¹⁵² *Ramirez v Amsted Industries Inc.*, 171 NJ Super 261, 408 A.2d 818 (NJ Super 1979).

¹⁵³ *Ibid* at 268–69.

¹⁵⁴ *Suncor*, *supra* note 149 at para 25.

¹⁵⁵ *Ibid*, citing *Ramirez*, *supra* note 152 at 817.

¹⁵⁶ *Suncor*, *supra* note 149 at para 25.

¹⁵⁷ *Ibid* at para 26.

successor liability doctrine espoused in *Ramirez* was limited to strict liability and product liability claims, holding that “it is not manifestly clear ... that such a limitation is justified.”¹⁵⁸

Importantly, the ruling of the court in *Suncor* has received favourable treatment on a number of occasions since it was issued.¹⁵⁹ In particular, in 2011, the Ontario Superior Court in *Central Sun Mining Inc. v. Vector Engineering Inc.*¹⁶⁰ reviewed US case law subsequent to *Ramirez* to highlight how the doctrine of successor liability has evolved since that pivotal decision, including with respect to how the doctrine treats de facto mergers and situations in which the purchasing corporation is alleged to be a mere continuation of the selling corporation.¹⁶¹ In this regard, the court highlighted that “the tests for *de facto* merger and mere continuation have tended to merge,” and that four criteria have become “generally accepted” in this context.¹⁶² These criteria are: (i) continuity of ownership between seller and purchaser corporations; (ii) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (iii) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (iv) continuity of management, personnel, physical location, assets, and general business operations.¹⁶³ The *Central Sun* court also approved of US courts’ finding that “not all of these factors must be present for a finding of mere continuation or *de facto* merger to be made,” but that “the determination of whether a predecessor corporation continues to exist for purposes of successor liability is ‘wholly fact specific’.”¹⁶⁴ Lastly, the *Central Sun* court endorsed the argument that the continued existence of the predecessor corporation as a “shell” or “gossamer” form will not prevent the application of successor liability pursuant to the theory of de facto merger or mere continuation, as this would essentially “elevate form over substance”.¹⁶⁵

¹⁵⁸ *Ibid* at para 27.

¹⁵⁹ See *Winnipeg Condominium Corp No 36 v Bird Construction Co*, [1999] 2 WWR 370, 132 Man R (2d) 32 (QB); *Caranci v Huckerby*, [2004] OTC 374 (available on CanLII) (ON SC); *Parlette v Sokkia* (2006), 151 ACWS (3d) 1059 (available on CanLII) (ON SC), *aff’d Parlette v Sokkia* (2007), 221 OAC 11, 46 CCLT (3d) 161.

¹⁶⁰ *Central Sun*, *supra* note 145.

¹⁶¹ *Ibid* at paras 39–47.

¹⁶² *Ibid* at para 40.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid* at paras 42–44, referring to *Milliken & Co v Duro Textiles*, 451 Mass 547, 887 NE (2d) 244, (Mass Sup Ct 2008) [*Milliken* cited to Mass].

¹⁶⁵ *Central Sun*, *supra* note 143 at para 45, citing *Milliken*, *supra* note 164 at 559.

That said, it is important to keep in mind that it remains to be seen how Canadian courts will approach the doctrine of successor liability in the context of criminal, rather than civil, liability. *Ramirez* and its progeny all arose in the context of civil litigation, including product liability cases, as well as cases based on creditor claims.¹⁶⁶ The state of the doctrine of successor liability in US law in the criminal context is somewhat “murkier”,¹⁶⁷ and, to the author’s knowledge, has yet to be considered in any fashion by Canadian courts. To this end, the US administrative decision in *Sigma-Aldrich*—a decision that has been heavily criticized¹⁶⁸—is “widely viewed as providing a key successor liability opinion” with respect to *FCPA* violations.¹⁶⁹ In this case, Sigma-Aldrich Corporation was fined US\$1.76 million for violations of export control laws committed by a newly acquired subsidiary prior to the acquisition. The administrative judge held that liability for the violations passed to Sigma-Aldrich pursuant to the “mere continuation”, or de facto merger, branch of successor liability.¹⁷⁰ Controversially, in doing so, the judge applied “a broadened ‘mere continuation’ theory commonly known as the ‘substantial continuity’ exception, which eliminates the requirement for a continuity of shareholders,” and pursuant to which “a literal ‘purchase’ of assets is not required to establish successor liability so long as there is some form of a ‘transfer’ of assets.”¹⁷¹ With respect to the determination of whether the subject

¹⁶⁶ See Grimm, *supra* note 115 at 285, referring to *United States v Mexico Feed & Seed Co.*, 980 F (2d) 478 at 487 (8th Cir 1992).

¹⁶⁷ Grimm, *supra* note 115 at 286.

¹⁶⁸ See *ibid* at 289–91; Aaron Xavier Fellmeth, “Cure Without a Disease: The Emerging Doctrine of Successor Liability in International Trade Regulation” (2006) 31 *Yale J Int’l L* 127 at 151.

¹⁶⁹ *Ibid* at 287–92, referring to *Re Sigma-Aldrich Business Holdings* (29 August 2002), 01-BXA-06, 01-BXA-07, 01-BXA-11, [archived online at: United States Department of Commerce, Bureau of Industry & Security <web.archive.org/web/20130315213655/https://www.bis.doc.gov/enforcement/casesummaries/sigma_aldrich_alj_decision_02.pdf>] [*Sigma-Aldrich*]; see also Peter D Trooboff, “Successor Liability” *National Law Journal* (4 April 2005), online: *National Law Journal* <www.nlj.com>; Carolyn Lindsey, “More Than You Bargained For: Successor Liability Under the U.S Foreign Corrupt Practices Act” (2009) 35:3 *Ohio NUL Rev* 959 at 965–68; John Barker, Ronald Lee & Michael Ginsberg, “Buyer Beware: Successor Liability for Export Violations and Due Diligence Measures to Identify and Mitigate Deal Risks” (2007) 11:3 *The M&A Lawyer* 1.

¹⁷⁰ *Sigma-Aldrich*, *supra* note 169 at 12–13.

¹⁷¹ *Ibid* at 9, referring to, inter alia, *Gould, Inc v A & M Battery and Tire Service*, 950 F Supp 653 (MD Pa 1997). Furthermore, though the “substantial continuity exception” requires “knowledge of potential liability on the part of the successor corporation,” the judge held that “it is easy to infer knowledge or notice when the successor holds itself out as the continuation of the previous enterprise by retaining the same employees, the same supervisory personnel, the same production facilities in the same location, produces the same product, and maintains continuity of assets and the general business operations” (*Sigma-Aldrich*, *supra* note 169 at 9–10).

statutory penalties should be applied to the purchaser of assets rather than to the originally offending entity, the judge considered a number of matters. First, the judge engaged in statutory interpretation, finding that “both the language and intent of the IEEPA and EAR strongly suggest that ‘successors’ should not be excluded from liability.”¹⁷² The judge then affirmed his decision with reference to policy, holding that “successor liability has been imposed to protect the public interest, as well as to prevent the purpose of federal regulations from being circumvented by corporate structuring formalities.”¹⁷³

It is unclear whether Canadian law would allow the same bridges to be built, given that, among other limitations, the purpose of the application of the doctrine of successor liability in the context of a *CFPOA* prosecution would be to *punish criminal activity* rather than to provide claimants *access to otherwise unavailable damages*, as is the case in the application of the doctrine in civil proceedings. To this end, it has been argued that the decision of the tribunal in *Sigma Aldrich* rests upon a misapplication of US law relating to these issues. As explained by Fellmeth:

Federal and state courts applying the doctrine of successor liability have stated consistently that the doctrine is equitable in origin and nature and, therefore, remedial. As such, successor liability is a remedy to be applied only to avoid injustice and not to aid the government in seeking to punish, and especially not to punish wrongs committed by a third party. Absent an express statutory authorization, the Supreme Court has long held that that it will not sustain an action in equity to enforce noncompensatory penalties. Only when applying a statute can a court resort to successor liability to effect a punishment, such as punitive damages, under positive law, and even then courts have attempted to justify the application of the doctrine as compensatory as opposed to punitive. Where the statute upon which the government bases its authority does not provide a legal basis for successor liability and the government seeks noncompensatory damages, courts cannot properly impose liability by fashioning or applying an equitable remedy such as successor liability.¹⁷⁴

Other possible limitations to the application of the doctrine of successor liability under Canadian law are identifiable. As conceded by both the United States Department of Justice and the Securities and Exchange Commission,

[s]uccessor liability does not ... create liability where none existed before. ... [I]f an issuer were to acquire a foreign company that was not previously subject to the FCPA’s jurisdiction, the mere acquisition of

¹⁷² *Ibid* at 7.

¹⁷³ *Ibid* at 11.

¹⁷⁴ Fellmeth, *supra* note 168 at 175.

that foreign company would not retroactively create FCPA liability for the acquiring issuer.¹⁷⁵

It is only reasonable that the same principle would be applicable under Canadian law in the context of asset acquisitions. If the owner of assets engages in foreign corrupt practices in connection with the operation of those assets but is not subject to the jurisdiction of the *CFPOA*, it should not be the case that the transfer of the assets to a Canadian corporation results in *CFPOA* liability for the past corrupt practices attached to the assets.¹⁷⁶

VII. Corporate Liability for the Corrupt Practices of Subsidiaries

International business transactions are rarely conducted by Canadian companies without the use of one or more international subsidiaries. These international corporate webs are typically the result of risk mitigation strategies, favourable tax regimes, treaty-shopping strategies, or related commercial or administrative considerations. They may also involve a variety of management structures, control schemes, and majority and minority interests. This reality therefore raises the following question: In what circumstances may a Canadian parent be held liable for the corrupt practices of a foreign subsidiary under the *CFPOA* and the *Criminal Code*? The question is a weighty one. If Canadian corporations were permitted to avoid liability for foreign corrupt practices through the mere incorporation of a foreign subsidiary, the purpose of the *CFPOA* would be significantly undermined.¹⁷⁷

According to the US Department of Justice and the Securities and Exchange Commission, there are several ways in which a parent corporation may be liable for corrupt practices engaged in by a subsidiary:

First, a parent may have participated sufficiently in the activity to be directly liable for the conduct—as, for example, when it directed its subsidiary’s misconduct or otherwise directly participated in the bribe scheme.

¹⁷⁵ US Department of Justice & US Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (14 November 2012) at 28, online: <www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [FCPA Guide].

¹⁷⁶ Note that this analysis is separate and distinct from an analysis of whether a part of the assets or related personal property could be considered “proceeds of crime” under Part XII.2 or section 354(1) or both of the *Criminal Code*, *supra* note 9.

¹⁷⁷ This issue is international in its pertinence. As noted by Skinnider, *supra* note 60 at 13, “[w]hether the authorities in a parent company’s country can take action against the parent company where one of its foreign subsidiaries bribes a foreign public official is a priority issue for OECD.”

Second, a parent may be liable for its subsidiary's conduct under traditional agency principles. The fundamental characteristic of agency is control. Accordingly, DOJ and SEC evaluate the parent's control—including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction—when evaluating whether a subsidiary is an agent of the parent. Although the formal relationship between the parent and subsidiary is important in this analysis, so are the practical realities of how the parent and subsidiary actually interact.

If an agency relationship exists, a subsidiary's actions and knowledge are imputed to its parent. Moreover, under traditional principles of *respondeat superior*, a company is liable for the acts of its agents, including its employees, undertaken within the scope of their employment and intended, at least in part, to benefit the company.¹⁷⁸

Although this summary rests on a number of principles somewhat particular to US law, in practical terms the different avenues to liability of Canadian corporations for the corrupt practices of foreign subsidiaries under the *CFPOA* and section 22.2 of the *Criminal Code* are generally similar to what is described above. In fact, it may be the case that Canadian law offers a wider range of means of attributing liability to a corporate parent for the corrupt practices of a foreign subsidiary than does US law.

First, a Canadian corporate parent may be liable for the corrupt practices of a foreign subsidiary if the parent either participated in or directed those corrupt practices. The former may be the case under the *Criminal Code's* section 22.2(a), which prescribes liability where a senior officer of the parent corporation is a party to an offence (that is, where the senior officer operating within the scope of his or her authority works with the foreign subsidiary to offer or provide an illicit benefit to a foreign public official). The latter may be the case under the *Criminal Code's* section 22.2(b), where liability arises if a senior officer of the parent directs the subsidiary to engage in the corrupt practices on behalf of the parent. Furthermore, in each case it must be appreciated that the *CFPOA* prohibits *indirect as well as direct* corrupt practices, meaning that the corrupt practices a senior officer of the parent participates in or directs may involve a third party or intermediary in addition to the foreign subsidiary.

Second, a Canadian corporate parent may be liable for the corrupt practices of a foreign subsidiary in various instances in which the parent has a less than immediate role in the corrupt practices. This may be the case pursuant to the *Criminal Code's* section 22.2(c), where liability arises if a senior officer of the parent knows that a foreign subsidiary is engag-

¹⁷⁸ FCPA Guide, *supra* note 175 at 27 [citations omitted]; see also Tarun, *supra* note 110 at 49.

ing, or is about to engage, in corrupt practices for the benefit of the parent, but the senior officer does not take reasonable measures to prevent the subsidiary from doing so. This may also be the case under section 22.2, which establishes liability where a senior officer of the parent is wilfully blind to corrupt practices in which a foreign subsidiary engages for the benefit of the parent. Again, in each case, the *CFPOA*'s prohibition of both direct and indirect corrupt practices must be appreciated. This prohibition means that the senior officer's wilful blindness or failure to take preventative measures may involve a third party or intermediary other than, or in addition to, the foreign subsidiary.

Third, section 5(1) of the *CFPOA*, added to the *Act* by Bill S-14, expands the means through which a Canadian corporate parent may be found complicit in corrupt practices undertaken by a foreign subsidiary. It provides that where a Canadian corporation engages in a conspiracy or attempt to commit, is an accessory after the fact in relation to, or provides counselling in relation to an offence found in either section 3(1) or section 4(1) of the *CFPOA*, any such acts or omissions by the corporation, wherever committed, shall be deemed to have occurred in Canada.¹⁷⁹ This essentially has the effect of expanding the nationality jurisdiction standard associated with direct contraventions of the *CFPOA* to various adjunct offences under the *Criminal Code*. The result is that a Canadian corporate parent cannot avoid various forms of liability for its complicity in corrupt practices that its foreign subsidiary engages in merely on the basis that such complicity is grounded in actions taken by the parent and its senior officers outside of Canada.

These forms of attributing liability to a Canadian corporate parent for the corrupt practices of its foreign subsidiary are not without areas of uncertain application. For example, at what point should a court find that a senior officer is engaging in corrupt practices for the benefit of the parent (as is required by the introductory language of section 22.2 of the *Criminal Code*), rather than for the benefit of the foreign subsidiary? Or does this distinction not matter, if it is arguable that *any benefit* to the Canadian parent, even if secondary in nature to that of the benefit enjoyed by the foreign subsidiary, is sufficient to attach liability to the parent under section 22.2? That said, it remains the case that the combination of section 3(1) of the *CFPOA* and its prohibition of both direct and indirect corrupt practices, sections 22.2(a), 22.2(b), and 22.2(c) of the *Criminal Code*, and the doctrine of wilful blindness together operate to provide Canadian federal authorities with a multiplicity of means through which to hold a Canadian corporate parent liable for corrupt practices engaged in by its for-

¹⁷⁹ *CFPOA*, *supra* note 1, s 5(1).

eign subsidiary. In fact, considered in conjunction with the provisions in sections 21 and 22 of the *Criminal Code* (which describe liability attached to attempts, common intention, aiding and abetting, and counselling accessory parties) and the application of nationality jurisdiction rather than territorial jurisdiction to such offences by virtue of the *CFPOA*'s section 5(1), the result is an often overlapping statutory web of prohibitions under which a Canadian parent may attract criminal liability in connection with the corrupt practices of a subsidiary, whether before, during, or following the actual commission of such corrupt practices.

This is particularly true given the Ontario Superior Court's expansive interpretation of the *CFPOA*'s section 3(1) in *Karigar*. The defendant in that case argued that the word "agrees" in the section's phrase "directly or indirectly gives, offers or agrees to give or offer" should be given its "ordinary meaning" to connote "the agreement of two people—one to pay a bribe and one to receive said bribe."¹⁸⁰ The Crown, on the other hand, argued that "inc[h]oate offences, in particular a conspiracy to pay bribes ... constitutes a violation of the Act."¹⁸¹ Justice Hackland agreed with the Crown, holding first that "the use of the term 'agrees' imports the concept of conspiracy" into the *CFPOA*, and second, that such conspiracy need not include a foreign public official: that is, that the *CFPOA* is contravened where the agreement is merely between business associates.¹⁸² In his reasons, Justice Hackland implied that an "agreement" or "conspiracy" to engage in corruption need not necessarily involve or identify a particular foreign public official.¹⁸³ In the context of foreign corrupt practices contemplated by international corporate "families", this interpretation of the *CFPOA*'s section 3(1) means that a Canadian parent will have violated the *Act* simply where it can be said to have "agreed" with a foreign subsidiary to engage in the corruption of a foreign public official, even if no specific foreign public official was selected or nominated, and the plan was never actually put into effect.¹⁸⁴

Given this already wide net of liability cast by the interaction of the *CFPOA*, the *Criminal Code*, and the ruling of the Ontario Superior Court

¹⁸⁰ See *Karigar*, *supra* note 121 at para 22.

¹⁸¹ *Ibid* at para 24.

¹⁸² *Ibid* at paras 28–29, 33.

¹⁸³ *Ibid* at paras 29–30.

¹⁸⁴ This interpretation is not without potentially unexpected results. For example, it is common for the executives of parent companies to also serve as executives of their foreign subsidiaries. If this is the case, pursuant to *Karigar*, it is arguable that the decision of a senior officer of a parent company, who is also a senior officer of one of its foreign subsidiaries, to engage in foreign corrupt practices would constitute an "agreement" between the two entities in violation of section 3(1) of the *CFPOA*, *supra* note 1.

in *Karigar*, it is noteworthy that yet another avenue of parental liability for a subsidiary's actions is sometimes discussed in relation to the enforcement of anti-corruption laws—that of piercing the corporate veil.¹⁸⁵ This doctrine is an exception to the fundamental rule of corporate law that a parent corporation will not be held liable for the acts of its subsidiaries (even where the subsidiary is wholly owned).¹⁸⁶ The doctrine may be found to apply, inter alia, where the subsidiary is completely dominated and controlled by its parent and is being used as a shield for a fraudulent or improper purpose,¹⁸⁷ or where the subsidiary is a mere agent, puppet, single enterprise with, or alter ego of the parent corporation.¹⁸⁸ Interestingly, it may be reasonable to argue that each of these avenues may be available to “pierce the corporate veil” to attribute foreign corrupt practices committed by a foreign subsidiary to a Canadian parent, depending on the circumstances.

In the case in which a Canadian parent incorporates a foreign subsidiary with the intent of using the subsidiary to commit corrupt acts abroad and in the hope of insulating itself from liability under the *CFPOA*, a Canadian court could be justified in piercing the corporate veil to hold the parent directly liable for the ensuing corrupt acts of the subsidiary. The court could reasonably find both that the subsidiary was a sham from the outset, and that there was an improper purpose in the mind of the corporate parent. In the case where the subsidiary is the puppet of the parent corporation, a Canadian court could be justified in piercing the corporate veil to hold a parent directly liable for the corrupt acts of its subsidiary pursuant to the “alter ego” doctrine where the subsidiary is “organized and operated as a mere tool or conduit” of the parent,¹⁸⁹ lacking any inde-

¹⁸⁵ See e.g. Archibald et al, *supra* note 21 at 17:30:90, referring to, inter alia, *Niko Resources*, *supra* note 35; William B Jacobson et al, “Caveat Emptor: Why and How FCPA Due Diligence Should be Conducted Prior to Mergers and Acquisitions” (2010) 29:1 Corporate Counsel Review 65 at 77–78.

¹⁸⁶ See e.g. *807608 Alberta Ltd v Medichair Ltd*, 2006 ABQB 781 (available on CanLII) at paras 11–13 (discussing *Salomon v Salomon & Co* (1896), [1897] AC 22 HL (Eng)).

¹⁸⁷ See e.g. *642947 Ontario Ltd v Fleischer* (2001), 56 OR (3d) 417, 209 DLR (4th) 182 at para 68 (CA); *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2000 ABCA 116, 189 DLR (4th) 269.

¹⁸⁸ See e.g. *Palmolive Manufacturing Co v R*, [1933] SCR 131, 2 DLR 81; *Aluminium Co of Canada v Toronto (City)*, [1944] SCR 267, 3 DLR 609 (cited in *Phillips v 707739 Alberta Ltd*, 2000 77 Alta LR (3d) 302 at paras 159, 205–10, CarswellAlta 147 [*Phillips*]); *Parkland Plumbing & Heating Ltd v Minaki Lodge Resort 2002 Inc*, 2009 ONCA 256 at para 51, 205 DLR (4th) 577; *Sun Sudan Oil Co v Methanex Corp*, [1992] 5 Alta LR (3d) 292 at paras 34–43, [1993] 2 WWR 154; *Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2 at 10, 34 DLR (4th) 208 [*Kosmopoulos*].

¹⁸⁹ *Phillips*, *supra* note 188 at para 207, citing *United States v Funds Held in Name of Wetterer*, 899 F Supp 1013 (EDNY 1995) at 1013–17, 1020, 1027. Note, however, that the

pendent mind, operations, finances, or resources devoted to its international operations and associated foreign corrupt practices.

Nonetheless, there exist at least two reasons why reliance on the doctrine of piercing the corporate veil should not be the first port of call for Crown prosecutors seeking to attribute the corrupt practices of a foreign subsidiary to a Canadian parent. The first is that, as is the case with the doctrine of successor liability with respect to asset acquisitions, the doctrine of piercing the corporate veil has historically only been analyzed and applied in Canadian law in relation to civil causes of action and remedies, rather than in relation to criminal liability. As such, it is again questionable whether it would be appropriate under Canadian law to apply a doctrine typically employed to prevent a claimant from being deprived of her rights in a civil context (for example, through the award of monetary damages) for the purpose of preventing the Crown from being deprived of its ability to prosecute criminal sanctions.¹⁹⁰ The second reason is that Canadian and English courts appear to be reaching consensus that the doctrine of piercing the corporate veil should only be applied if there is no alternative remedy available to assist an aggrieved party.¹⁹¹ Considered in light of the various other means of attributing corrupt practices of a foreign subsidiary to a Canadian parent, this suggests that Canadian courts may hesitate to resort to this doctrine where alternative means to the same end are available.¹⁹²

court in *Phillips* was careful to highlight that US courts have shown a greater willingness than their Canadian counterparts to treat one company as a mere instrumentality of another and that, as a result, American jurisprudence on these matters should be treated with caution.

¹⁹⁰ See *Kosmopoulos*, *supra* note 188 at 11, where the Supreme Court of Canada stated that “if the veil is to be lifted at all *that should only be done in the interests of third parties who would otherwise suffer as a result of that choice*,” citing LCB Gower et al, *Principles of Modern Company Law*, 4th ed (London: Stevens & Sons, 1979) at 138 [emphasis added]. See also *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423 at 433–34, 2 OTC 146, (Ont Ct J (Gen Div)), *aff’d* 74 ACWS (3d) 207 (available on QL) (Ont CA). Note, however, the more general pronouncement by the United Kingdom Supreme Court that “the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse,” and “is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law” (*Prest v Petrodel Resources Ltd*, [2013] UKSC 34, [2013] 2 AC 415 at para 27, Lord Sumption JSC [*Prest*]).

¹⁹¹ See *Prest*, *ibid* at para 35, where it is held “if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course.” Compare *XY, LLC v Zhu*, 2013 BCCA 352, [2013] BCJ No 1624 at paras 86–97.

¹⁹² That said, there remain circumstances in which it is conceivable that the doctrine of piercing the corporate veil may be of significant utility in *CFPOA* enforcement. One of

Conclusion

For a number of different reasons, investigations and prosecutions of corporations for foreign corrupt practices tend to end early and in plea agreements, with very few cases proceeding to judicial consideration and determination. These reasons include the fact that corporations and their shareholders generally prefer to put criminal controversies behind them as soon as reasonably possible, rather than endure prolonged court battles and the steady stream of headlines that accompany such battles. Moreover, corporations, unlike individuals, cannot be imprisoned. As a result, as noted by the United States Federal Court, “there [have] been surprisingly few decisions throughout the country on the *FCPA* over the course of the last thirty years.”¹⁹³ There is no reason to believe that things will be markedly different in Canada. The guilty pleas of Niko Resources and Griffiths International Energy can only support this assumption.

In contrast, given that individuals charged with foreign corrupt practices do face significant terms of imprisonment, they have a far greater incentive to vigorously contest any corruption charges levied against them. To this end, it is reasonable to expect that, going forward, a greater number of foreign corrupt practices court decisions will relate to charges levied against individuals rather than against corporations. The last five years have witnessed a patent increase in the number of prosecutions against individuals under the *FCPA* by the US Department of Justice. With prosecutions of a number of SNC-Lavalin executives likely to follow the conviction of Nazir Karigar, Canadian authorities appear to be no less dedicated to this pursuit.

Such case law will continue to provide valuable insight into the scope and substance of the *CFPOA*'s prohibitions and related areas of law (for example, the application of the doctrine of willful blindness in the context of foreign corrupt practices). However, these cases are unlikely to touch either frequently or meaningfully on legal questions of particular significance to Canadian corporations, including but not limited to the appropriate application of section 22.2 of the *Criminal Code* in the context of foreign corrupt practices and the potential application of the doctrine of successor liability to asset acquisitions in the context of criminal proceedings.

these circumstances is if it is desirable to move one step further up a chain of Canadian affiliates, given that the lower level Canadian corporation is a shell company without significant assets or funds of its own against which to levy monetary penalties for criminal offences. Another is if the prosecution concerns corrupt practices occurring prior to the passage of Bill S-14 (and is therefore subject to territorial jurisdiction rather than nationality jurisdiction), and the parent's actions have a greater connection to Canada than do the subsidiary's actions.

¹⁹³ *United States v. Kozeny*, 493 F Supp (2d) 693 (SDNY 2007) at 697.

This is less than ideal. Uncertain application of anti-corruption law can easily result in managerial inefficiencies, increased compliance costs, and the misallocation of resources. It can also create an unnecessary chill on international transactions, decreased Canadian involvement in emerging markets, and decreased competition in those economies that foreign anti-corruption law is partly intended to benefit. Further discussion and deliberation on these issues at academic, policy, and professional levels is therefore worthwhile, and would likely be welcomed by Canadian corporations and enterprises.
