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THE *CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT* AND CANADA'S EXPANDING JURISDICTION UNDER THE "REAL AND SUBSTANTIAL LINK" TEST

GERALD CHAN AND NADER R. HASAN

The *Corruption of Foreign Public Officials Act* [the *CFPOA* or the Act][1] is Canada's implementation of its international treaty obligations to fight corruption. The first decade of the *CFPOA* was marked by bureaucratic inertia and unwillingness to devote sufficient resources to investigate and prosecute Canadian companies and executives, engaging in corrupt business practices abroad. The recent high-profile conviction of Niko Resources Ltd., however, has prompted some legal commentators to suggest that we have entered a new era of vigilant anti-corruption enforcement. Still, international organizations and non-governmental organizations continue to criticize Canada for perceived loopholes in the *CFPOA*.[2] Chief among these criticisms is that Canada has created a jurisdictional loophole by insisting that a significant part of the activity constituting the offence must have a "real and substantial link" with Canadian territory. By contrast, the courts of other countries, such as the United States, assume jurisdiction over their nationals even where the allegedly criminal conduct was committed entirely abroad.

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We will argue that, although the conceptual basis for Canadian jurisdiction in criminal law is *territoriality* rather than *nationality*, this distinction is increasingly meaningless in practical terms. The Supreme Court of Canada's definition of "real and substantial link" has evolved to the point where it is virtually coterminous with nationality jurisdiction. As a result, Canadian companies and executives operating abroad should be wary of legal advice that there is a jurisdictional loophole in Canada's anti-corruption enforcement regime. The loophole may be more illusory than real.

Background

The impetus for global efforts to fight corruption in international business was the 1977 enactment of the U.S. *Foreign Corrupt Practices Act* [the *FCPA*].[3] Soon after the *FCPA*'s enactment, U.S. companies began complaining to their government that the *FCPA* put them at a competitive disadvantage doing business abroad. In turn, the U.S. persuaded other nations to undertake similar legislative reforms aimed at curbing corruption abroad.[4]

On December 17, 1997, Canada signed the *Convention on Combating Bribery in International Business Transactions* of the Organisation for Economic Co-operation and Development (the "OECD Convention").[5] The OECD Convention aims to remove bribery as a non-tariff barrier to trade and create a level playing field in international business. In 1998, Parliament enacted the *CFPOA* to implement Canada's obligations under the OECD Convention.[6] The *CFPOA* created a criminal offence of bribing a foreign public official.[7]

The Jurisdictional Loophole

Canada, unlike other signatories to the OECD Convention, ordinarily bases criminal law jurisdiction on *territoriality* rather than *nationality*. To be subject to the criminal jurisdiction of the Canadian courts, a "significant portion" of the activities giving rise to the offence must have taken place in Canada.[8] For Canadian courts to assume jurisdic-

tion, there must be a "real and substantial link" between the offence and Canada.[9]

The absence of nationality jurisdiction in Canada's anti-bribery laws has attracted significant criticism. Transparency International Canada has said that it is "very disappointed at Canada's failure" to legislate nationality jurisdiction.[10] The OECD has described the absence of nationality jurisdiction as a "substantial loophole" that "needlessly poses a substantial hurdle to investigation and prosecution."[11]

The OECD correctly observes that, while territoriality is the primary basis for jurisdiction in Canadian criminal law, it is not the only basis.[12] Rather, Canadian law expressly contemplates the possibility of legislating other forms of jurisdiction, including nationality jurisdiction.[13] Canada has established nationality jurisdiction over the offences of terrorism,[14] child sex tourism,[15] air and maritime piracy,[16] and war crimes and crimes against humanity.[17] Canada also provides for nationality jurisdiction with respect to torture,[18] desecration of cultural property during armed conflict,[19] and offences relating to the protection of nuclear material.[20] But, since the *CFPOA* is silent on jurisdiction, the presumptive territorial jurisdictional basis in Canadian criminal law applies.[21]

In response to the OECD's criticism, the Government of Canada in 2009 proposed an amendment to the *CFPOA* to add the offence of bribing a foreign public official to its list of nationality-based offences. The proposed amendment expressly provided that "every person who commits an act or omission outside Canada that, if committed in Canada would constitute an offence under section 3 [of the *CFPOA*]" is deemed to have committed that act in Canada, provided that the person is a Canadian citizen, a permanent resident, or a company organized under the laws of Canada or a province.[22] The Bill got through its second reading, but died in committee when Parliament was prorogued in December 2009. To date, the Bill has not been re-introduced.[23] To the extent a jurisdictional loophole exists, it remains intact.

The "Real and Substantial Link" Test Is More Real than Critics Think

Notwithstanding the OECD's criticism and the continuing absence of nationality jurisdiction, Canadian companies should be wary of relying on this "substantial loophole" in the *CFPOA*. Apart from the real possibility that Parliament will reintroduce Bill C-31 to legislate nationality jurisdiction in the *CFPOA,* three factors suggest that the distinction between nationality-based jurisdiction and territoriality-based jurisdiction may be less significant in practice than in theory.

First, the "real and substantial link" test for territoriality-based jurisdiction has been applied broadly in the case law, with significant weight being given to the nationality of the accused individual or the place of business of the accused corporation. The police and prosecutors are aware of this. As noted in the OECD's 2011 report, the RCMP and PPSC have expressed a willingness to pursue cases of foreign bribery with a broad understanding of what amounts to a "real and substantial link" to Canada.[24] Two recent cases suggest that the courts are likely to affirm their position.

In *Lehman Cohort Global Group Inc. (Re),*[25] the Ontario Securities Commission ("OSC") alleged that Lehman Cohort Global Group Inc. ("Lehman") and its four individual principals solicited European investors to invest in a fraudulent investment scheme. Lehman was incorporated in Ontario, had its virtual head office listed at a Toronto address, and had bank accounts opened in Toronto into which it deposited the proceeds from the scheme.[26] In other words, it appeared to be an Ontario company. None of the individual respondents, however, resided in Ontario; only one of them had ever been to Ontario in connection with the alleged scheme (*i.e.*, to open the Toronto bank accounts); and none of the solicited investors resided in Ontario. Rather, all of the solicited investors lived in Europe, which is where much of the fraud appears to have been committed. Despite this fact, the OSC found a "real and substantial link" between the fraud and Ontario in part because it viewed the incorporation in

Ontario, the establishment of the Toronto virtual office, and the opening of the Toronto bank accounts as "preparatory activities to perpetrate the fraudulent scheme."[27] On this theory, even if the crux of an offence is committed abroad, there may be a real and substantial link to Canada if the commission of the offence is dependent to some degree on Canadian-based corporate infrastructure.

A similar lesson can be drawn from *R. v. Niko Resources Ltd.* On June 24, 2011, Niko Resources Ltd. ("Niko") pled guilty to bribery under the *CFPOA* before the Alberta Court of Queen's Bench after its Bangladesh subsidiary provided a $190,984 vehicle to the energy minister in Bangladesh.[28] Niko was fined $9.5 million—by far the largest monetary penalty in the short history of the *CFPOA*—and was made subject to a three-year probation order.[29]

While the bribe paid to Bangladesh's energy minister was made by Niko's foreign subsidiary to a foreign public official in foreign territory, the parties agreed that there was a "real and substantial link" to Alberta because Niko, which is based in Alberta, knew of and funded the payment.[30] Thus, even though the transaction was carried out entirely abroad, a real and substantial link to Canada existed because knowledge of the bribe and the money for the bribe could be traced back to a Canadian actor.

Second, there is a strong policy-based argument that the "real and substantial link" test should be applied less restrictively in the anti-bribery context than in other contexts. In *Libman,* the Supreme Court of Canada declined to establish a structured framework for the determination of what may constitute a "real and substantial link." It did, however, state that the "outer limits of the test may … well be coterminous with the requirements of international comity."[31] "Comity" refers to informal acts performed and rules observed by states in their mutual relations out of politeness, convenience, and goodwill.[32] Often, respect for international comity will prompt states to decline jurisdiction in deference to the jurisdiction of another state. In the anti-bribery context, however, the promotion of goodwill with foreign states may actually require a more (and not less) expansive approach to jurisdiction. Indeed, the other 28 signatories to the OECD Convention—each of whom has implemented nationality-based jurisdiction—would welcome a more aggressive approach from Canada as part of the coordinated, international effort to combat bribery. Anything less might be seen as having the effect of giving Canadian businesses an unfair advantage in the global economy.

Third, the Supreme Court of Canada recently clarified—and arguably expanded—the "real and substantial connection" test for determining jurisdiction in the private law context in *Club Resorts Ltd. v. Van Breda*.[33] While the Court did not explicitly address the "real and substantial link" test for determining criminal law jurisdiction, *CFPOA* lawyers who disregard *Van Breda* do so at their clients' peril. Not only is the language of the two tests the same, but the two tests have been linked with one another since their inception. When the Court created the "real and substantial link" test for criminal law in *Libman,* it noted that this was a "test well known in public and private international law."[34] And when the Court established the same test in the private law context in *Morguard Investments Ltd. v. De Savoye,* it pointed out the "close parallel" between the private law test and the criminal law test adopted in *Libman*.[35]

The Supreme Court in *Van Breda* clarified the "real and substantial connection" test in the private law context by articulating four "presumptive" factors, any one of which is sufficient to create a rebuttable presumption in favour of jurisdiction: (i) the defendant is domiciled or resident in the province, (ii) the defendant carries on business in the province, (iii) the tort was committed in the province, or (iv) a contract connected with the dispute was made in the province.[36]

If applied in the criminal law setting, particularly with regards to *CFPOA* liability, the first two presumptive factors may be sufficient to do away with any territorial limits to jurisdiction for Canadian companies operating abroad. The *Van Breda* test is

broad. Indeed, while carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, any company maintaining an office or even regularly visiting the territory of the particular jurisdiction will be caught by the presumption in favour of jurisdiction.[37] This presumption may be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the particular jurisdiction, but it is unclear how narrowly the necessary relationship will be construed.[38]

The breadth of this new approach was underscored by the Court's application of the test to the facts in *Charron v. Club Resorts Ltd.* (*Van Breda*'s companion case).[39] Club Resorts Ltd. had an active commercial presence in Ontario even though it maintained no office in Ontario. Its representatives travelled to Ontario regularly to promote the resorts that it managed; it had access to the office of SuperClubs, which owned the resorts that it managed; and it arranged for the preparation and distribution of its promotional materials in Ontario.[40] In the Court's view, these activities were sufficient to establish that Club Resorts Ltd. was carrying on business in Ontario and thus to raise a presumption in favour of Ontario courts' jurisdiction. That presumption was not rebutted.[41]

Whether this same approach will be exported to the criminal law context remains to be seen. On the one hand, it might be argued that criminal law jurisdiction should be narrower than that which exists in private law because it is potentially more offensive to international comity to have a government prosecuting the activities within another country than it is to have a private litigant doing the same. On the other hand, criminal law jurisdiction should arguably be broader because the concern that the court expressed in *Van Breda* about multinational corporations being exposed to liability anywhere and everywhere does not exist to the same extent,[42] as governments are far more likely to coordinate their prosecutorial efforts than are private plaintiffs.

In the meantime, prudent Canadian companies should assume that the courts will adopt a broad interpretation of territoriality-based jurisdiction in the *CFPOA* context—one that may be so broad that the distinction between territoriality-based jurisdiction and nationality-based jurisdiction becomes inconsequential.

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

2 OECD, *Canada Phase 3*: *Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*, March 18, 2011, online <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/47438413.pdf> at paras. 14–123 ("OECD 2011 Report").

3 *Foreign Corrupt Practices Act, 1977*, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. 78a *et seq.*).

4 See Lori Ann Wanlin, "The Gap Between Promise and Practice in the Global Fight against Corruption" (2006) 6 Asper Rev. Int'l Bus. & Trade L. 209 at 210–2.

5 *Convention on Combating Bribery in International Business Transactions*, December 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (entered into force February 15, 1999) (the "OECD Convention").

6 In addition to the OECD Convention, Canada is a party to other international treaties relating to bribery and corruption, including the Organization of American States' *Inter-American Convention Against Corruption*, March, 29, 1996 (entered into force March 6, 1997) and the United Nations *Convention against Corruption* (UNCAC) 2003) U.N. Doc. A/58/422 (entered into force on December 14, 2005).

[7] *CFPOA*, *supra* note 1, s. 3(1).

[8] *R. v. Libman*, [1985] S.C.J. No. 56 at para. 74 (S.C.C.).

[9] *Ibid.*

[10] Barrie McKenna, "Time to Tighten Screws on Corruption of Foreign Officials," *Globe and Mail,* May 1, 2011, online <http:// http://www.theglobeandmail.com/report-on-business/rob-commentary/time-to-tighten-screws-on-corruption-of-foreign-officials/ article624755/>.

[11] OECD 2011 Report, *supra* note 2 at para. 119.

[12] *Ibid.* at para. 117. See also *R. v. Hape,* [2007] S.C.J. No. 26 at para. 66 (S.C.C.).

[13] *See R. v. Hape, ibid.* at para. 60.

[14] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 7(3.73)–(3.75).

[15] *Ibid*., s. 7(4.1).

[16] *Ibid.*, ss. 7(1) and 7(2.1).

[17] *Criminal Code*, *supra* note 14, ss. 7(3.73)–(3.75); *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, s. 8.

[18] *Ibid.*, s. 7(3.7).

[19] *Ibid.*, s. 7(2.01).

[20] *Ibid.*, s. 7(3.2).

[21] This presumption is codified in s. 6(2) of the *Criminal Code*: "Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada."

[22] House of Commons, Bill C-31, *An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act* (May 15, 2009), s. 38.

[23] OECD 2011 Report, *supra* note 2 at para. 121.

[24] *Ibid.* at para. 116.

[25] (2010), 12 Admin. L.R. (5th) 219.

[26] *Ibid.* at paras. 3, 8, 12, 15, 16, and 35.

[27] *Ibid.* at para. 116.

[28] Agreed Statement of Facts, Alberta Court of Queen's Bench, Calgary Courts Centre, Alberta. *R. v. Niko Resources Ltd.*, E-File No. CCQ 11 NIKO RESOURCES, June 24, 2011 at para. 28 (unreported).

[29] *Ibid*.

[30] *Ibid.* at paras. 4 and 56.

[31] *R. v. Libman, supra* note 8 at para. 76 (S.C.C.).

[32] *R. v. Hape, supra* note 12 at para. 47 (S.C.C.).

[33] [2012] S.C.J. No. 17 (S.C.C.).

[34] *R. v. Libman, supra* note 8 at para. 74 (S.C.C.).

[35] *Morguard Investments Ltd. v. De Savoye*, [1990] S.C.J. No. 135 at para. 49.

[36] *Supra* note 33 at para. 90.

[37] *Ibid.* at para. 87.

[38] *Ibid.* at para. 96.

[39] [2012] S.C.J. No. 17.

[40] *Supra* note 33 at para. 120.

[41] *Ibid.* at para. 122.

[42] *Ibid.* at para. 114.

COULD CANADA BECOME A NEW FORUM FOR CASES INVOLVING HUMAN RIGHTS VIOLATIONS COMMITTED ABROAD?

JOHN TERRY AND SARAH SHODY

Unlike the United States, with its *Alien Tort Statute*,[1] Canada has no legislation specifying which courts should take jurisdiction over actions brought by non-Canadians in respect of alleged human rights violations committed outside of Canada. For that reason, among others, plaintiffs seeking a forum for the determination of an action alleging human rights abuses in a jurisdiction other than the place where the alleged human rights abuses occurred have tended to pursue actions in the United States rather than Canada.

That may now, however, be starting to change. In recent years, foreign plaintiffs, particularly in mining cases, have sought to have Canadian courts take jurisdiction over cases alleging human rights abuses in foreign jurisdictions. In addition, there are currently two leave to appeal applications before the Supreme Court of Canada in which plaintiffs are seeking to pursue actions in Canada respecting alleged human rights abuses that occurred in other countries. As these developments unfold in Canada, the frequency and scope of such cases may be on the decline in the United States. Accordingly, would-be plaintiffs in cases alleging human rights violations outside of North America may increasingly consider Canada as a potential forum, particularly where there is some link between the facts of the case and Canada.

Recent Efforts by Foreign Plaintiffs to Bring Actions in Canadian Courts Respecting Alleged Human Rights Violations Committed Abroad

Over the past 15 years, there has been a steadily increasing number of instances in which foreign plaintiffs have sought to have Canadian courts take jurisdiction over alleged human rights abuses committed in foreign jurisdictions.

In 1998, in *Recherches Internationales Québec v. Cambior Inc.*,[2] the Quebec Superior Court refused to take jurisdiction over an action in which it was alleged that Cambior, a Canadian mining company, was negligent with respect to a tailings dam collapse at its mine in Guyana. The collapse allegedly contaminated the water supply of thousands of Guyanese. While the Court determined that there were some connections to Quebec, it ultimately determined that Guyana was the appropriate forum.

In 2004, in *Bouzari v. Iran*,[3] an Iranian citizen who emigrated to Canada sought to sue Iran in Ontario in respect of torture allegedly committed by the Iranian government. His claim was dismissed by both the Superior Court and the Ontario Court of Appeal on grounds of state immunity. Nevertheless, Justice Goudge, for a unanimous Court of Appeal, dealt in *obiter* with jurisdictional issues. He noted that if this were the usual case of a foreign defendant sued in Ontario for a foreign tort, the application of the normal jurisdictional connection factors would probably yield the conclusion that there is no real and substantial connection to Ontario. However, he stated that there were several circumstances that made the presumptive conclusion of no jurisdiction "troubling," including that (1) the action was based on torture by Iran, which had eliminated itself as a possible forum; and (2) if Ontario did not take jurisdiction, the plaintiff would be left without a place to sue.[4]

In 2010, in *Piedra v. Copper Mesa*,[5] the plaintiffs were Ecuadorian nationals who alleged that human rights violations had been committed against them by security forces at an Ecuadorian mine site owned by a subsidiary of Copper Mesa, a mining corporation incorporated in British Columbia. In addition to suing Copper Mesa itself, the plaintiffs sued the Toronto Stock Exchange, and individual Copper Mesa directors, alleging that the directors failed to take steps to prevent the alleged human rights violations.

Although the claims in *Copper Mesa* were dismissed for failing to disclose a reasonable cause of

action, the case and the publicity it has received appear to have encouraged others to come forward. Three actions have been brought against HudBay Minerals Inc. and HMI Nickels Inc. in respect of human rights violations allegedly committed by security forces at a subsidiary's mine site in Guatemala,[6] and it appears that a motion regarding whether Ontario can take jurisdiction is forthcoming in at least one of them.[7]

The Two Appeals for which Leave to the Supreme Court of Canada Has Been Sought

i. *ACCI v. Anvil Mining*

The Supreme Court of Canada is currently determining whether to grant leave to appeal in *Association canadienne contre l'impunité v. Anvil Mining Ltd.*[8] The issue in *ACCI* on which leave to appeal is sought is whether Quebec has the jurisdiction to hear a class action brought on behalf of residents of the Democratic Republic of the Congo ("DRC") against Anvil Mining Ltd., a corporation operating a mine near Kilwa, DRC. The central allegation in that case is that, in October 2004, the DRC military responded to an uprising in Kilwa by brutalizing and killing numerous Kilwa residents. It is alleged that Anvil provided logistical support, including trucks and airplanes, to the military that carried out the alleged violations.

In April 2011, the Quebec Superior Court determined that Quebec had jurisdiction to hear the Kilwa residents' class action, in part because Anvil had an office in Montreal (although this office did not exist at the time of the Kilwa incident). The Superior Court rejected Anvil's arguments that the DRC or Australia were more appropriate fora (Anvil's head office in 2004 was in Australia). With respect to the DRC, residents of Kilwa had already brought a civil claim before a military tribunal there, but the Court determined that that claim had been unfairly adjudicated.[9] With respect to Australia, while a class proceeding had been brought in 2007, the Court determined that the DRC had obstructed and impeded the NGO in prosecuting that class action, which led the NGO to abandon the action.

In January 2012, however, a three-member panel of the Quebec Court of Appeal overturned the Superior Court's decision, concluding that Quebec could not take jurisdiction. The Court determined that, while Anvil was incorporated in the Northwest Territories and was listed on the Toronto Stock Exchange, it had no establishment or activity in Quebec in 2004,[10] when the Kilwa incident occurred. The Court of Appeal also rejected the ACCI's argument that Quebec was a "forum of necessity" on the basis argued by the plaintiffs (that the residents of Kilwa had been unable to obtain justice in the DRC or Australia), especially since the Court was not persuaded by the plaintiffs' evidence regarding their inability to proceed in Australia.

The ACCI has sought leave to appeal from the Supreme Court. If leave is granted, the Supreme Court will have to address the question of how the principles regarding the assumption of jurisdiction, set out in the Supreme Court's recent decision in *Club Resorts Ltd. v. Van Breda*,[11] are applied in cases involving alleged human rights abuses by corporations operating abroad. The Court will have to consider, in particular, whether special consideration should be given to such cases, since many of them will involve vulnerable plaintiffs who might not have recourse in other jurisdictions.

In *Van Breda*, the Court listed four presumptive connecting factors that, when present, give rise to a "real and substantial connection" and entitle a court to assume jurisdiction over a dispute involving a tort: the defendant is domiciled or resident in the province, the defendant carries on business in the province, the tort was committed in the province, and a contract connected with the dispute was made in the province. The Court also made it clear that these connecting factors are not the only ones, and that the courts may add new presumptive connecting factors, with a view to the values of order, fairness, and comity.

In *Van Breda*, the Court stated that it was not addressing the doctrine of "forum of necessity" because it was not at issue in that case. But its decision suggested the doctrine may have a role to play in an appropriate case. As Justice LeBel stated for the Court, "[i]f the court concludes it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, *subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons*."[12] If the Supreme Court grants leave in *ACCI*, it will have an opportunity to provide context to the doctrine of necessity, which could become a key basis on which courts could grant jurisdiction in cases where human rights abuses in the plaintiffs' home jurisdiction are alleged.

[In November 2012, following the completion of this article, the Supreme Court of Canada dismissed the motion for leave to appeal in *ACCI v. Anvil Mining*. The treatment of the forum of necessity doctrine in Canadian jurisprudence thus remains unsettled, and may have to be resolved in a subsequent case.]

ii. *Kazemi v. Iran*

The plaintiffs in another case involving alleged human rights violations committed abroad, *Kazemi v. Iran*,[13] have also recently sought leave to appeal to the Supreme Court of Canada. In 2003, Iranian-Canadian photographer Zahra Kazemi was arrested, tortured, and killed in Iran. Her son, Stephan Hashemi, on behalf of her estate and on his own behalf, sued Iran, along with a number of individuals in the Iranian government.

In January 2011, the Quebec Superior Court determined a motion to dismiss by the defendants in *Kazemi*, who argued that they were immune from suit because of the *State Immunity Act* of Canada.[14] The Superior Court permitted Mr. Hashemi's claim to proceed, since, in the Court's view, the alleged injury to Mr. Hashemi—that is, nervous shock—occurred in Quebec. This is important because s. 6(a) of the *SIA* provides that a foreign state is not immune in proceedings that "relate to … death or personal or bodily injury … that occurs in Canada." However, the Superior Court dismissed the claim by Ms. Kazemi's estate, since the assaults suffered by Ms. Kazemi took place in Iran.

An appeal of *Kazemi* was decided in August 2012. The plaintiffs appealed the dismissal of the claim by Ms. Kazemi's estate, and the defendants appealed the order permitting the son's claim to proceed. The Quebec Court of Appeal determined that both claims were barred by the *SIA*. The decision to dismiss Mr. Hashemi's claim turned on an interpretation of s. 6(a) that excluded the nervous shock alleged by Mr. Hashemi from the definition of "personal or bodily injury."

Although the *Kazemi* case focuses on state immunity rather than jurisdictional issues, it provides a second opportunity—from a different angle—for the Supreme Court to consider whether cases in which foreign governments have allegedly committed serious violations of human rights, such as torture, should be given an exceptional status that allows such claims to be heard in Canada.

Looming Developments in the United States

The policy considerations raised in the *ACCI* case are especially timely, since the U.S. Supreme Court will soon determine, in *Kiobel v. Royal Dutch Petroleum*,[15] whether corporations, in addition to natural persons, can be liable for human rights violations committed abroad under the ATS.

The *ATS* provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." While the ATS was enacted in 1789, it has only become the basis for litigation in the U.S. for the past 20 years,[16] and the issue of corporate liability under it has only been canvassed at length recently. The leading cases on it up until now have mostly dealt with individual liability.[17]

In *Kiobel*, the plaintiffs, 12 Nigerian nationals, allege that the defendants, consisting of Dutch, British, and Nigerian oil companies that operated an oil production facility in Nigeria, were complicit in human rights violations committed against them by the Nigerian government, in relation to protests against oil drilling in Nigeria.

The issue regarding corporate liability in *Kiobel* arises because the *ATS* refers only to torts "committed in violation" of international law. The defendants in *Kiobel* argue that there are no norms of international law that can impose civil liability on corporations, and, consequently, the *ATS* cannot apply to them.

The U.S. Court of Appeals for the Second Circuit agreed with the defendants, and dismissed the case.[18] However, other U.S. Circuit courts have disagreed and held that corporations can be liable for civil wrongs under the *ATS*—so there is now a split that must be resolved by the U.S. Supreme Court.[19]

Kiobel was initially argued before the U.S. Supreme Court in February 2012, but was met with a curious twist: the Court ordered the case to be re-argued, with the additional question of whether the *ATS* allows courts to recognize a cause of action for violations of international law occurring outside of the United States.

An additional issue in *Kiobel*, then, is whether the *ATS* confers the jurisdiction to deal with extraterritorial violations of international law on U.S. courts *at all*—whether the alleged violator is a corporation or an individual. This referral of the case back to the lower court could be one indication of a new reluctance on the part of the U.S. Supreme Court to have U.S. courts assume jurisdiction over cases arising from other jurisdictions.

Kiobel was re-argued on October 1, 2012, and the U.S. Supreme Court's decision is pending. If the *Kiobel* case reshapes the U.S. landscape regarding claims regarding alleged human rights violations committed abroad, and alters the scope of the *ATS*, Canada may become a more popular choice for such claims.

[*Editor's Note*: John Terry is a partner in and Sarah Shody is an associate in the litigation department of Torys LLP.]

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1 28 U.S.C. § 1350 [*ATS*].

2 [1998] Q.J. No. 2554 (S.C.J.).

3 [2002] O.J. No. 1624 (S.C.J.), aff'd [2004] O.J. No. 2800 (C.A.) [*Bouzari*].

4 *Bouzari* (C.A.), *ibid*. at paras. 32–37.

5 [2010] O.J. No. 2239, aff'd [2011] O.J. No. 1041.

6 [2011] O.J. No. 3417 (Ont. S.C.J.), Ontario Court File Nos. CV-10-411159, CV-11-423077, CV-11-435841.

7 *Ibid.*

8 [2011] J.Q. No. 4382, rev'd [2012] J.Q. no 368 [*ACCI*].

9 RMP/ 0064/NMB/2005-RP 010/2006. For an account of the action brought by Kilwa residents before a military tribunal in the DRC, see United Nations Human Rights: Office of the High Commissioner, "Democratic Republic of the Congo", August 2010 <http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf> at 400–01.

10 The "establishment" and "activity" indicia are part of the *Quebec Civil Code*; see s. 3148(2) *C.C.Q.*

11 [2012] S.C.J. No. 17 [*Van Breda*].

12 *Van Breda*, *ibid*. at para. 100 [emphasis added].

13 [2011] Q.J. No. 412, leave to appeal granted [2011] J.Q. no 1974, rev'd [2012] Q.J. No. 7754 [*Kazemi*].

14 R.S.C. 1985, c. S-18 [*SIA*].

15 U.S. Supreme Court Docket No. 10-1491.

16 The *Alien Tort Statute* remained largely ignored until *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2nd Cir. 1980), in which the United States was found to have jurisdiction over a lawsuit against a former Paraguayan official, later resident in the United States., in respect of the alleged torture and murder of a Paraguayan national.

17 The U.S. Supreme Court's only other case on the *Alien Tort Statute*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), dealt with a lawsuit by a Mexican national alleging that he was arbitrarily detained by another Mexican national.

18 2010 WL 3611392 (2nd. Cir. Sept. 17, 2010).

19 See, *e.g.*, *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, No. 09-7125 (D.C. Cir. 2011); *Sarei v. Rio Tinto*, No. 02-56256 (9th Cir. 2011).

THE CORPORATE SOCIAL RESPONSIBILITY COUNSELLOR AND THE IMPLICATIONS OF THE IFC PERFORMANCE STANDARDS FOR CANADIAN COMPANIES OPERATING ABROAD

MICHAEL TORRANCE

In May 2009, the Government of Canada established the Office of the Extractive Sector Corporate Social Responsibility Counsellor ("CSR Counsellor") and explicitly endorsed the International Finance Corporation's ("IFC") Performance Standards on Environmental and Social Sustainability ("IFC Performance Standards")[1] as a primary part of the Canadian government's Corporate Social Responsibility ("CSR") expectations for the Canadian mining, oil, and gas industries. This endorsement highlights the increasingly important role the IFC Performance Standards play in setting CSR and sustainable development standards for Canadian extractive companies investing and operating abroad.

The IFC Performance Standards possess legal significance for the Canadian extractive sector that is highlighted by this endorsement by the Canadian government and the creation of the CSR Counsellor. In light of this legal significance, Canadian extractive companies must now consider (1) the liability that may arise where the expectations of the IFC Performance Standards are not met, and (2) the strategic legal opportunities the IFC Performance Standards provide as a defence for Canadian extractive companies where their international practices are challenged.

Canada's CSR Counsellor for the Extractive Sector

The office of the CSR Counsellor was established by the Government of Canada in 2009 to promote best CSR practices for Canadian mining, oil, and gas companies operating abroad. In particular, the office was created to help Canadian mining, oil, and gas companies meet their (i) environmental responsibilities and (ii) social responsibilities (including employment and labour, health and safety, human rights, community relations, and aboriginal issues) when operating abroad, to improve the Canadian extractive industry's reputation both domestically and abroad, and to maintain access to international markets.

The strategy to improve CSR practices emerged from a dialogue between representatives of government, industry and non-governmental organizations, called the National Roundtables on CSR and the Canadian Extractive Industry in Developing Countries ("Roundtables"). The Roundtables sought to address the reputational risks arising from the lack of effective regulatory oversight in jurisdictions outside of Canada.[2] As the Roundtables identified, few mechanisms exist in law to enforce environmental and social obligations other than domestic regulations—which may be substantively deficient or lacking enforcement in developing countries where many extractive companies operate. This legal reality creates a "governance gap" in the areas of social and environmental protections, which, in turn, creates reputational risks for Canadian businesses that may be accused of unethical conduct even where they comply with the law.[3]

As part of the recommendations of the Roundtables, the CSR Counsellor's office was established to provide a non-judicial grievance process to address disputes through constructive engagement.[4] Complementing this dispute resolution mechanism, Canada's extractive industry was encouraged to adopt the best practices in the areas of environmental and social risk management—even where such best practices may not be legally required by a particular jurisdiction. To this end, the Parliamentary Order in Council creating the CSR Counsellor[5] expressly endorsed[6] three CSR "performance guidelines" for Canadian businesses operating abroad: (1) the IFC Performance Standards, (2) the Voluntary Principles on Human Rights and Security

("Voluntary Principles"),[7] and (3) the non-financial reporting frameworks of the Global Reporting Initiative ("GRI").[8] These endorsed standards can "fill the gap" of emerging market legal systems, where the regulatory requirements of those jurisdictions fall below the expectations of the endorsed performance guidelines.

The CSR Counsellor was also empowered to facilitate (a purely voluntary) structured engagement involving Canadian extractive companies in relation to complaints or concerns of stakeholders.[9] Rules of procedure were developed by the CSR Counsellor ("Rules") to govern the engagement process.[10] Under the Rules, complaints to the CSR Counsellor are called "Requests for Review." A Request for Review can be accepted by the CSR Counsellor from any person or community outside of Canada who "reasonably believes" that they are being or may be adversely affected by the operations of a Canadian extractive sector company, contrary to the performance guidelines that the CSR Counsellor is required to apply. Canadian extractive companies can also bring matters forward if they believe they are the subject of unfounded allegations concerning their corporate conduct in relation to the applicable standards. As noted, the process is purely voluntary. A party that is subject to a Request for Review can choose not to participate at any time, which will cause the process to end. The CSR Counsellor has reporting obligations to the minister of international trade (which are made public) even if a Request for Review ends without full resolution.[11]

To date, three complaints have been brought to the CSR Counsellor for review.[12] One complaint, involving the Canadian mining company Excellon Resources Inc. ("Excellon"), moved to the fact-finding stage. That Complaint was brought by a Mexican non-governmental organization called the Proyecto de Derechos Económicos, Sociales y Culturales A.C. ("ProDESC") and the National Mining Union of Mexico (which is affiliated with the United Steelworkers Union), alleging that Excellon violated the Voluntary Principles on Security and Human Rights, workers' rights to organize, and health and safety obligations (such as those covered by the IFC Performance Standards) at its La Platosa mine. According to the CSR Counsellor's Closing Report, after an initial meeting and two "field visits" by the CSR Counsellor to Mexico, the process ended when Excellon unilaterally withdrew.[13] Excellon alleged in part that the complainants were not representative of workers at the mine and that the Complaint was not brought in good faith. As the CSR Counsellor process is voluntary, this withdrawal ended the process without resolution. The dispute between the parties is still ongoing.[14]

Aside from the Excellon case, the CSR Counsellor has addressed two other matters. One matter was closed when it was identified that the issues had been addressed through different fora.[15] A new complaint is now under consideration by the CSR Counsellor in relation to the operations of McEwen Mining Inc. in Argentina, which has passed the intake stage but has yet to proceed to fact finding or informal mediation.[16]

IFC Performance Standards–Filling the Gaps of Hard Law

The CSR Counsellor's use of the IFC Performance Standards is consistent with their original purpose, *i.e.*, to set a minimum environmental and social performance expectation in emerging markets where legal controls are weak. To this end, the IFC Performance Standards require a corporation to go beyond minimum compliance with the local laws of emerging jurisdictions to address the goal of sustainable development.[17]

There are eight IFC Performance Standards:[18]

1. ***Assessment and Management of Environmental and Social Risks and Impacts***: requiring impact assessments, stakeholder engagement and the development of action plans, and an Environmental and Social Management System ("ESMS").
2. ***Labour and Working Conditions***: setting standards for the management of human

resources, including workers' organizations, occupational health and safety, child and forced labour practices, and the establishment of grievance mechanisms.

3. ***Resource Efficiency and Pollution Prevention***: including the management of emissions such as greenhouse gases, pollution of land, air, or water.
4. ***Community Health, Safety, and Security***: requiring design, hazardous materials management, and emergency preparedness, as well as risk management on the use of security services.
5. ***Land Acquisition and Involuntary Resettlement***: establishing standards to be applied where there is expropriation of land and/or resettlement of communities affected by a project.
6. ***Biodiversity Conservation and Sustainable Management of Living Natural Resources***: establishing requirements to manage and mitigate impacts on habitats and ecosystems.
7. ***Indigenous Peoples***: requiring consultation with affected indigenous communities, including, in some circumstances, to the point of Free Prior and Informed Consent ("FPIC") of indigenous peoples as part of the stakeholder engagement process—a new and controversial requirement of the 2012 IFC Performance Standards.[19]
8. ***Cultural Heritage***: establishing requirements for the identification, management, and protection of cultural heritage that may be affected by project activities.

The IFC Performance Standards establish a system of private regulation to fill governance gaps created by weak enforcement of environmental and social regulations in emerging markets where the IFC invests.[20] By incorporating sustainable development expectations into the financing agreements between the World Bank and its private sector partners, encouraging sustainable development can become enforceable as contractual conditions for financing.

The IFC Performance Standards are now regularly incorporated into private investment agreements by international investment banks that have committed to the Equator Principles agreement ("EPs"),[21] which have been accepted by 77 of the world's leading financial institutions.[22] The EPs require adherents to apply the IFC Performance Standards to the evaluation of project financings, project-related corporate loans, bridge financings, or advisory services, meeting certain monetary thresholds. Notwithstanding the express limitations on the scope of the EP agreement, the IFC Performance Standards are increasingly used by financial institutions beyond the project financing context as a risk management and investment evaluation tool for assessing all types of asset-based financing and even equity underwriting.[23]

Legal Implications for Canadian Extractive Companies

The creation of the CSR Counsellor and related endorsement of the IFC Performance Standards by the Government of Canada has legal implications for Canadian extractive companies operating in emerging markets. The most obvious implications arise from risks of a Request for Review with the CSR Counsellor. Wherever a Request for Review occurs, initiating a public process including a possible fact finding and public reporting by a Government of Canada official, risks will arise for the involved company. Such a review could result in disclosures of information that in turn trigger litigation. The process also gives rise to reputational risks (and opportunities) for the company being reviewed.

There is also clear normative implication from the Government of Canada's endorsement of the IFC Performance Standards as evidence of good sustainable development practices and CSR for Canadian resource companies. Recent Canadian bilateral trade treaties, such as the Canada-Peru Free Trade Agreement ("FTA"), explicitly permit and encourage the promotion and enforcement of "internationally recognized standards of corporate social responsibility" as an exception to the states' obligations to liberalize trade. While there is no clear definition of what constitutes an "internationally recognized standard of CSR," the Government of

Canada's explicit endorsement of the IFC Performance Standards (and their pervasive use globally) suggests that they provide the best evidence of what acceptable standards would look like. As such, the IFC Performance Standards could readily be used in international trade or investment disputes where CSR or sustainable development is at issue.

Two potential disputes that could see the application of the IFC Performance Standards are (i) the Peruvian government's revocation of a mining licence held by Canadian mining company Bear Creek and (ii) the Bolivian government's recent expropriation of South American Silver's Malku Khota mine.[24] Both government actions were tied to indigenous protests against these mines and the alleged failures of the mining companies to address the concerns of local stakeholders.[25] Should these matters become the subject of international arbitration, violations of the indigenous rights or stakeholder engagement sections of the IFC Performance Standards could be used by the expropriating governments as evidence of the consultation standard these companies ought to have met. Conversely, these companies could themselves rely on these standards to demonstrate how they have discharged their social and environmental responsibilities to local communities, removing any justification for expropriation that might otherwise exist. In either case, the IFC Performance Standards could play an important role as a legal obligation or justification for government interference in future international disputes involving environmental or social issues.[26]

Conclusions

The IFC Performance Standards are taking on more significance than simply as a *de facto* baseline for sustainability or a voluntary expectation approved of by the CSR Counsellor. Indeed, there appears to be a trend toward making the IFC Performance Standards the *de jure* content of legal expectations relating to sustainable development and CSR in international investment and commercial contracts.

The legal relevance of the IFC Performance Standards is not always self-evident, but derives from the normative role they play in establishing the content of CSR, particularly for the Canadian extractive sector operating in developing countries.

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1 International Finance Corporation, IFC Sustainability–Environmental and Social Performance Standards, online <http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards>.

2 National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries–Advisory Group Report (March 29, 2007), online <http://www.pdac.ca/pdac/misc/pdf/070329-advisory-group-report-eng.pdf>.

3 John Gerard Ruggie, "Current Developments: Business and Human Rights: The Evolving International Agenda" (2007) 101 Am. J. Int'l L. 820.

4 For more information on existing non-judicial grievance processes see BASESwiki, online <http://baseswiki.org/en/Main_Page>.

5 Terms and conditions governing the appointment of a special adviser to the Minister of International Trade, to be known as the Extractive Sector Corporate Social Responsibility Counsellor, who may be appointed by the Governor in Council under para. 127.1(1)(c) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13), P.C. 2009-0422, (May 26, 2009).

6 It should be noted that the Government of Canada has only endorsed the 2006 version of the IFC Performance Standards and not certain changes contained in the recently released 2012 version. Endorsement of this sort does not make the endorsed standards "laws" *per se*, but government endorsement is intended to encourage internalization of such standards by corporate actors. The Government of Canada's forbearance from the imposi-

tion of hard regulations may be dependent upon the effective internalization of endorsed (but voluntary) standards by the Canadian Extractive Sector. The imposition of legislated requirements to adhere to the IFC Performance Standards was proposed in a Private Members' Bill, C-300, introduced in 2009 but which was ultimately defeated in 2010.

7 Voluntary Principles on Security and Human Rights, online <http://www.voluntaryprinciples.org/principles/index.php>.

8 Global Reporting Initiative/Reporting Framework, online <http://www.globalreporting.org>.

9 The Roundtables had originally recommended a "compliance mechanism" that would have made the CSR Counsellor process non-voluntary. The recommendations included the establishment of a standing tripartite Compliance Review Committee that shall determine the nature and degree of any company non-compliance with the Canadian CSR Standards that could make recommendations with regard to (1) referral to external dispute-resolution processes, (2) measures to be taken by the company to return to compliance and the monitoring of those measures, and (3) a determination that no further action is required. This determination of compliance—or the nature and degree of non-compliance with regard to the specific aspects of the complaint—and any recommendations would be made public. In cases of serious non-compliance, where the Compliance Review Committee determines that remedial steps have not been or are unlikely to be successful, the Compliance Review Committee would make recommendations with regard to the withdrawal of financial and/or nonfinancial services by the Government of Canada. This recommendation has not been implemented to date; see Note 2.

10 Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor (October 20, 2010), online <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Rules%20of%20procedure%20FINAL.pdf>.

11 Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor "Closing report," Request for Review file #2011-01-MEX, online <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Closing_report_MEX.pdf>.

12 CSR Counsellor, Registry of Requests for Review, online <http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?view=d>.

13 Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor "Closing report", Request for Review file #2011-01-MEX, online <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Closing_report_MEX.pdf>.

14 On July 12, 2012, the Justice and Corporate Accountability Project ("JCAP") of Osgoode Hall Law School submitted a request to the Ontario Securities Commission (the "Commission") to investigate Excellon, which is listed on the Toronto Stock Exchange. JCAP represents ProDESC in this matter. The request alleges that Excellon breached the Ontario *Securities Act*, R.S.O. 1990, c. S.5, disclosure requirements, which obligate companies to disclose the nature and substance of material changes forthwith, by not adequately disclosing the nature of the dispute at the La Platosa mine. The Canadian Labour Congress has also written a letter to Excellon's principal shareholder expressing concern about the company's alleged failure to provide information to shareholders regarding the nature of conflicts at the mine.

15 Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, "Closing Report", File #: 2011-02-MAU, online <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/2011-02-MAU_closing_report-rapport_final-eng.pdf>.

16 Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, "Interim Report", File #: 2012-03-ARG, online <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/interim_report-rapport_provisoir_01-eng.pdf>.

17 Sustainable development has been defined as "development that meets the needs of the future without compromising the ability of future generations to meet their own needs." See the 1987 "Brundtland Report" in World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987) 43.

[18] In addition to the foregoing topics, the 2012 IFC Performance Standards address issues such as stakeholder engagement as well as human rights due diligence in light of the Protect, Respect and Remedy Framework adopted by the United Nations Human Rights Commission in 2011; see U.N. Doc. A/HRC/17/31; SRSG John Ruggie, "Protect, Respect and Remedy: a Framework for Business and Human Rights" (2008) U.N. Doc. A/HRC/8/5.

[19] The Equator Principles Framework is currently applying the 2006 version of the standards, but is likely to adopt the 2012 version by the end of 2012. The 2006 version did not have an FPIC requirement.

[20] The framework began as the World Bank "Safeguard" policies and evolved in the 2006 IFC Performance Standards, which were revised again in 2012.

[21] Equator Principles, online <www.equator-principles.com>.

[22] The Equator Principles Framework is currently applying the 2006 version of the standards, but is likely to adopt the 2012 version by the end of 2012.

[23] *Ibid.*

[24] See the *Globe and Mail*, "Peru revokes licence of Canadian mining firm Bear Creek" (June 26, 2011), online <http://www.theglobeandmail.com/news/world/peru-revokes-licence-of-canadian-mining-firm-bear-creek/article584615/>; the *Globe and Mail*, "No compensation for seized Canadian mine: Bolivia" (October 3, 2012), online <http://m.theglobeandmail.com/report-on-business/international-business/latin-american-business/no-compensation-for-seized-canadian-mine-bolivia/article4586391/?service=mobile>.

[25] *Ibid.*

[26] For an example of the evidentiary value of IFC impact assessments see *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] I.C.J. Rep. 14; *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures Order of July 13, 2006, [2006] I.C.J. Rep. 113 at para. 204; see also M. Torrance, "Persuasive authority beyond the State: A theoretical analysis of transnational corporate social responsibility norms as legal reasons within positivist legal systems" (2001) 12 German Law Journal 1573.

ANTI-BRIBERY AND CORRUPTION PLANNING: AN OUNCE OF PREVENTION BEATS A POUND OF CURE

KEVIN O'CALLAGHAN AND CLAUDIA FELDKAMP

Introduction

Canadian companies increasingly face litigation risks related to international bribery and corruption ("B&C") allegations. While the effect of increasing anti-corruption legislation is most obvious during litigation and government investigations, it is at the front end—in managing exposure to bribery and corruption risks—that companies can most effectively address B&C liability. The challenge for companies operating internationally is to create an effective anti-bribery compliance program based on national enforcement legislation. For Canadian companies, the challenge is greater because the *Corruption of Foreign Public Officials Act* [*CFPOA*][1] has a scant track record and provides limited guidance on due diligence measures. This article therefore addresses the challenge of creating, implementing, and maintaining an effective compliance program with reference to the expectations of law enforcement authorities in sister jurisdictions, including the United States and the United Kingdom.

Why Companies Need a B&C Corporate Plan

Companies operating abroad increasingly face strict anti-corruption legislation in their home jurisdiction, whether in the United States under the *Foreign Corrupt Practices Act* [*FCPA*],[2] the United Kingdom under the relatively new *Bribery Act 2010* [*Bribery Act*],[3] or Canada under the often-overlooked *CFPOA*. Each of these pieces of legislation promises harsh implications for a company found guilty of corruption. The *FCPA*, in particular, enjoys broad jurisdictional reach and tough penalties. And, in the Canadian context, if the Royal

Canadian Mounted Police's promises of greater enforcement and larger penalties hold true, the *CFPOA* may soon start to show some real teeth.

While not all B&C legislation provides for a due diligence defence, a company that implements clear and comprehensive policies and compliance procedures will almost always be in a far better position to avoid B&C liability. The *Bribery Act* includes a strict liability offence of corporate failure to prevent bribery but provides a full defence against this liability if a company can prove that it had "adequate procedures" in place to prevent bribery.[4] The *FCPA* does not provide for a formal due diligence defence.[5] Nonetheless, prosecutorial discretion and sentencing can both be significantly affected where the company can show that it had in place a comprehensive compliance system with rigorous in-house enforcement.[6] The Department of Justice's ("DOJ") prosecutorial guidelines, the "Principles of Federal Prosecution of Business Organizations," include a requirement that prosecutors consider "the existence and effectiveness of the corporation's pre-existing compliance program."[7]

In Canada, neither the *CFPOA* nor the *Criminal Code*[8] (for domestic bribery) affords a due diligence defence. There is very limited case law under the *CFPOA* to determine whether there will be a similar exercise of prosecutorial discretion in Canada where a company has a robust compliance program. However, if the recent case involving Niko Resources Ltd. ("Niko")[9] is any indication, Canada will follow the lead of the United States in pursuing cases and in crafting any settlements. The Niko Probation Order was drafted in consultation with U.S. officials and the terms are consistent with recent U.S. DOJ-deferred prosecution agreements.[10] The Crown provided the Court with examples of U.S. penalties imposed under the *FCPA*, and the Court considered these in approving the fine imposed on Niko.[11]

The Elements of a Corporate B&C Plan

There is plentiful guidance on establishing effective compliance programs from both the United Kingdom and the United States, and some guidance in the Canadian context from the Niko Probation Order. In accordance with s. 9 of the *Bribery Act*, the U.K. Government has published principles-based guidelines (the "Guidance")[12] on what are "adequate procedures."[13] While the DOJ has not issued a similar publication, its expectations of effective compliance programs have been articulated in Schedule C to its Deferred Prosecution Agreements,[14] Opinion Procedure Releases,[15] and U.S. Federal Sentencing Guidelines for Organizations. The OECD has also published guidance on good practices to ensure compliance with anti-corruption laws (the "OECD Guidance").[16]

The following elements of an effective corporate plan to address B&C risks are derived from the *FCPA*—in particular, Schedule C to its deferred prosecution agreements—the Guidance, the Niko Probation Order, and the OECD Guidance.

1. *Written Anti-Bribery Policy*: The organization must have a clear and visible written corporate policy against violations of anti-bribery laws.[17]
2. "*Tone from the Top*": The organization must ensure that senior management provides strong and explicit support and commitment to its corporate policy against violations of the anti-corruption laws.[18]
3. *Policies and Procedures*: The organization must put into place compliance standards and procedures, adequate to the identified and assessed risks, to prevent and detect violations of anti-bribery laws. Policies governing gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorships, facilitation payments and solicitation, and extortion must be included.[19]
4. *Risk Assessment*: The organization must periodically assess the foreign bribery risks facing it and take appropriate steps to design, implement, or modify its compliance program to reduce the risks identified through this process. Specified factors that must be taken into account include geographical locations, interactions with gov-

ernment officials, industrial sectors of operation, and third-party agreements.[20]

5. *Monitoring, Reviewing and Updating*: The organization must monitor and review anti-corruption compliance standards and procedures on a continual basis and update and adapt them as appropriate, taking into account relevant developments in the field and evolving international and industry standards.[21]
6. *Oversight Responsibility*: The organization must assign responsibility to one or more senior corporate executives for the implementation and oversight of the organization's anti-corruption policies, standards, and procedures with clearly set-out reporting lines, including to the Board of Directors or a committee of the Board of Directors.
7. *Books and Records*: The organization must establish a system of financial and accounting procedures designed to ensure maintenance of fair and accurate books that cannot be used to conceal foreign bribery.
8. *Communication, training and certification of training*: The organization must ensure that employees, directors, agents, and business partners receive appropriate training and guidance on the organization's policies and procedures. The organization must also ensure that its bribery prevention policies are well communicated externally.[22]
9. *Due Diligence*: The organization must develop due diligence procedures proportionate to the identified risks, particularly when entering into new relationships with agents and business partners or entering into new territories. All due diligence must be carefully documented.[23]
10. *Consistent Enforcement Internally*: Through a combination of incentives and disciplinary measures, the organization's compliance program must be consistently promoted and enforced throughout the organization.
11. *Monitoring and Evaluating, and Employee Support*: The organization must take reasonable steps to (a) ensure that its compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct, and implementing a response plan to "red flags"; (b) evaluate periodically the effectiveness of the compliance program; and (c) have a system where employees (i) can report, anonymously and confidentially, suspected compliance violation and (ii) obtain urgent advice when confronting potential violations in a foreign country.

Creating an Ethos of Compliance

Even the best-designed compliance program will achieve limited success in the absence of a strong top-down and bottom-up corporate governance culture. An "ethos" of compliance is the linchpin of a successful B&C corporate plan. A company must establish a strong corporate culture of ethical business behaviour by encouraging and meaningfully supporting ethical behaviour—even if it results in the loss of a business opportunity—and providing sharp disciplinary response to unethical behaviour. A "paper program" is insufficient.

The case of Morgan Stanley is illustrative. One of Morgan Stanley's employees, Garth Peterson, former managing director of Morgan Stanley's real estate business in China, pled guilty to one count of conspiracy to circumvent internal controls. Nonetheless, the DOJ did not pursue any criminal or civil enforcement action against Morgan Stanley after its voluntary disclosure of Mr. Peterson's actions. Morgan Stanley escaped sanction by showing, to the DOJ's satisfaction, that it had an effective and well-maintained compliance program in place that its rogue employee had deliberately circumvented. In particular, Morgan Stanley had carefully documented all aspects of its compliance program including communications with employees on compliance such as employee training and certifications.[24] As the Morgan Stanley case demonstrates, the "tone from the top" must be enforced

through the corporate ladder, from chief executive officers to operations managers, effectively creating a "tone in the middle" regularly to reinforce company's B&C expectations and policies. The consistency and pervasiveness of Morgan Stanley's program evidenced an established corporate ethos of compliance, and highlighted that Mr. Peterson's actions were indeed rogue.

Crisis Management

The best compliance program is not fail-safe. The way a company responds to a crisis, such as the actions of a rogue employee, can play an important role in how regulators and prosecutors will consider the case. Morgan Stanley's rapid and comprehensive response played an important role in the ultimate result.[25] After completing an internal investigation, it voluntarily disclosed its employee's actions to the DOJ and proactively constructed a response to the DOJ and the U.S. Securities and Exchange Commission built on its internal compliance program.[26]

Conclusion

In the final analysis, front-end planning can significantly limit B&C risks by creating a corporate culture that strongly dissuades bribery and implementing a program to respond effectively to B&C incidents and allegations. When considering the potential costs in lost business, reputational damage, and litigation risk, an ounce of prevention will always be worth more than a pound of cure.

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1 S.C. 1998, c. 34.

2 (15 U.S.C. § 78dd-1, *et seq.*)

3 2010 c. 23.

4 *Ibid.* at art. 7(2).

5 There has been a renewed push to amend the *FCPA* to include a compliance defence. See Greg Andres ("DOJ") testimony at the hearing, "Examining Enforcement of the Foreign Corrupt Practices Act, Senate Subcommittee on Crime and Drugs, chaired by then-Senator Arlen Specter, November 30, 2010.

6 The DOJ has also provided significant guidance on what type of compliance programs companies should implement. Since Panalpina World Transport Ltd., Deferred Prosecution Agreements have set out the elements to an effective compliance program in an appendix (Schedule C). In addition to Panalpina, see Alcatel-Lucent S.A., 2010; and Johnson & Johnson, 2011, Pfizer H.C.P. Corporation, 2012.

7 USAM 9-28.300, 9-28.800.

8 R.S.C. 1985, c. C-46.

9 Niko, a Calgary-based oil and gas company, pled guilty to bribing a Bangladeshi minister with a luxury SUV and a trip to New York and Calgary. Niko paid a fine in the amount of $9.5 million and agreed to a three-year probation.

10 Royal Canadian Mounted Police, News Release, "Corruption Charge Laid Against NIKO Resources" (June 24, 2011), see <http://www.rcmp-grc.gc.ca/ab/news-nouvelles/2011/110624-niko-eng.htm>; Greg McArthur, "Niko Resources pleads guilty in Bangladesh bribery case," *Globe and Mail*, June 24, 2011).

11 Joint sentencing recommendation, Counsel for the Crown and Niko, June 24, 2011, as imposed by Justice Brooker of the Court of Queen's Bench, Alberta.

12 The *Bribery Act* 2010 Guidance issued by the Ministry of Justice on March 30, 2011.

13 The Director of Public Prosecutions and the Director of the Serious Fraud Office issued joint guidance for prosecutors setting out the Directors' approach to deciding whether to bring a prosecution on the *Bribery Act.* In cases where there is sufficient evidence, the prosecutor will proceed if prosecution is in the public interest. One factor that will be taken into account is whether the company has taken a "genuinely proactive approach involving self-reporting and remedial action."

[14] *Supra* note 6.

[15] Issuers and domestic concerns can obtain an opinion of the Attorney General as to whether prospective conduct will conform to the DOJ's then-current enforcement policy regarding the anti-bribery provisions of the *FCPA* (Opinion Procedure Releases). See, for example, Opinion Releases 81-01, 81-02 and 82-01 relating to policies on gifts.

[16] Good Practice Guidance on Internal Controls, Ethics, and Compliance, adopted by the OECD, February 19, 2010.

[17] Principle 1, Proportionate Procedures, Guidance. The term "procedures" as used in the Guidance covers both bribery prevention policies and the procedures that implement them.

[18] Principle 2, Top-level Commitment, Guidance.

[19] The *Bribery Act* 2010 Guidance issued by the Ministry of Justice on March 30, 2011.

[20] Principle 3, Risk Assessment, Guidance.

[21] Principle 6, Monitoring and Review, Guidance.

[22] Principle 5, Communication (including training), Guidance.

[23] Principle 4, Due Diligence, Guidance.

[24] Peterson received personal training on the *FCPA* seven times at Morgan Stanley, and received 35 reminders to complete the training.

[25] The DOJ's press release (DOJ Press Rel. 12-534) cited Morgan Stanley's voluntary disclosure and efforts to cooperate with the DOJ as supporting the DOJ's decision not to prosecute Morgan Stanley.

[26] *Ibid*.