

Navigating the Choppy Waters of Foreign Anticorruption Enforcement

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The first reported case of corporate foreign corruption dates back to the 16th century, when the British East India Company bribed Mogul rulers with "rare treasures, including paintings, carvings and costly objects made of copper, brass and stone" in consideration of a tax break on exports.¹ Historically, these practices were seen as an essential aspect of doing business abroad, or "as a kind of grease to move economic machinery along when there were bureaucratic obstacles."² Thus, foreign corruption became a well-entrenched profitable practice, which was even welcomed by shareholders of early multinationals.³

However, "a serious foreign policy problem"⁴ emerged for the United States in the wake of the Watergate scandal, when investigations by the Securities and Exchange Commission ("SEC") revealed "slush funds" that were used by US corporations to bribe foreign public officials in order to secure business.⁵ The ensuing adoption of the *US Foreign Corrupt Practices Act* ("FCPA") paved the way for US authorities to enforce a new set of business standards. Such enforcement has become more intrusive over time, as evidenced by the US\$4 billion in settlements under the *FCPA* collected from both US and foreign companies over the past five years.

By comparison, Canada's enforcement of its *Corruption of Foreign Public Officials Act*⁶ is still in its infancy. In fact, since the *CFPOA* came into force in 1998, its enforcement has led to only three corporate guilty pleas – those of Hydro Kleen Systems,⁷ Griffiths Energy International⁸ and Niko Resources⁹ – and to the conviction of one individual, Nazir Karigar.¹⁰ That being said, the tide is quickly turning, especially since the adoption of Bill S-14

in June 2013, which, among other things, expanded the foreign corruption offence to acts committed abroad by Canadian nationals and corporations, added a separate offence for certain deceptive bookkeeping practices for the purpose of bribing a foreign public official, and provided for the repeal of the facilitation payments exception. As investigations by the RCMP International Anti-Corruption Unit are mounting and high-profile cases are making their way through the courts, the expectations of former Minister of Foreign Affairs Lloyd Axworthy, one of the *CFPOA*'s sponsors, that there would "be a large catalogue of prosecutions every year"¹¹ may well come to fruition.

While the authorities are pulling out the heavy legislative artillery and cracking down on enforcement, little administrative guidance is provided on the *CFPOA*'s implementation, especially with respect to its impact on corporations. Therefore, many queries remain as to the full scope of the *CFPOA* and its implications for Canadian businesses. This article seeks to shed light on some of the *CFPOA*'s intricacies and legal puzzles that await the courts.

1. WHAT IS FOREIGN CORRUPTION?

Foreign corruption, as criminalized under the *CFPOA*, is

1. the giving, offering or agreement to give or offer
2. an advantage or benefit of any kind
3. directly or indirectly to a foreign public official

in order to obtain an advantage in the course of business, and

- a) as consideration for an act or omission by the official in connection with the performance of his or her duties; or
- b) to induce the official to use his or her position to influence the decisions of his or her state or public international organization.¹²

A closer look at the main components of the offence reveals its breadth. First, the *CFPOA* criminalizes the conduct of giving, offering or agreeing to give or offer a bribe, whether or not the bribe was actually received by the public official.¹³ In criminal law, such an offence is referred to as an inchoate offence or a conduct crime, as opposed to a result crime.¹⁴ It follows that if a person agrees to offer a benefit to a foreign public official, but later changes his or her mind, that person has nonetheless committed an offence under the *CFPOA*.

For instance, Nazir Karigar was convicted on the basis that he had agreed to bribe Air India officials and India's Minister of Civil Aviation, at the time, in order to secure a security contract. According to the court, the crime was consummated the minute Karigar agreed to bribe a foreign public official, even though Karigar's principal was not ultimately awarded the security contract and even though the Crown had failed to prove that money had actually changed hands.¹⁵

Second, the concept of an *advantage or benefit of any kind* leaves open the possibility of even relatively small benefits falling afoul of the *CFPOA*.¹⁶ The offence targets not only offshore wire payments and envelopes filled with cash. It can also encompass lavish gifts and less obvious benefits, such as payment of tuition, promises of future employment, support for business opportunities, provision of confidential information or access to an exclusive club.¹⁷ An exception is provided for benefits that are permitted or required under local laws or under a public international organization's governing laws.¹⁸ Providing travel, hospitality or entertainment to a public official can also amount to an unlawful benefit, unless the expenditures are reasonable and are directly related to a valid business purpose, such as the demonstration of products or the execution of a contract.¹⁹ However, this exception does not, for example, cover the expenditures of a public official's guest.

"Late rewards" bestowed after a foreign public official has done or omitted to do something are not expressly covered by the offence. While such payments might not have influenced the public official to take any given course of action, they could still be viewed as evidence of a prior agreement.

Third, the offence covers both direct and indirect benefits. The notion of an *indirect benefit* covers an array of scenarios by which benefits can find their way to or benefit a foreign public official through intermediaries. On the one hand, it can refer to the funnelling of the bribe through intermediaries, such as consultants and subsidiaries. For instance, in *Niko Resources*, Niko's Bangladeshi subsidiary had provided a Toyota Land Cruiser to the Bangladeshi State Minister for Energy and Mineral Resources in order to influence the Minister in his dealings with Niko Bangladesh. In its guilty plea, Niko Canada acknowledged

having funded Niko Bangladesh's acquisition of the car, knowing that the company would deliver it to the foreign public official.²⁰

On the other hand, an *indirect benefit* can also refer to providing a benefit to a third party who is affiliated with a foreign public official, including a child, a relative, a political party or a business. Prosecutors could take the position that an offence has been committed if the benefit given or offered to the affiliated third party ultimately benefits the foreign public official. For instance, Schering-Plough Corporation, a US-based pharmaceutical company, made a US\$76,000-donation to a *bona fide* charity founded by the director of a Polish regional government health authority. The SEC found, pursuant to the *FCPA*, that the payment was made to induce the director to purchase Schering-Plough's pharmaceutical products within the regional health authority.²¹ Accordingly, the SEC viewed Schering-Plough as having given something of value – perhaps "enhanced self-worth or prestige"²² – to a foreign public official. Schering-Plough paid a civil penalty of US\$500,000 and undertook to retain an independent consultant to review its anticorruption policies.

An additional issue, sometimes coined the "princeling problem," refers to the practice of hiring or doing business with public officials' children or relatives. In the United States, authorities have taken the position that such practice could constitute an offence if the official's duties relate to the hiring company's interests and something of value passes through the relative to the official.²³ Corporations should be cautious about hiring the children of foreign public officials, unless there is a *bona fide* business reason that is unrelated to the child's lineage.

2. WHO IS A FOREIGN PUBLIC OFFICIAL?

The notion of a *foreign public official* could very well be the most elusive notion of foreign anticorruption laws. Some aspects of the *CFPOA*'s definition of *foreign public official* are clear: a foreign public official is a person who holds a legislative, administrative or judicial position for a foreign state, or is an official or an agent of a public international organization.²⁴ However, the definition also includes the potentially more elastic notion of

a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function.

The performance of public duties or functions may vary from country to country. Consider, for instance, (i) a political party official in a single-party state such as China, (ii) a healthcare professional employed by a private organization, or (iii) a representative of a non-state actor exercising *de facto* control over a territory. The party official may qualify as a foreign public official, depending on his or her function within the party. The same could be said of the healthcare professional who, despite being employed by a private entity, performs "public" functions. As for the non-state actor's representative, the definition of foreign

public official could be sufficiently broad to include officials of *de facto* authorities who are, in the absence of a *de jure* government, providing essential services to the population on the ground. It follows then that one's qualification as a *foreign public official* likely depends on whether he or she performs public functions, which leads to the question: What are public functions?

The recent decision of the US Court of Appeals for the Eleventh Circuit in the *Esquenazi*²⁵ case offers some helpful guidance on this matter. In this case, the accused were in the business of purchasing phone time from foreign vendors and reselling the minutes to customers in the United States. One of the accused's main providers was Telecommunications d'Haiti ("Haiti Teleco"), a Haitian-based entity controlled by the Haitian government. In consideration of debt relief measures, the accused agreed to pay kickbacks to a Haiti Teleco director. Ultimately, the business paid US\$822,000 in kickbacks and the accused's debt was reduced by over US\$2 million. The issue before the Court of Appeals focused on whether Haiti Teleco was "doing the business of the government,"²⁶ in which case its director would qualify as a foreign public official under the *FCPA*. In finding that Haiti Teleco was indeed performing public functions, the Court stressed that the concept of governmental function "changes over time and varies from nation to nation," and gave a broad interpretation to the notion of foreign public official. The Court also considered the following indicia:

- The entity had a state-sanctioned monopoly over the function it carried out;
- The government subsidized the costs associated with the entity providing services;
- The entity provided services to the public at large in the foreign country; and
- The public and the government of that foreign country generally perceived the entity to be performing a governmental function.

The *Esquenazi* indicia may also find application under the *CFPOA* to determine whether an entity is performing public functions for a foreign state. Moreover, it seems that the *CFPOA*, unlike the *FCPA*, does not require an entity to be controlled by a foreign state to be performing public functions. Canadian authorities may therefore argue that the notion includes representatives of privatized entities or subcontractors performing services under government direction or influence. Accordingly, Canadian businesses should be cautious before awarding any benefit to the officials or employees of entities that, despite their apparent private character, are in fact providing services that are traditionally provided by states.

3. CAN FOREIGN SUBSIDIARIES EXPOSE THEIR PARENTS TO LIABILITY?

Understanding the mechanics of corporate criminal liability for intentional offences, such as those under the *CFPOA*, will help us understand how subsidiaries can, by bribing a foreign public official, engage a parent corporation's criminal liability.

Pursuant to section 22.2 of the *Criminal Code*, a corporation can be a party to the offence if, with the intent, at least in part, of benefiting the organization, one of its "senior officers"

1. acting within the scope of his or her authority, is a party to the offence;
2. having the mental state required to be a party to the offence and acting within the scope of his or her 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
3. knowing that a representative of the organization is or is about to be a party to the offence, fails to take all reasonable measures to stop the representative from being a party to the offence.

Accordingly, a corporation could become criminally liable through the combination of guilty acts and guilty minds of either its senior officers²⁷ or representatives such as agents, contractors, employees or partners. Although a subsidiary is not *per se* a representative of its parent corporation, it can qualify as a representative if it acts as the parent's agent or contractor. It follows that a parent corporation could be liable for an offence committed by a subsidiary if a parent's senior officer, for instance, fails to take all reasonable measures to stop the subsidiary from committing a *CFPOA* offence when the senior officer knew or ought²⁸ to have known that the subsidiary is or was about to commit it.

4. CAN AN ACQUIRED ENTITY'S FOREIGN BRIBES EXPOSE THE PURCHASER TO LIABILITY?

Corporations that merge with or acquire the shares of entities that have violated anticorruption laws may be considered to have "bought" the target's criminal liability. For example, in 2010, General Electric paid a US\$1-million fine and US\$22.5 million in disgorgement to settle *FCPA*-based accusations for the alleged involvement of four subsidiaries in a US\$3.6-million kickback scheme with Iraqi governmental agencies in order to secure contracts in the context of the UN Oil-for-Food Program. Significantly, the accusations included offences committed by two companies prior to their acquisition by General Electric.²⁹

Successor liability concerns can affect the transaction price and, in certain circumstances, effectively derail entire transactions, as illustrated by the failed merger between Lockheed and Titan in 2004. Improper payments by Titan in several foreign jurisdictions had come to light through Lockheed's due diligence. Titan disclosed the payments to the authorities upon Lockheed's request. Ultimately, the merger fell through because of the corruption issue and Titan settled enforcement actions by pleading guilty to *FCPA* charges and paying a US\$28-million fine.³⁰

Some authorities may consider a disclosure mechanism, drawing on Halliburton's initiative in the context of its 2008 acquisition of UK-based Expro International Group. As a result of UK legal restrictions in the bidding process for public UK companies, Halliburton had

insufficient time and inadequate access to information to complete appropriate *FCPA* and anticorruption due diligence pre-closing. In an attempt to limit its potential exposure to successor liability, Halliburton requested an opinion from the US Department of Justice (“DOJ”) regarding potential *FCPA* enforcement action against it for both pre-acquisition and post-acquisition unlawful conduct and, at the same time, undertook to implement a comprehensive anticorruption due diligence and disclosure plan. In response, the DOJ confirmed that it would forgo any enforcement action with respect to pre- or post-acquisition improper conduct disclosed during a 180-day period following the closing.³¹

It remains to be seen whether Canadian authorities would forgo enforcement actions based on the Halliburton initiative. In our view, a voluntary disclosure mechanism is necessary to satisfy the imperatives of combating foreign corruption without unduly putting a chill on investments. Nevertheless, the risks of successor liability highlight the importance of conducting thorough pre-closing anticorruption due diligence and of including specific warranties and indemnifications in the purchase agreement.

5. HOW TO DEAL WITH FACILITATION PAYMENTS

Certain “facilitation payments” made with the intent to induce a public official to perform or expedite the performance of a routine act that is part of the foreign public official’s duties or functions are currently exempt from the *CFPOA* bribing offence. Such routine duties, which are usually non-discretionary, include the issue of permits, mail delivery, power and water supply, police protection or the loading and unloading of cargo.³²

However, legislation to repeal the facilitation payment exception has been passed by Parliament and will take effect if and when it is proclaimed in force, which could happen without advance notice.³³ The suspension of the repeal gives Canadian businesses time to adjust their foreign activities accordingly.

In any event, as the *CFPOA* indicates that the facilitation payment exception applies only with respect to the foreign corruption offence,³⁴ and not to the books and records offence, facilitation payments must be entered as such in the company’s books and records. Furthermore, facilitation payments, regardless of their current legal status in Canada, are not exempt from other anticorruption legislation in some other jurisdictions, such as the *UK Bribery Act 2010* or the *Brazilian Clean Companies Act*. Accordingly, it may be prudent for Canadian businesses to subscribe to the highest international standards and not rely on the *CFPOA* exemption for facilitation payments, especially in anticipation of the possible repeal of the exception.

6. WHAT CONSEQUENCES ARISE FROM A *CFPOA* CONVICTION OR INVESTIGATION?

We explore below four of the most important potential consequences of a *CFPOA* offence: (A) jail and fines, (B) debarment from public contracts, (C) loss of investment protection under international treaties, and (D) shareholder derivative actions for failure to fully investigate potential corruption offences.

A. Jail and Fines

Contrary to the *FCPA*, which provides for both civil penalties and criminal sanctions, the *CFPOA*’s sanctions are purely criminal. Organizations and individuals found guilty of a *CFPOA* offence face fines at the discretion of the court. Individuals also face a prison term of up to 14 years. In determining the sentence, a judge will consider a number of factors, including the following:

- the sophistication of the bribery scheme;
- the value of the bribe;
- the economic viability of the organization;
- the profits made as a result of corrupt practices;
- whether the organization has dismissed the executives and employees responsible for the offence; and
- whether the organization has effectively instituted a robust anticorruption program to avoid re-offending.

Aggravating factors include the involvement of senior public officials, circumstances of dishonesty (e.g., bid rigging and receiving insider information), a sense of entitlement with respect to the business advantage obtained or anticipated, as well as the extent of the accused’s involvement in conceiving and orchestrating the bribe. Where applicable, courts also consider the accused’s cooperation, the timely conduct of an internal investigation, the accused’s reputation and prior criminal history, together with the failure of the bribery scheme, as mitigating factors.

Precedents of *CFPOA* sentencing are scarce. In *Karigar*, the court imposed a three-year prison sentence despite the accused’s cooperation. The two most significant corporate fines were levied against Niko Resources and Griffiths Energy International, which had both pleaded guilty, and were fined C\$9.5 million and C\$10.35 million, respectively. Niko Resources was also subject to an order requiring ongoing probations and audits. However, the offences at issue in *Karigar*, *Griffiths* and *Niko Resources* took place at a time when the maximum term of imprisonment was only five years. Under the current *CFPOA*, the Crown may be expected to seek harsher sentences.

B. Debarment from Public Contracts

A criminal conviction may also lead to debarment from public contracts and to the revocation of existing ones. The most comprehensive public debarment mechanisms in Canada are found in the Integrity Framework of Public Works and Government Services Canada³⁶ (the federal government’s main provider of goods and services) and in Québec’s *Integrity in Public Contracts Act*.³⁷ Both provide for the debarment of persons found guilty of foreign corruption and certain other offences, whether by a Canadian or a foreign court.³⁸ Organizations can also be debarred if their directors or officers have been found guilty of foreign corruption offences.³⁹

International organizations such as the World Bank, the European Investment Bank, the African Development Bank, the European Bank for Reconstruction and Development and the United Nations also have similar debarment policies.

C. Loss of Investment Protection under International Treaties

Investments made abroad through corrupt means can be deprived of the protections afforded by bilateral investment treaties. In *World Duty Free Co. Ltd. v. Republic of Kenya*,⁴⁰ one of the world's leading travel retailers filed before an International Centre for Settlement of Investment Disputes ("ICSID") tribunal an investor-state claim against Kenya. The claim alleged that the company's investment (the construction, maintenance and operation of duty-free complexes at the Nairobi and Mombasa International Airports) had been unlawfully expropriated by the state. However, evidence led in the proceedings indicated that the investor had paid a bribe of US\$2 million to the then-president of Kenya to secure the contract. The tribunal found that the contract could not be enforced because it had been secured through bribery, which contravened international public policy.

Similarly, in 2007, Siemens won an award of US\$200 million against Argentina for the unlawful expropriation of Siemens' investment in the design and construction of an information technology system commissioned by the Argentinian government. However, before Siemens could have the award enforced, it was investigated for corruption offences by Argentinian, US and German agencies. The information filed by the DOJ alleged, among other things, that Siemens' Argentinian subsidiary had participated in a conspiracy to pay US\$30 million in "consulting payments" to secure public contracts from the Argentinian government, including the same IT contract that was the subject of the ICSID expropriation claim. As a result, Argentina sought a revision of the earlier award on the grounds that the investment was procured by fraud and therefore was not protected by the investment treaty. In consideration of Argentina abandoning the revision proceeding, Siemens agreed not to request enforcement of its US\$200-million award. In addition, Siemens paid US\$800 million to the US and German authorities to settle the corruption allegations.

D. Shareholder Derivative Actions

Failure to properly investigate indications of CFPOA offences can also attract shareholder lawsuits based on the breach of a fiduciary obligation to pursue an investigation into bribery allegations. A recent decision of the Delaware Supreme Court⁴¹ offers an example of the damages this can entail. In 2012, a newspaper article reported that Wal-Mart's Mexican subsidiary had allegedly made improper payments to Mexican officials in exchange for zoning changes and the favourable processing of permits and licences for new stores. Efforts by the general counsel to conduct an internal investigation had been, according to the article, hampered by the company's executives, who purportedly reassigned the investigation to one of its early targets and who found no evidence of improper payments.

In the days following the publication of the article, the multinational's stock price fell 8.2 per cent and several

shareholder derivative suits sprouted across the United States. A group of shareholders asked if they could inspect broad categories of documents relating to the bribery allegations. One purpose of the demand was to investigate the possibility that the company breached its fiduciary duty by failing to properly investigate the allegations. The company's refusal to disclose documents protected by the asserted solicitor-client privilege was contested all the way up to the Delaware Supreme Court. In forcing the company to hand over the documents, the Court ultimately found that solicitor-client privilege did not cover files and documents essential to proving a breach of fiduciary duties.

This decision is a reminder that when C-suite executives see red flags, they should ensure that evidence of potential corruption offences is fully investigated and that the investigation efforts are properly recorded.

CONCLUSION

Foreign bribery is no longer a legitimate cost of doing business but rather a crime with potentially severe consequences for the corporations that engage in it, as well as for their employees, regardless of their position within the corporate hierarchy. In order to mitigate the serious ramifications of foreign anticorruption enforcement, corporations should implement and enforce comprehensive internal policies.

Such policies should emphasize the corporation's zero-tolerance stance against making improper payments to foreign officials, and offer effective whistleblower protection. Moreover, staff training should be regularly provided to ensure the program's effectiveness. At the same time, corporations must remain vigilant in their internal verification efforts: high-risk practices should be identified and controlled, while organizational red flags should be immediately investigated and dealt with, whether they are uncovered during the normal course of business or pursuant to a proposed transaction. Most crucially, these policies and verification mechanisms should be routinely audited. This would help to ensure the policies' continued implementation, effectiveness and improvement, as well as serve to highlight the seriousness of the corporation's efforts to minimize the risks that corrupt practices pose for the organization. ■

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1. Milton S. Gwirtzman, "Is Bribery Defensible?" *New York Times Magazine* (5 October 1975) 19.
2. Statement of Wesley Cragg, President of Transparency International Canada, in the Debates of the Senate (Hansard), 1st Session of the 36th Parliament, vol. 137, issue 100 (December 3, 1998) at 1650 ("CFPOA Debates").
3. Gwirtzman, *supra* note 1.
4. Senator Frank Church's opening remarks to the Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations, 94th Cong. 1 (1975) at 2.
5. For a detailed study of the legislative history of US foreign anticorruption legislation, see Mike Koehler, "The Story of the Foreign Corrupt Practices Act" (2012) 73:5 *Ohio State L.J.* 929.
6. SC 1998, c 34 ("CFPOA").
7. *R v Watts*, [2005] AJ No 568 (ABQB) (Quicklaw).

8. *R. v Griffiths Energy International*, [2013] AJ No 412 (ABQB) (Quicklaw) (“*Griffiths*”).
9. *R. v Niko Resources Ltd.*, 2011 CarswellAlta 2521 (ABQB) (Westlaw) (“*Niko*”).
10. *R. v Karigar*, 2013 ONSC 5199 (“*Karigar*”).
11. *CFPOA Debates*, *supra* note 2 at 1630.
12. *CFPOA*, s 3.
13. *Karigar*, *supra* note 10, ¶¶28-29.
14. *R. v Greenwood*, [1991] OJ No 1616, ¶31 (ONCA) (Quicklaw).
15. *Kargiar*, *supra* note 10, ¶¶29 & 33. Another good illustration of the offence’s inchoate nature is *Griffiths*, *supra* note 8, in which an initial agreement to bribe the Chadian Ambassador to Canada was terminated on the advice of the company’s counsel and replaced by an agreement to pay the same bribe to the Ambassador’s wife. Only the latter payment was completed. In the agreed statement of facts, however, criminal liability was acknowledged with respect to both agreements.
16. However, it may prove difficult to characterize a trivial benefit as being given as consideration for an act or omission.
17. Mark Pieth, Lucinda A Low & Nicola Bonucci, eds., *The OECD Convention on Bribery: A Commentary*, 2nd ed. (New York: Cambridge University Press, 2014) at 128.
18. *CFPOA*, para. 3(3)(a).
19. *CFPOA*, para. 3(3)(b).
20. *Niko*, *supra* note 9, Agreed Statement of Facts, ¶4.
21. US SEC, admin proceeding file no 3-11517 (June 9, 2004), online: <www.sec.gov/litigation/admin/34-49838.htm>.
22. Mike Koehler, “A Double Standard? Part III” (September 30, 2010), online: <www.fcpaprofessor.com/category/schering-plough>.
23. US DOJ, FCPA Opinion Releases, No 82-01, 82-04 & 95-03, online: <www.justice.gov/criminal/fraud/fcpa/>. See also *CFPOA Debates*, *supra* note 2 at 1540, in which former Minister of Foreign Affairs Axworthy mentions that the award of a benefit to the relative of a foreign public official could amount to an offence if “the public official gained some benefit along the way through this activity.”
24. *CFPOA*, s 2 “foreign public official.”
25. *United States v Joel Esquenazi and Carlos Rodriguez*, No 11-15331, online: (11th Cir. May 16, 2014), cert. denied.
26. *Ibid* at 13.
27. A senior officer is defined under section 2 of the *Criminal Code* as a representative of an organization – that is “a director, partner, employee, member, agent or contractor”:
 - who plays an important role in the establishment of an organization’s policies; or
 - who is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer.
28. Willful blindness of the senior officer in respect of the acts of the subsidiary can be a substitute for actual knowledge: *R v Briscoe*, [2010] 1 SCR 411, ¶21.
29. US SEC, “SEC Charges General Electric and Two Subsidiaries with FCPA Violations” (July 27, 2010), online: <www.sec.gov/news/press/2010/2010-133.htm>.
30. US SEC, *Securities and Exchange Commission v The Titan Corporation*, Litigation Release No 19107 (March 1, 2005), online: <www.sec.gov/litigation/litreleases/lr19107.htm>.
31. US DOJ, FCPA Opinion Releases, No 08-02, online: <www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf>.
32. *CFPOA*, subs 3(4).
33. *Fighting Foreign Corruption Act*, SC 2013, c 26, s 5 (“Bill S-14”).
34. *CFPOA*, subs 3(4). See also OECD’s Working Group on Bribery in International Business Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (26 November 2009), online: <www.oecd.org/daf/anti-bribery/44176910.pdf>, para. VI(ii).
35. *Niko*, *supra* note 9, Agreed Statement of Facts, ¶64.
36. PWGSC, *Integrity Framework*, online : Government of Canada <www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html> (« *Integrity Framework* »).
37. SQ 2012, c 25.
38. *Integrity Framework*, *supra* note 36; *An Act Respecting Contracting by Public Bodies*, CQLR c C-65.1, subs. 21.26(1) & (4) (“ACPB”).
39. See, e.g., subs 1(3) of Standard Instructions - Goods or Services - Competitive Requirements, online: Government of -clauses-and-conditions-manual/1/2003/18>; ACPB, subs. 21.26(3).
40. ICSID Case No ARB/00/7, Award (Oct. 4, 2006), online: <italaw.com/documents/WDFv.KenyaAward.pdf>. See also *Metal-Tech Ltd v The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (Oct. 4, 2013), online: <italaw.com/sites/default/files/case-documents/italaw3012.pdf>, ¶¶279, 372-373.
41. *Wal-Mart Stores, Inc v Indiana Electrical Workers Pension Trust Fund IBEW*, Del Supr, No 614, 2013 (July 23, 2014). For the latest developments in this case, see *In Re Wal-Mart Stores, Inc. Shareholder Derivative Litigation*, WD Ark, No 4:12-cv-4041, 2015 (March 31, 2015) (appeal expected), dismissing eight Wal-Mart shareholder FCPA-related derivative claims. The court found that the claims did not sufficiently plead that a majority of the board knew about or consciously ignored the alleged wrongful conduct at the relevant time. Interestingly, the court refused to attribute to the directors a constructive notice of the alleged misconducts and other red flags.