

GLOBAL ANTI-CORRUPTION COMPLIANCE: THE ROLE OF CULTURAL COMPARISONS

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Thank you for inviting me to speak about Global Anti-Corruption Compliance. Justice Todd Archibald and I have been working tirelessly over the last decade in the area of corporate compliance and it is nice to see that there is a new wave of compliance in the United States and Canada. The United States has enforced its Foreign Corrupt Practices Act (“FCPA”) on a global scale and Canada is committed to rigorous enforcement of its Corruption of Foreign Public Officials Act (“CFPOA”). Canada has joined the international set of enforcement actions with the cases of *Niko Resources Ltd.*,¹ *Griffiths Energy International Inc.*,² and the recent *Karigar* case, which I will talk about tonight. My wife says that I tend to “rant” about compliance and she is here tonight to suffer through another lecture.

I strongly believe in the role of cross-cultural comparisons in the field of compliance. The Thomas M. Cooley Law School is to be congratulated for its initiative in coming to Canada and allowing us to share our perspective. There is academic commentary that law schools ought to take a multi-jurisdictional approach to global anti-corruption regimes.³ Justice Archibald and I are proud of our textbook used in the course, as we apply principles of risk management that are global in nature.

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1. *R. v. Niko Res. Ltd.*, 2011 CarswellAlta 2521 (Can. Alta. Q.B.) (WL).

2. *R. v. Griffiths Energy Int'l*, [2013] A.J. No. 412 (Can. Alta. Q.B.) (QL).

3. See Alison von Rosenvinge, *Global Anti-Corruption Regimes: Why Law Schools May Want to Take a Multi-Jurisdiction Approach*, 10 German L.J. 785 (2009).

To illustrate the role of culture, I want to tell a story about scotch. Not just any scotch, but 30-year-old Macallan scotch. I had a client who wanted to serve this scotch at a celebration of the completion of the first phase of a project in Vietnam. The client called me and asked if it would be appropriate to serve 30-year-old Macallan at the celebration where there would be government officials present. They also wanted to give away Apple iPods with some promotional material on them about the second phase of the project. My first “gut reaction” was that serving the scotch would be fine as the government officials were not taking the bottles with them and what they consumed would be through their systems in eight hours. The iPods concerned me as they were gifts that might be used to seek an advantage.

Before I gave advice to our client, I decided to consult my friend Paul McNulty, former U.S. Deputy Attorney General and author of a milestone statement on federal prosecution of business organizations—the “McNulty Memorandum”⁴—considered a valuable element in determining how a corporation should respond to allegations of criminal wrongdoing.

Paul returned my call right away, and his response was the complete opposite of my initial “gut reaction” which demonstrated that the United States has a lot more experience in dealing with this topic than Canada has to date. Paul said that he was not concerned about the iPods as there is an exemption for reasonable promotional expenses (which we have in our legislation as well.)⁵ Paul then said, “I don’t like the idea of the scotch. I think that 30-year-old Macallan might be quite expensive and it will not pass the *New York Times* test.” Well, it turned out that Paul was right. One shot of Macallan 30-year-old Fine Oak costs approximately \$53.87. A bottle costs £940.50 English pounds. If it was reported in the *New York Times* that foreign government officials in Vietnam had been served scotch that was worth about \$1500 a bottle, this might be interpreted as a

4. Memorandum from Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Att’ys (Dec. 12, 2006), available at http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

5. Corruption of Foreign Public Officials Act, S.C. 1998, c.34, s.3(3) (Can.) (“No person is guilty of an offence under subsection (1) if the loan, reward, advantage or benefit . . . was made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to . . . the promotion, demonstration or explanation of the person’s products and services . . .”).

gift that was made in order to obtain or retain an advantage in the course of business, even if this was not the case. Hence it failed the “*New York Times* test” and we advised the client not to serve the scotch. This does not, however, preclude me from personally indulging in a scotch once in a while.

CENTERPIECE OF THE CFPOA

The “centerpiece”⁶ of the CFPOA is the offence of bribing a foreign public official, contained in section 3(1) of the Act as follows:

3(1) Bribing a foreign public official

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

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

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

3(2) Punishment

Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

6. DEP’T OF JUSTICE OF CAN., THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT: A GUIDE 3 (1999) [hereinafter CFPOA GUIDE].

The potential scope of the concept of “agree” is illustrated by the first litigated case under the CFPOA, which is the case of *R. v. Karigar*.⁷

KARIGAR AND CONSPIRACIES

A conviction was entered in *Karigar*, decided on August 15, 2013. The *Karigar* case is important on a number of levels. Most importantly, the case demonstrates that the word “agrees” in section 3 of the Act imports the concept of conspiracy. Moreover, where there is a conspiracy, the prosecution need not prove the identity of the recipient of a proposed bribe as this could put foreign nationals at risk. The conspiracy to bribe had as its purpose the winning of a tender for a multi-million dollar contract to sell facial-recognition software to Air India, a state enterprise. Facial-recognition software may play an important role in preventing the boarding of planes by unauthorized persons. In light of recent and tragic events regarding the missing Malaysian plane, the importance of facial-recognition software is clear.

The *Karigar* case could be the subject of a Hollywood movie. The following e-mail was sent by Karigar under the pseudonym “Buddy” to the Fraud Section of the U.S. Department of Justice (FCPA):

There was a tender put out by Air India (Government of India enterprise) for a biometric security system, Cryptometrics bid on the system.

1. Cryptometrics Paid USD 200,000 to make sure that only two (2) companies were technically qualified.
2. They paid \$250,000 for the minister to ‘bless’ the system. There are documents executed to return the funds if the contract is not awarded. There are recordings asking for the money back.

7. *R. v. Karigar*, 2013 ONSC 5199 (Can.). Superior Court Justice Hackland commented that this was the first prosecution under the CFPOA that had proceeded to trial. *Id.* ¶ 27.

3. The People involved are mr. [sic] Robert Barra, US citizen, CEO of Cryptometrics and Dario Berini, COO of Cryptometrics, also US Citizen.
4. I am a Canadian Citizen on contract with the Canadian subsidiary of Cryptometrics.
5. What about my immunity?⁸

It is not necessary to establish a violation of section 3 of the CFPOA that a bribe be actually paid to a foreign official with the power to offer a business advantage, if the party believes that a bribe is being paid to such an official. The court found that Karigar believed that bribes needed to be paid as a cost of doing business in India and he agreed with others to pay such bribes. He believed bribes were in fact paid and he said as much to the Deputy Trade Commissioner in Mumbai and to U.S. authorities and to the Royal Canadian Mounted Police.

“Agrees” to Give or Offer

As noted above, there was no evidence as to whether funds were offered or paid to anyone who qualified as a foreign public official under the Act. Justice Hackland found that this gap did not prevent a conviction under the conspiracy doctrine:

In any event, I am satisfied that a conspiracy or agreement to bribe foreign public officials is a violation of the *Act*. The *actus reus* of this offence is the agreement to pursue an unlawful object. The *CFPOA* specifies that an agreement is an element of the offence itself. Section 3 (1) of the *Act* criminalizes the act of one who “. . . directly or indirectly gives, offers or agrees to give or offer . . . an advantage or benefit of any kind”. In my view, the use of the term “agrees” imports the concept of conspiracy into the *Act*. In doing so, it meets Canada’s obligations under the *Convention* to criminalize conspiracies to give or offer bribes to foreign public officials.

I also reject the accused’s submission on a policy basis. In my opinion if the word “agrees” in the

8. *Id.* ¶ 15.

Act is restricted to the act of essentially two parties, “one to pay the bribe and one to receive the bribe”, the scope of the *Act* would be unduly restricted and its objectives defeated. Moreover, to require proof of the offer of or receipt of a bribe and the identity of a particular recipient would require evidence from a foreign jurisdiction, possibly putting foreign nationals at risk and would make the legislation difficult if not impossible to enforce and possibly offend international comity.

The evidence in this case satisfies me beyond a reasonable doubt that all of the contemplated recipients of bribes, as identified in the spreadsheets and in the electronic communications between the accused and his co-conspirators, were employees of Air India or the Minister of Civil Aviation himself and as such were foreign public officials within the meaning of the *CFPOA*.⁹

Level of Intent Required

With respect to the *mens rea* of the offence set out in section 3 of the *CFPOA*, the Department of Justice Guide to the *CFPOA* states:

No particular mental element (*mens rea*) is expressly set out in the offence since it is intended that the offence will be interpreted in accordance with common law principles of criminal culpability. The courts will be expected to read in the *mens rea* of intention and knowledge.¹⁰

The concept of *mens rea* includes the doctrine of willful blindness, which has been recently reviewed by the Supreme Court of Canada in the *Briscoe*¹¹ decision. Justice Charron for the Court observed, “The doctrine of willful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries.”¹²

9. *Id.* ¶¶ 28–30.

10. *CFPOA GUIDE*, *supra* note 6, at 3.

11. *R. v. Briscoe*, 2010 SCC 13 (Can.).

12. *Id.* ¶ 21.

The concept of willful blindness has a U.S. parallel in the doctrine of conscious avoidance.¹³ This concept has been developed in the anti-corruption area, most recently in the colorful case of *United States v. Kozeny*¹⁴ case involving the “Pirate of Prague.”¹⁵

Despite the parallels to a Hollywood script, the Canadian media gave the *Karigar* case very little attention. Hollywood North does not exist when it comes to press coverage of corruption. I have a theory as to why this is, which has no scientific basis and is purely speculation. I think that Canadians believe in the stereotype that we are polite and law abiding, and corruption is an anomaly which does not deserve to be covered. Perhaps this perception may change over time, or if Jimmy Kimmel turns his attention to the CFPOA.

KARIGAR AND SENTENCING

Karigar was sentenced on May 23, 2014, to a penitentiary term of three years for conspiring to bribe several Indian government officials.¹⁶ Superior Court Justice Hackland ruled that Karigar “had a leading role in a conspiracy to bribe Air India officials in what was undoubtedly a sophisticated scheme to win a tender for a Canadian based company.”¹⁷ The Court issued the following warning: “Any person who proposes to enter into a sophisticated scheme to bribe

13. ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS* 5 (2d ed. 2012).

14. 664 F. Supp. 2d 639 (S.D.N.Y. 2009).

15. The defendant, Viktor Kozeny, was commonly referred to in the media as the “Pirate of Prague.” See, e.g., David Glovin, *Pirate of Prague Invokes Napoleon, Mandela as He Denies Fraud*, BLOOMBERG (Oct. 1, 2008), <http://www.bloomberg.com/apps/news?sid=aYo5XHTxYDT0&pid=newsarchive>. Tapes of phone conversations in this case are illustrative of the type of discussions that constitute conscious avoidance or deliberate ignorance. The following passage is a transcript of Kozeny’s co-defendant’s words:

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

Kozeny, 664 F. Supp. 2d at 387.

16. *R. v. Karigar*, 2014 ONSC 3093 (Can.).

17. *Id.* ¶ 36.

foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary.”¹⁸

In his reasons for sentence Justice Hackland stated, “The idea that bribery is simply a cost of doing business in many countries, and should be treated as such by Canadian firms competing for business in those countries, must be disavowed. The need for sentences reflecting principles of general deterrence is clear.”¹⁹

Aggravating Factors

Justice Hackland identified a number of aggravating factors including the following:

(a) This was a sophisticated and carefully planned bribery scheme intended to involve senior public officials at Air India and an Indian Cabinet Minister. If successful, it would have involved the payment of millions of dollars in bribes and stock benefits, over time. . . .

(b) . . . [Karigar’s] participation in the bidding process involved other circumstances of dishonesty such as the entry of a fake competitive bid to create the illusion of a competitive bidding process and the receipt and use of confidential insider information in the bid preparation.

(c) . . . [Karigar] candidly relat[ed] to a Canadian trade commissioner that bribes had been paid and then urged the Canadian Government’s assistance in closing the transaction.

(d) Mr. Karigar personally conceived of and orchestrated the bribery proposal including providing the identity of the officials to be bribed and the amounts proposed to be paid as reflected in financial spreadsheets he helped to prepare.²⁰

18. *Id.*

19. *Id.* ¶ 8.

20. *Id.* ¶ 11.

Mitigating Factors

The following mitigating factors were identified by Justice Hackland:

(a) There was a high level of co-operation on [Karigar's] part concerning the conduct of the prosecution. Indeed he exposed the bribery scheme to authorities following a falling out with his co-conspirators. He unsuccessfully sought an immunity agreement. A great deal of trial time was avoided as a result of [Karigar's] extensive admissions

(b) Mr. Karigar appears to have been a respectable businessman all of his working life, prior to his involvement in this matter. He had no prior criminal involvements. He is also in his late 60's and not in the best of health.

(c) Of considerable importance was the fact that the entire bribery scheme was a complete failure.²¹

RISK ASSESSMENT

Risk assessment is highly relevant to compliance.

1. Proper risk management will reduce the risk of non-compliance;
2. A robust risk assessment matrix will make it more difficult to prove that an organization has been willfully blind to the payment of bribes; and
3. The parties' provision of the Criminal Code expands the concepts of corporate liability to require that senior officers take all reasonable steps to prevent corruption that they become aware of. In the context of large payments being made from an organization's financial resources, the requirement to take all reasonable steps makes risk assessment essential.

21. *Id.* ¶ 12.

METHODOLOGY: A RISK MATRIX

Justice Archibald and I have developed a risk matrix analysis in our textbook, which we derived from the engineering field and applied to legal concepts. Risk assessment requires a balancing of two fundamental concepts: “precautions taken to avoid the event” versus “systems to measure potential gravity of impact.” The two categories can be used to generate a matrix that directs priorities in the taking of preventative steps.

The risk management matrix has been accepted within engineering and environmental fields for some time now.²² Matrix analysis is also used by the federal government. For example, the Treasury Board of Canada has developed a sophisticated corporate risk profile that color codes a risk matrix and sets out plans of action based on the level of risk.²³ Our risk matrix methodology has been cited in the International Chamber of Commerce Antitrust Toolkit.²⁴

My wife makes fun of my enthusiasm for the matrix. She claims that when we plan a holiday, that I weight the precautions to avoid problems on the trip against the potential to have fun. She may be right.

APPLICATION OF MATRIX ANALYSIS TO ANTI-CORRUPTION

Foreign Corrupt Practices: Calculation of the Probability of Non-Compliance

The frequency of risk of corrupt practices can be analyzed under the conglomerate heading of “Precautions Taken to Avoid the Event.” The following ten factors are subsumed under this heading:

- Preventative systems;
- Foreseeability of the effect;
- Alternative solutions and scenarios;

22. See RISK ASSESSMENT AND MANAGEMENT HANDBOOK FOR ENVIRONMENTAL, HEALTH, AND SAFETY PROFESSIONALS *passim* (Rao V. Kolluru et. al. eds., 1996).

23. *Guide to Corporate Risk Profiles*, TREASURY BOARD OF CAN. SECRETARIAT (July 11, 2011), <http://www.tbs-sct.gc.ca/tbs-sct/rm-gr/guides/gcrp-gepro02-eng.asp>.

24. INT’L CHAMBER OF COMMERCE, THE ICC ANTITRUST COMPLIANCE TOOLKIT 23 n.21 (2013), available at <http://www.iccwbo.org/Data/Policies/2013/ICC-Antitrust-Compliance-Toolkit-ENGLISH/>.

- Past compliance;
- Past efforts to address the problem;
- Over what period of time, and promptness of response;
- Skill level of the accused;
- Matters beyond control including technological limitations;
- Complexities; and
- Industry standards.

Each heading may result in a probability percentage, which when combined with the other headings gives a rough estimation of the aggregate probability of risk of corrupt behavior.

Calculation of the Potential Gravity of Harm

The following three factors are relevant to the gravity of the impact or harm:

- Gravity of adverse effect;
- Character of the neighborhood; and
- Economic considerations.

In calculating the potential gravity of harm, an entity must evaluate both the seriousness of harm as reflected by legislative risk assessment, multiplied by the volume of the product or problem in issue. The risk assessment required in *Niko* specifically requires an assessment of volume:

in particular *foreign bribery risks* facing the company, including but not limited to its geographic organization, interactions with various types and levels of government officials, industrial sectors of operation, involvement in joint venture agreements, importance of licences and permits in the company's operations, *degree of governmental oversight and inspection*, and *volume and importance of goods and personal clearing through customs and immigration*.²⁵

25. Agreed Statement of Facts dated June 23, 2011, app. A, § 2(c), R. v. Niko Res. Ltd., 2011 CarswellAlta 2521 (Can. Alta. Q.B.) (WL) (emphasis added).

DRAWING THE MATRIX

The risk management matrix combines the relative gravity of potential harm in relation to the precautions taken to ensure compliance.

Legal audit levels and priorities		Potential Gravity of Harm				
		Level 1 (Low)	Level 2	Level 3	Level 4	Level 5 (High)
Likelihood of Compliance (compliance history/willingness and capacity to comply)	Category A (High)	Compliance training				
	Category B		Legal review of financial and compliance audits			
	Category C			Legal audit of due diligence systems		
	Category D				Internal investigation Immediate and Comprehensive Rectification	
	Category E (Low)					Self-reporting to Regulator: negotiating immunity or leniency

The above matrix sets out ranges of priorities. This is a fairly basic model, which will be significantly expanded in practice. In the lowest quadrant of risk, compliance training will be appropriate, based on existing Codes of Conduct.

The second level of risk contemplates that the legal department, or external legal counsel, will review the financial and compliance audits that have been conducted internally to ensure compliance with the CFPOA.

The third or medium level of risk requires that the legal department or external legal counsel conduct an audit of the due diligence system in place with respect to CFPOA compliance. This

type of audit is more advanced than the second stage as it requires the legal department to make its own inquiries and review documents, whereas the second stage only requires that the legal advisor review the results of the audits as done internally.

The fourth stage of internal investigation is a quantum leap, and reflects the fact that level four is serious in terms of probability and gravity. An excellent reference in this regard is Rober Tarun's chapter on "Conducting a *Foreign Corrupt Practices Act* Investigation" in his book, *The Foreign Corrupt Practices Act Handbook*.²⁶ The internal investigation will require interviews and retaining experts as required, such as forensic accountants. Reports must be prepared to the company and board of directors along with legal advice concerning remedial measures and the potential for self-reporting, as contemplated in the highest quadrant of risk.

NEW SYSTEMS TO ENCOURAGE COMPLIANCE

The sentence imposed in *Karigar* is a reminder of how important compliance systems are. It is essential that the tone from the top reject the notion that bribes are a cost of doing business. Agents cannot be used as vehicles to improperly achieve objectives. Canadian companies must be ever vigilant in monitoring and, where appropriate, auditing the process of negotiations and agreements made with agents and third parties who may be interacting with government officials on their behalf. Individuals must realize that they can and will go to jail for bribery offenses.

Compliance programs will have enhanced importance where an individual employee or agent commits an offence. For example, in April of 2012, Garth Peterson, a former managing director for Morgan Stanley's Real Estate Group in the People's Republic of China, pleaded guilty to conspiring with others to circumvent Morgan Stanley's internal controls in order to transfer a multi-million dollar ownership interest in a Shanghai building to himself and a Chinese public official.²⁷ Peterson was sentenced to nine months in jail despite the government's request for a five- to six-year sentence,²⁸ and the SEC announced civil charges and a settlement with Peterson.²⁹

26. TARUN, *supra* note 13, ch. 8.

27. United States v. Peterson, No. 12-CR-224, 2012 WL 1448108 (E.D.N.Y. Apr. 26, 2012).

28. See Christopher M. Matthews, *Former Morgan Stanley Exec Gets Nine Months in FCPA Case*, WALL ST. J. CORRUPTION CURRENTS BLOG (Aug. 17, 2012,

In the Morgan Stanley case, the U.S. government declined to bring any enforcement action against the company related to Peterson's conduct given that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials. Morgan Stanley had voluntarily disclosed the matter and cooperated throughout the Department of Justice's investigation.³⁰

The risk assessment required by organizations in the area of foreign corrupt practices is a complex exercise as it is multi-jurisdictional and multi-disciplinary. The mathematical model of a risk matrix will assist in organizing this complexity and providing a plan of action going forward. In Canada, this is no longer an exercise conducted by only those companies interested in corporate social responsibility. It is now legally essential.

12:11 PM), <http://blogs.wsj.com/corruption-currents/2012/08/17/former-morgan-stanley-exec-gets-nine-months-in-fcpa-case/>.

29. Press Release, U.S. Sec. & Exch. Comm'n, Litigation Release No. 22346, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), *available at* <https://www.sec.gov/litigation/litreleases/2012/lr22346.htm>.

30. *See id.*