

# Corruption of Foreign Public Officials Act: Overview

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This note discusses the provisions of the Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (CFPOA) and leading recent cases. The note also focuses on corporate liability, the scope of middle managers and corporate compliance.

## The CFPOA: Mandatory Risk Assessment

The [Corruption of Foreign Public Officials Act](#), S.C. 1998, c. 34 (CFPOA) has been in force since 1999. In June of 2011, the CFPOA streaked across the radar screens of compliance officers when Niko Resources Ltd. (Niko), a Canadian energy company, plead guilty and paid a fine of almost \$10 million as a result of bribes paid to a Bangladeshi official. The bribes included a luxury SUV (Toyota Land Cruiser) and trips to New York and Calgary.

Niko and its subsidiaries were placed on probation requiring that the companies develop compliance procedures based on a risk assessment. The following paragraph from the Probation Order demonstrates the extent to which a risk assessment is now a mandatory element of compliance in the anti-corruption arena:

The company will develop these compliance standards and procedures, including internal controls, ethics and compliance programs on the basis of a risk assessment addressing the individual circumstances of the company, in particular foreign bribery risks facing the company, including but not limited to, its geographical 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 personnel clearing through customs and immigration.

In this note, we survey the essentials of the CFPOA and develop the concept of a risk management matrix which has been applied on a global scale. The matrix will assist an organization in identifying the appropriate level of auditing and training that will be necessary in a given situation. The methodology of this matrix is also discussed.

## Centerpiece of the CFPOA

The "centerpiece" of the CFPOA is the offence of 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

- as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
- 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.

Every person who commits this offence is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

(sections 3(1) and (2), CFPOA)

The CFPOA contains a number of definitions which are important to consider.

**"Foreign public official"** means:

- A person who holds a legislative, administrative or judicial position of a foreign state.
- 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.
- An official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

Note that the definition does not include members of political parties that are in opposition, but caution should be exercised in this scenario.

**"Foreign state"** means a country other than Canada, and includes:

- Any political subdivision of that country.
- The government, and any department or branch, of that country or of a political subdivision of that country.
- Any agency of that country or of a political subdivision of that country.

## The First Litigated Case: Karigar

The case of *R. v. Karigar, 2013 CarswellOnt 11325 (Ont. S.C.J.)* (*Karigar*) was decided on August 15, 2013. This case is important on a number of levels:

- **Whistleblowing backfired, relevant only to sentence.** A very unusual aspect of the case is that Mr. Karigar described the scheme in an e-mail sent under a pseudonym "Buddy" to the Fraud Section (FCPA) of the US Department of Justice stating he had information about US citizens paying bribes to foreign officers and inquired about reporting the matter. Mr. Karigar admitted that he is "Buddy". The statement described the scheme as follows:  
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 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.
  3. The People involved are Mr. 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?

Ultimately Karigar did not receive immunity. To the contrary, he was charged and convicted in Canada under the CFPOA. The court decision does not discuss why Karigar's immunity request was denied.

- **Conspiracy.** The decision in *Karigar* demonstrates that the word "agrees" in section 3 of the CFPOA 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. In *Karigar*, the purpose of the conspiracy to bribe was to win a tender for a multi-million dollar contract to sell facial recognition software to Air India, a state enterprise.
- **No actual bribe, but belief in a bribe.** It is not necessary for the prosecution to prove that a bribe was actually paid to a foreign official to establish a violation of section 3 of the CFPOA. It is sufficient for the party to believe that a bribe was 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 US authorities and to the RCMP.

The decision in *Karigar* was *affirmed on appeal*, [2017 CarswellOnt 10393 \(Ont C.A.\)](#). Justice Feldman affirmed that the offence is clearly committed when a person agrees with a foreign public official to give that official a benefit. But equally clearly, the offence is not limited to that scenario. It includes both a **direct and an indirect** agreement to give or to offer an advantage. There is no limiting language on who must "agree", prescribing the parties to the agreement. Justice Feldman rejected the defence position that the agreement must be with the foreign official. The offence only requires that the loan, reward, advantage or benefit that is the subject of the agreement must be a loan, reward, advantage or benefit to (or for the benefit of) a public official.

### Level of Intent Required: Includes Willful Blindness

With respect to the *mens rea* (intent to commit) 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.

The concept of *mens rea* includes the doctrine of willful blindness, which has been reviewed by the Supreme Court of Canada in *R. v. Briscoe*, [2010 CarswellAlta 589 \(S.C.C.\)](#). Justice Charron for the Court observed that:

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.

The existence of a robust compliance system will assist organizations in refuting any suggestion that they were willfully blind.

## Exemption for Reasonable Promotional Expenses

**Promotional expenses on behalf of government officials: when is this necessary?** The CFPOA contains an exemption for reasonable promotional expenses. This concept may cause some initial confusion, as one does not normally think about payments to government officials as promotional in nature, unless the government is a prospective customer. However, in order to obtain government approvals, it is often necessary to explain the nature of the proposed project and this may require that foreign officials take action such as travel to the location of the proposed project or take time away from their office. The officials may require that travel be provided or that expenses are reimbursed.

**Exact wording of promotional exemption.** The exemption reads as follows:

No person is guilty of an offence under subsection (1) if the loan, reward, advantage or benefit:

- is permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions; or
- 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, or
  - the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.

(section 3(3), CFPOA)

## Facilitation Payments

The CFPOA previously had an exception for facilitation payments, for example, payments made for acts of a routine nature such as the issuance of a permit or the processing of official documents.

**Facilitation payments are outside government fee schedules.** Facilitation payments are best described by first contrasting them to official government programmes for expedited payments. For example, if applying for a passport, one can pay a fee to the government to expedite the processing of the passport. A facilitation payment, by way of contrast, is a payment made to individual government officials who indicate that approvals may be expedited by a payment to them individually, outside of an official framework (section 3(4), CFPOA).

**Elimination of facilitation payments.** The CFPOA was amended in June 2013. These amendments provided for the elimination of the exception for facilitation payments on a later date to be decided by Cabinet. The amendments are in force as of October 31, 2017 so facilitation payments are no longer permitted under the CFPOA.

## Books and Records

**A new criminal offence.** As part of the June 2013 amendments, there is a new books and records offence: all transactions and expenditures must be adequately and accurately identified in the books and records of the company. While the offence does not explicitly outline a mental element, it is expected that the courts will read in

the requirement of intention and knowledge, which flows from the preamble wording "for the purpose of bribing". In contrast to the law in the United States, there is no parallel civil enforcement mechanism relating to proper books and records.

**Books kept for the purpose of bribing or hiding a bribe.** The new provision reads as follows:

Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,

- establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
- makes transactions that are not recorded in those books and records or that are inadequately identified in them;
- records non-existent expenditures in those books and records;
- enters liabilities with incorrect identification of their object in those books and records;
- knowingly uses false documents; or
- intentionally destroys accounting books and records earlier than permitted by law.

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.

(section 4, CFPOA)

**Six Categories of Books and Records Offences.** From a practical view, the books and records categories can be labelled as follows:

- **The "offsheets books" offence:** Maintaining accounts which do not appear in any of the required books and records (section 4(a), CFPOA).
- **The "invisible transactions" offence:** Making transactions that are not reported or are inadequately recorded and identified. What constitutes "inadequate" will be a source of considerable litigation (section 4(b), CFPOA).
- **The "fake expenditures" offence:** Recording non-existent expenditures in the books and records (section 4(c), CFPOA).
- **The "incorrect liabilities" offence:** Entering liabilities with incorrect identification of their object in those books (section 4(d), CFPOA).
- **The "false documents" offence:** Knowingly using false documents (section 4(e), CFPOA).
- **The "destruction of documents" offence:** Intentionally destroying accounting books and records earlier than permitted by law (section 4(f), CFPOA).

**Transparency in books and records.** Businesses should ensure that they have complete and continually updated books and records with respect to all third-party consultants in foreign jurisdictions. These books and records must be sufficiently transparent and have enough independence to withstand potential audits. Where possible, companies should demand audit rights from third-party agents. It would be wise to have a forensic accounting firm retained by counsel to review and test the books and records systems against the potential six categories of offences listed above and to remediate where necessary.

The Canadian government has not followed the U.S. route of also having a civil regime to enforce books and records requirements. Canadian companies that are cross listed in the United States must comply with U.S. books and records law. In the matter of Nordion (Canada) Inc. the U.S. [Securities and Exchange Commission](#) (SEC) imposed a civil money penalty in the amount of \$375,000 on March 3, 2016. Nordion did not have adequate policies and

procedures in place to detect corruption risks. Nordion mischaracterized fees paid to its Agent as legitimate business expenses when some or all of the fees may have been used to make corrupt payments to Russian government officials. In assessing the amount of the penalty, the SEC "considered remedial acts promptly undertaken by Nordion, Nordion's self-reporting, and their cooperation afforded the Commission staff. Nordion self-reported the conduct to authorities in both the U.S. and Canada, conducted a thorough internal review, identified the illegal conduct, voluntarily produced witnesses from Canada for interviews in the U.S. and translated documents, and implemented substantial remedial measures to prevent future violations."

## Nationality Jurisdiction and the Real and Substantial Connection

As part of the June 2013 amendments, Canadian authorities may now prosecute a Canadian company for actions taken entirely in a foreign country if such actions would otherwise constitute offences under the CFPOA.

Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence is deemed to have committed that act or omission in Canada if the person is any of the following:

- a Canadian citizen;
- a permanent resident;
- a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.

(section 5(1), CFPOA)

If the events at issue occurred prior to the June 2013 amendments, the common law "real and substantial connection" test applies. As the amendments are a deeming provision, it is likely that the real and substantial connection test continues to apply even where the acts are done by someone who is not a Canadian citizen but where there is a real and substantial connection to Canada.

The Court of Appeal dealt with the issue of territorial jurisdiction in *Karigar* as the offence was committed prior to the amendments that established territorial jurisdiction based on Canadian nationality. The Court enumerates the type of factors that satisfied the "real and substantial link": a Canadian company was the proposed contracting party, the unfair advantage and fruits of the contract obtained through bribery would benefit that company. A great deal of the contract work was to be done in Canada. In addition, nearly all of the documents and emails that evidenced the transaction were seized in Canada, and all the witnesses were from Canada.

## Corporate Liability Under the CFPOA

As the CFPOA is federal legislation which creates indictable offences, the [Criminal Code](#), R.S.C. 1985, c. C-46 (Criminal Code) party provisions apply, which incorporate the party provisions concerning corporate liability:

"Senior officer" means a representative who plays an important role in the establishment of an organization's policies or 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.

(Section 2, Criminal Code)

**Tone from the middle.** On August 9, 2013, Justice Tôth of the Quebec Superior Court delivered a decision in the trial of *R. c. Pétroles Global inc., 2013 CarswellQue 9172 (C.S. Que.) (Global Fuels)*. This case was the first litigated case in Canada to test the parameters of the Criminal Code's corporate criminal liability provisions. What led to the conviction of Global Fuels of price fixing is the fact that a regional manager of Global Fuels knowingly allowed territory managers to participate in collusion. There was no evidence that the head office of Global Fuels was aware of the scheme, nor was the prosecution required to prove this. The actions of middle managers were sufficient to make Global Fuels criminally liable. From a corporate compliance view, tone from the top has been converted into tone from the middle.

**Middle managers responsible for managing.** The use of the word "or" creates a disjunctive test that collapses policy with operational duties. "Senior officer" means a representative who plays an important role in the establishment of the organization's policies or is responsible for managing an important aspect of the organization's activities.

**Important aspect of the organization's activities.** The reference in the legislation to an "important role" in the establishment of the organization's policies or the managing of an "important aspect" of the organization's activities creates a grey area for interpretation. The Canadian government recognizes the grey area created by the concept of "important role":

While the courts would still have to decide in each case whether a particular person is a senior officer, I believe the proposal clearly indicates our intention that the guilty mind of a middle manager should be considered the guilty mind of the corporation itself. For example, the manager of a sector of a business such as sales, security or marketing, and the manager of a unit of the enterprise like a region, a store or a plant, could be considered senior officers by the courts.

The above passage was cited by Justice Tôth in *Global Fuels*. The test to determine whether a person is a "senior officer" requires a functional analysis that goes beyond the title of the employee.

#### **Due diligence at two levels:**

- **Senior officer level.** At the senior officer level, a robust compliance program will hopefully result in compliance with the law. If there is a failure and senior officers commit the offence of bribery, the corporation is liable.
- **Areas under senior officer's supervision.** At the levels under the senior officer's supervision, a compliance system may support a defence based on the taking of reasonable measures.

What organizations have to show is that **all** reasonable measures were taken to ensure compliance with rules and regulations applicable to a particular case. If a senior officer knows that a representative of the organization is or is about to be a party to the offence, she/he must **take all reasonable measures** to stop them from being a party to the offence.

In the context of foreign corruption, much attention has been paid recently to the UK legislation which creates a strict liability offence for commercial organizations for failing to prevent bribery where an associate person engages in bribery with the intention of obtaining or retaining business for the organization or to obtain and retain an advantage in the conduct of business for the organization. Although the UK legislation is innovative, the Canadian legislation is not far behind since the failure of senior officers to take all reasonable measures to stop employees or agents from

paying bribes will lead to criminal liability in Canada. The difference of course is that in Canada, the prosecution must prove the absence of reasonable steps beyond reasonable doubt.

## Agents and Contractors

**Two types of potential liability.** Companies in Canada may be liable for the acts of agents and contractors in two different ways:

- A company may be aware that an agent is about to pay a bribe and fail to take all reasonable measures to stop them.
- If an agent or contractor is delegated management of an important aspect of an organization's activities, the agent may become part of the class of senior officers who bind the corporation in criminal law, even where the executives of the corporation are unaware that the agent is offside.

**Review duties placed on agents and contractors.** The potential impact of a combination of the CFPOA and the Criminal Code party provisions may be a surprise to many executives. Most Canadian companies do not view their foreign agents and contractors in places such as Russia, China, and Brazil as potential senior officers who can bind the company in criminal law. Yet contracts are often drawn up with foreign agents with a view to maximizing the duties and obligations that such agents have. Careful review of "duty heavy" contracts may reveal that the impact is to delegate responsibility to the foreign agent to manage an important part of the organization's business in that foreign jurisdiction with the potential effect that the foreign agent becomes a senior officer.

**Maintain a Full Roster of All Third-party Agents.** It is imperative that businesses survey and keep a list of everyone they have acting as third-party agents in a foreign jurisdiction, no matter how small the transactions may be. Companies should also develop comprehensive training programs for third-party agents in foreign jurisdictions, as well as procedures for ensuring the oversight of these agents.

## Sentencing

**Individual liability.** Karigar was sentenced on May 23, 2014 to a penitentiary term of three years for conspiring to bribe several Indian government officials. 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." The court issued the following warning: "Any person who proposes to enter into a sophisticated scheme to bribe 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".

**Corporate liability.** Previous cases such as *R. v. Griffiths Energy International (unreported) (January 25, 2013)*, *Doc. 130057425Q1, [2013] A.J. No. 412 (Alta.Q.B.) (GEI)* and *Niko* involved corporate accused and were resolved by way of guilty pleas.

In *GEI*, the company was a private, Calgary-based oil and gas company, pleading guilty on a single count of bribery under the CFPOA. The charge arose from GEI's illegal payment of US \$2 million to Chadian officials, a transaction described by the sentencing judge as "an embarrassment to all Canadians". After extensively cooperating with authorities in Canada and the US, GEI was fined \$10.35 million.

GEI demonstrates that cooperating with authorities once wrongdoing has been discovered (and implementing robust compliance procedures) can reduce penalties resulting from such misconduct.

GEI's admission of guilt and cooperation with authorities ought to serve as an example that despite the fine imposed, the benefits dramatically outweigh the costs. Compare the sentence imposed to Niko after they pled guilty to bribing Bangladeshi officials in 2011. While the bribes included a luxury SUV, and trips to New York and Calgary, the illicit contributions only amounted to approximately \$200,000. However, the firm was still slapped with a fine of almost \$10 million. Comparatively, GEI's bribe to Chadian officials was over 10 times as high, and yet as a result of the company's cooperation with authorities (and new internal compliance policies now in place), the fine was almost identical. Self-reporting in GEI's case was clearly beneficial as their voluntary disclosure was noted by Justice Brooker as having resulted in the fines being more favourable.

## New Systems to Encourage Compliance

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 offences.

**Key steps in a risk-based approach.** An interesting comparison is the UK Bribery Act which has created a strict liability offence (with a defence of due diligence) for a failure by companies to prevent bribery. The UK Ministry of Justice March 30, 2011 Guidance sets out six principles of a risk-based approach to managing bribery risks, which can be summarized as follows:

- **Proportionate Procedures:** The one size fits all solution is rejected in favour of a tailor made approach.
- **Top Level Commitment:** This requires that senior officers specifically address bribery risks.
- **Risk Assessment:** External risks (such as country risk and sector risk) must be evaluated along with internal risks (such as poor training, cultures that promote excessive risk taking and poor financial controls).
- **Due Diligence:** The Guidance encourages commercial organizations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.
- **Communication (Including Training):** Communication is not only tone from the top, but the creation of a confidential means to report bribery conduct.
- **Monitoring and Review:** Methods may include staff surveys, testing and verification of procedures by outside parties and certified compliance by multilateral bodies.

The steps in a risk-based approach should not be foreign to Canadian counsel who will have seen a similar approach developed in competition law. The Competition Bureau has identified seven elements that are fundamental to a proper compliance program regardless of the particular model adopted, its level of complexity or the size of a business. In the "Corporate Compliance Programs" Bulletin of the Competition Bureau, the seven essential elements that should be incorporated in every program are:

1. Management Commitment and Support
2. Risk-based Corporate Compliance Assessment

3. Corporate Compliance Policies and Procedures
4. Compliance Training and Communication
5. Monitoring, Verification and Reporting Mechanisms
6. Consistent Disciplinary Procedures and Incentives for Compliance
7. Compliance Program Evaluation

## Risk Assessment

Risk assessment is relevant to anti-corruption on several levels:

- Proper risk management will reduce the risk of non-compliance.
- A robust risk assessment matrix may be introduced in court as documentary proof of a proper system.
- 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. The requirement to take all reasonable steps makes risk assessment essential.

**Methodology: A risk matrix.** 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. Matrix analysis is also used by the federal government. For example, the Treasury Board of Canada has developed a sophisticated corporate risk profile that colour codes a risk matrix and sets out plans of action based on the level of risk. The *International Chamber of Commerce Antitrust Compliance Toolkit* uses matrix analysis extensively in the global antitrust field. See pages 18-23 for examples of the matrix in operation.

**Application of Matrix Analysis to Anti-corruption.** A matrix will identify the appropriate level of supervision or auditing for each organization.

The above matrix sets out ranges of priorities. This is a fairly basic model, which will be significantly expanded in practice:

- **Level 1.** In the lowest quadrant of risk, compliance training will be appropriate, based on existing Codes of Conduct.
- **Level 2.** 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.
- **Level 3.** 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.
- **Level 4.** The fourth stage of internal investigation is a quantum leap, and reflects the fact that level 4 is serious in terms of probability and gravity. 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.

- **Level 5.** The fifth stage may require self-reporting to authorities with the hope that a prosecution can be avoided or any penalty lessened.

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