

Privacy Update

Breach Reporting & Notification under PIPEDA

Presented by: Catherine Carscallen
November 9, 2017



Overview

- *Digital Privacy Act* amendments to the *Personal Information Protection and Electronic Documents Act* (PIPEDA)
 - mandatory breach reporting, notification and record-keeping obligations
- Not yet in force pending finalization of Regulations
- Sept. 2, 2017 – draft *Breach of Security Safeguards Regulations* published for 30 day comment period

Regulations Objectives

- Ensure individuals receive consistent information about breaches that pose a risk of significant harm to them and that breach notifications contain sufficient information to enable individuals to understand the significance and potential impact of the breach
- Ensure the OPC receives consistent and comparable information about breaches that pose a risk of significant harm and is able to provide effective oversight and verify that organizations are complying with these new requirements

What is a Breach of Security Safeguards?

- New obligations for organizations that experience a “breach of security safeguards”
- Defined under PIPEDA as:

“the loss of, unauthorized access to or unauthorized disclosure of personal information resulting from a breach of an organization’s security safeguards that are referred to in clause 4.7 of Schedule 1 or from a failure to establish those records”

Reporting Requirement

- Organization must *report to the Office of the Privacy Commissioner* (OPC) any breach of security safeguards involving personal information under its *control* if it is reasonable in the circumstances to believe that the breach creates a *real risk of significant* harm to an individual

Notification to Individual(s)

- Organization must *notify an individual* (unless prohibited by law) of any breach of security safeguards involving the individual's personal information under the organization's *control* if it is reasonable in the circumstances to believe that the breach creates a *real risk of significant harm* to the individual

Significant Harm

Includes:

- bodily harm
- humiliation, damage to reputation or relationships
- loss of employment, business or professional opportunities
- financial loss, identity theft, negative effects on credit record
- damage to or loss of property

Real Risk of Significant Harm

- Threshold for reporting and notification obligations
- Risk assessment
- Factors to consider include:
 - sensitivity of the personal information involved
 - probability that the personal information has been, is being or will be misused
 - any other prescribed factor

Report Requirements

- Must be made *as soon as feasible* after organization determines that the breach has occurred
- Must be in writing and contain prescribed information and be made in prescribed form and manner

Content, Form and Manner of Report

- Description of the circumstances of the breach and, if known, the cause
- Day on which, or period during which, the breach occurred
- Description of the personal information that is the subject of the breach
- Estimate of the number of individuals for whom the breach creates a real risk of significant harm

Content, Form and Manner of Report

...cont'd

- Description of the steps that the organization has taken to reduce the risk of harm to each affected individual resulting from the breach or to mitigate that harm
- Description of the steps that the organization has taken or intends to take to notify each affected individual of the breach
- Name and contact information of a person who can answer, on behalf of the organization, the OPC's questions about the breach



Notification Requirements

- Notification to an individual must contain sufficient information to allow the individual to understand the significance to them of the breach and to take steps, if any are possible, to reduce the risk of harm that could result from it or to mitigate that harm
- Any other prescribed information

Content of Notification

- Description of the circumstances of the breach
- Day on which, or period during which, the breach occurred
- Description of the personal information that is the subject of the breach
- Description of the steps that the organization has taken to reduce or mitigate the risk of harm to the affected individual resulting from the breach

Content of Notification

...cont'd

- Description of the steps that the affected individual could take to reduce or mitigate the risk of harm resulting from the breach
- Toll-free number or email address that the affected individual can use to obtain further information about the breach
- Information about the organization's internal complaint process and the affected individual's right to file a complaint with the OPC



Form, Manner and Time of Notification

Must be:

- conspicuous
- given *directly* to the individual in prescribed form and manner, except in prescribed circumstances, in which case it shall be given *indirectly* in prescribed form and manner
- given *as soon as feasible* after the organization determines that the breach has occurred

Direct Notification - Manner

- By email or any other secure form of communication if the individual has consented to receiving information from the organization in that manner;
- By letter delivered to the individual's last known *home* address;
- By telephone; or
- In person

Indirect Notification - Circumstances

- Direct notification would cause further harm to the individual
- Cost of giving of direct notification is prohibitive for the organization
- Organization does not have contact information for the individual or the information it has is out of date

Indirect Notification - Manner

- By a conspicuous message, posted on the organization's website for at least 90 days; or
- By means of an advertisement that is likely to reach the affected individuals

Notification to Organizations

- Organization must also notify any other organization or government institution of the breach if it believes that the other organization or government institution may be able to reduce the risk of harm that could result from the breach or mitigate that harm
- As soon as feasible after organization determines that the breach has occurred

Record-Keeping Requirements

- Organization must maintain a record of *every* breach of security safeguards involving personal information under its control
 - for 24 months after day on which organization *determines* that the breach has occurred
 - must contain any information pertaining to the breach that enables the OPC to verify compliance with the mandatory reporting and notification requirements

Record-Keeping Requirements

...cont'd

- Organization must provide the OPC, on request, with access to, or a copy of, a record
- Report to the OPC may be used by the organization as a record of the breach of security safeguards

Confidentiality

- breach reports and records confidential
- exceptions - OPC may disclose if:
 - in public interest
 - necessary to conduct an investigation, audit or establish findings or recommendations in a report
 - in the course of proceedings
 - useful in investigation of a contravention of laws that has been, is being or is about to be committed

Enforcement and Penalties

- OPC
 - power to initiate complaint, investigate, conduct audit, make recommendations, enter compliance agreements, apply to Court for hearing
 - no power to issue compliance order or assess administrative monetary penalty
- offences (including knowing contravention of breach reporting, notification or record-keeping requirement) punishable by court on summary conviction by fine up to \$10,000 or on indictment by fine up to \$100,000

Next Steps and Coming Into Force

- Regulations to be finalized
- Regulations provide for implementation on day on which related provisions under PIPEDA come into force
- Transition period between publication of final Regulations and their coming into force



Questions?

Contact Us

Catherine Carscallen



T 416.865.6654



E ccarscallen@grllp.com



W grllp.com



@grllp



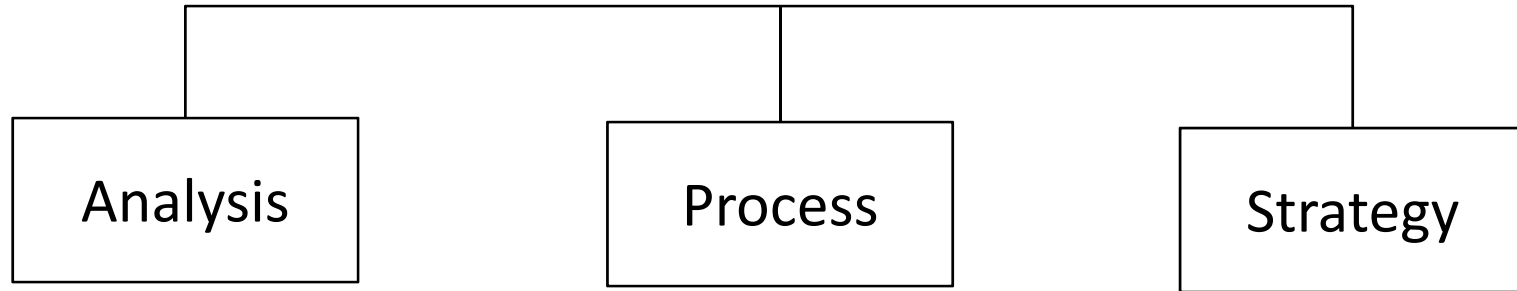
Bring Me Your Disputes and I will Set You Free

Presented by: John Campion
November 9, 2017

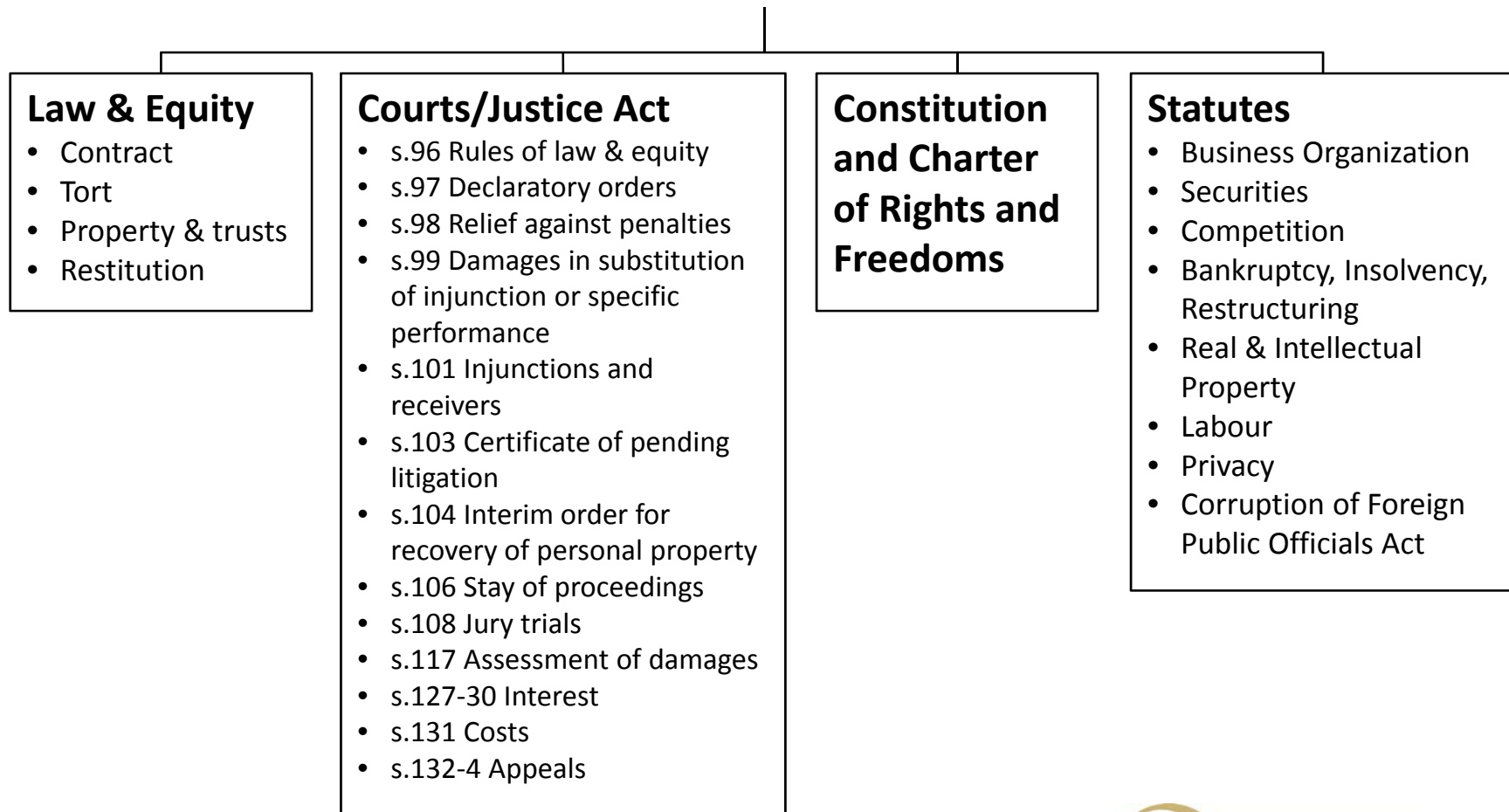


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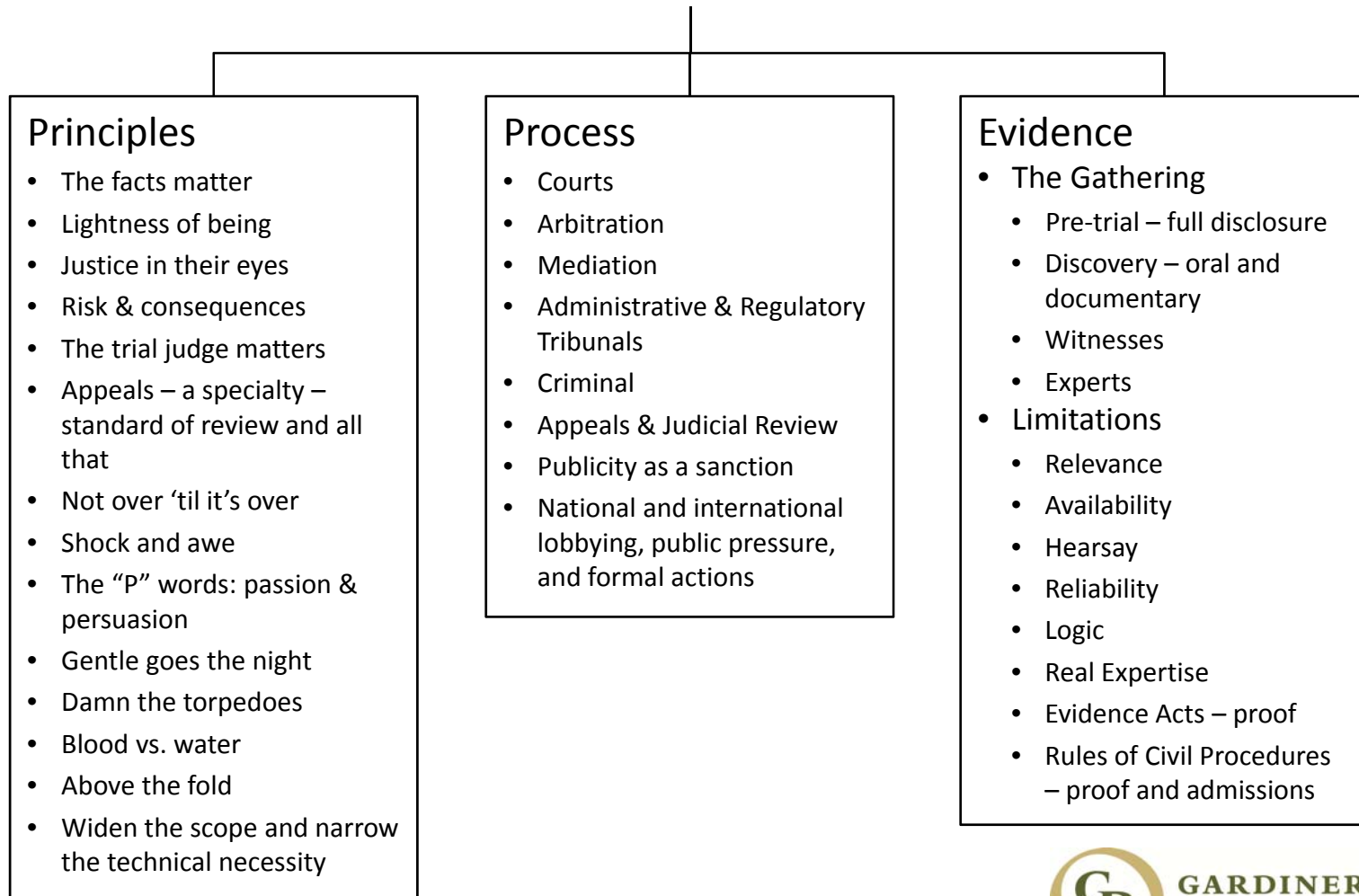
The Code: The Legal Mind



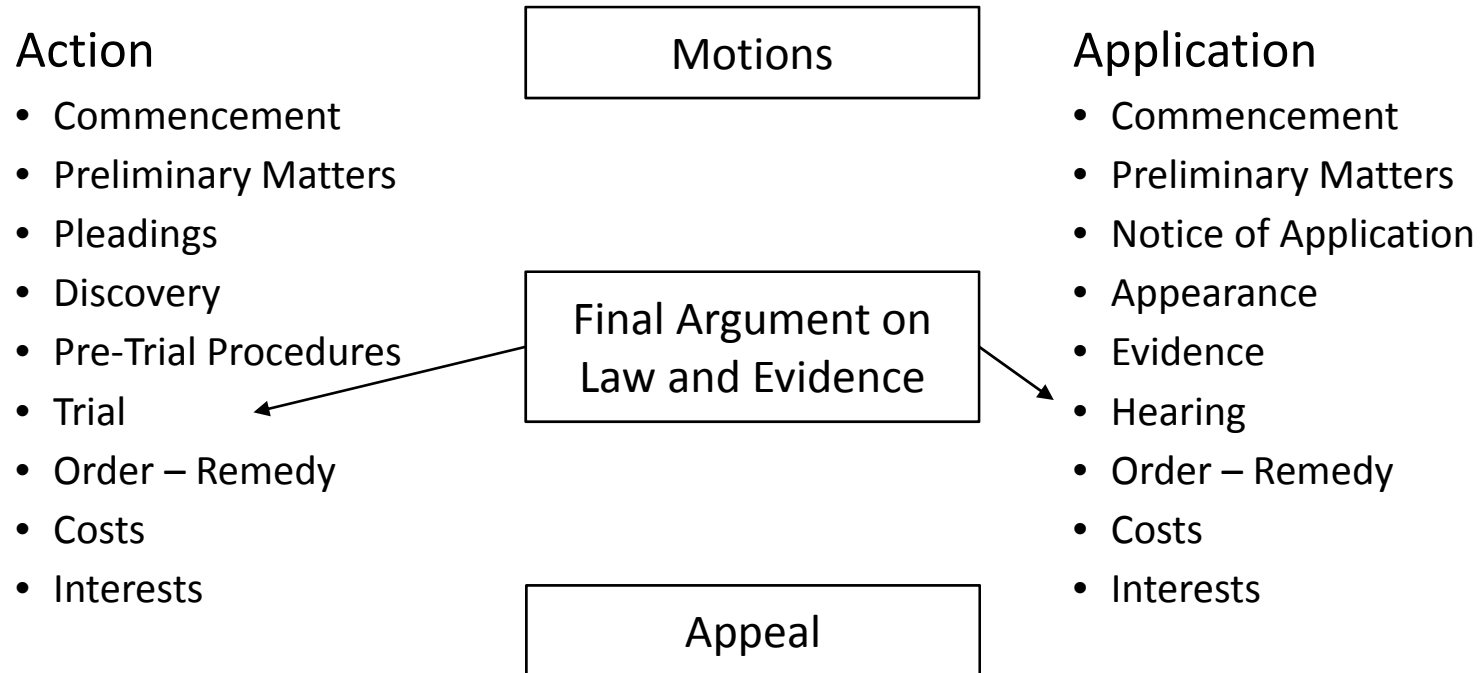
Analysis: Overview – The Learning of The Ages



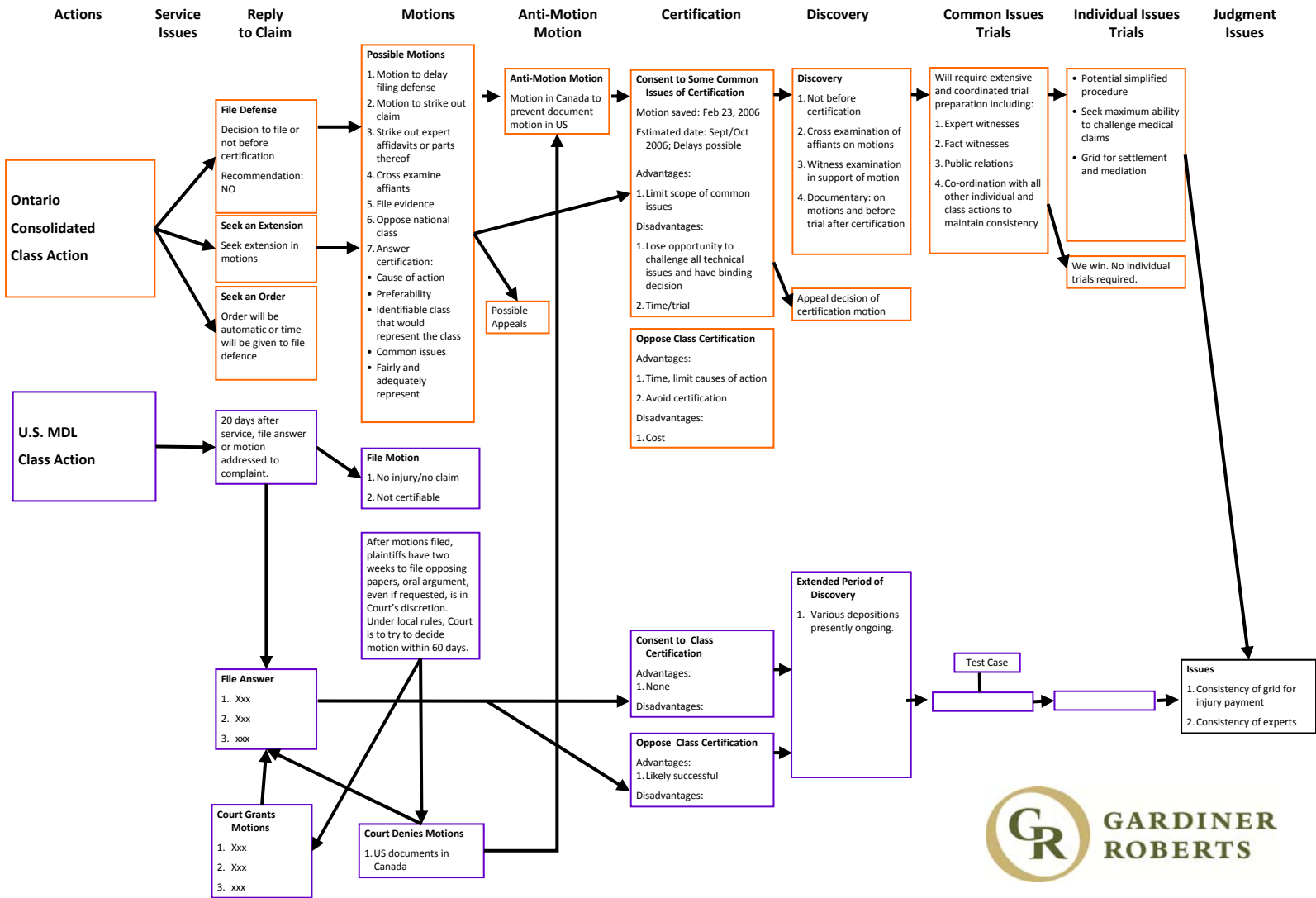
Process: Proof and Principles



Litigation Process - The Universal Main Event



Litigation Process – Class Action



Arbitration – Process Globalization

1. An existing dispute (not merely an unresolved issue);
2. Parties choose neutral decision-maker under an arbitration agreement;
3. Expressed intention in the agreement that the decision be binding and be made in a judicial or quasi-judicial manner;
4. The hearing be impartial and fair;
5. The decision in the hearing be based on evidence and argument;

Arbitration – Process Globalization

6. International arbitration (not defined in model code – see federal and provincial Acts): parties have places of business in different States when arbitration agreement is made; one of the following is outside the State where parties have places of business – place of arbitration, place for performance of obligations, place where subject matter of dispute is most closely connected; commercial arbitration acts that adopt or incorporate UNCITRAL Model Law – applicable to all provinces and federal arbitrations;

Arbitration – Process Globalization

7. Domestic commercial arbitration: modern provincial arbitration Acts that provide for domestic arbitration based on the model law; provisions vary significantly from province to province (contracting out, appeal rights and contracting out, procedural rules, administration of arbitration and deemed agreement provisions;



Arbitration – Process Globalization

8. Federal legislation: United Nations Foreign Arbitral Awards Convention Act R.S.C. 1985, C.16 (2nd Supp): Implements the New York Convention on recognition and enforceability of arbitral awards (effective May 7, 1986). New York Convention: Contracting States recognize arbitral awards; limited grounds for refusal to recognize and enforce; limited to recognition and enforcement of commercial arbitration awards made in contract in the States;
9. Guidelines: for arbitrators, awards, remedies, enforcement, legal requirements, appeals, ethics, finality.



Mediation – Process Maximizing Client’s Role

1. Pillars of Process: Contracting, story, interests, options, alternatives, best alternative to negotiated agreement (BATNA), agreement.
2. Contracting: Engage the participants in the process of making a contract; explain the process, clarify roles and responsibilities of participants and mediator; negotiate ground rules.
3. Defining the problem and dealing with conflict: understanding the conflict, the parties’ view of the conflict (individual stories), working with the dynamics of the conflict; understanding the law – analyzing the legal risks and opportunities.



Mediation – Process Maximizing Client's Role

4. Understanding interests: explore the parties' needs and interests (what matters to them going forward); generate options; evaluate options using the parties' goals, needs and interests, the law and other reference points; develop packages; test packages against parties' goals, needs and interests for stability, durability and commitment.
5. Looking to the future: draft agreements; review, refine and improve upon agreements; have a concern for the unrepresented; determine next steps; implementation – provision for future review and modification.



Mediation – Process Maximizing Client’s Role

6. Identify and control: drama, narrative, identity and emotion.
7. Trust in the mediation and commitment to trust for future action.
8. Imperfections: dysfunctional communication and emotion; asymmetries of information; extreme “partisan perception” bias; disrespect (real or perceived); failure to understand others’ views, or care; strong desire for revenge or vindication; agreement has unpalpable meaning.
9. Process variance: preliminary work (pre-planned, a formal evaluation phase, mediate discovery, caucuses single-text model.



Mediation Made Simpler

Variable **Five Stage© Resolution Process** to early and later stage dispute assessment, strategy, risk audit assessment, mediation, arbitration, litigation and resolution.

- **Stage 1** – Setting the base for success – trust, creativity and tailoring the process, mediation/arbitration agreements, desire/pressure to resolve.
- **Stage 2** – the gathering – facts, chronology, analysis, explanations, documents and data and compiling all in a common independent programme developed on consent.



Mediation Made Simpler

- **Stage 3** – process selection – interchange, combinations and switching: managed direct settlement negotiation or offer exchange (online or face to face), mediation, arbitration.
- **Stage 4** – expert advice – area of dispute (large corporate, closely held enterprise, estates, on-going relationships) psychological factors, settlement design, tax implications, media, regulatory and government relations.
- **Stage 5** – philosophy – settle what is known through identifying and prioritizing legal issues and actual interests; have a process to deal with future issues if and when they arise through negotiation or arbitration.



Process – Regulatory & Criminal: Ceding Control

Business Corporations

Securities

Energy

Office of the Children's
Guardian

Public Trustee

Labour

Real Estate & Business

Brokers

Criminal Code

Tax

Insurance

Broadcasting

Transportation

Professional Complaint:

Self-regulating professions

Lawyers

Doctors

Nurses

Accountants

Other



Strategy – Psychology 101

- LAMS: Litigation, arbitration, mediation, settlement
- Analysis and process – combine in a complex interaction, depending on realistic goals, timing, financial, psychological and other limitations, advantages and disadvantages
- Impacts inside legal system – “In” Factors
 - Corporate
 - Directors
 - Public – negative
 - Securities – disclosure
 - Professional status
 - Criminal act and recovery



Strategy – Psychology 101

- Outside legal system – “Out” Factors
 - Business and political impact
 - Publicity as a tool and a sanction
 - Resources of parties
 - Financial
 - psychological



Contact Us

John Campion



T 416.865.6697



E jcampion@grllp.com



W grllp.com



@MootPoint1



Where the Wild (IP) Things Are Current Intellectual Property Issues

Presented by: Bob Nakano, Partner
November 9, 2017



Overview

1. Where IP issues lurk
2. Types of IP
3. Issues @ play
4. What to consider
5. Summary of IP rights
6. Questions

Where IP issues lurk

Everywhere... (well many places)

o Daily

- New product developments / updates
- Market expansions (geographic, product)
- Marketing and branding materials (websites, promotions)
- Employment / service contracts

o Transactions

- IPOs / Acquisitions
- Asset Purchases / Sales

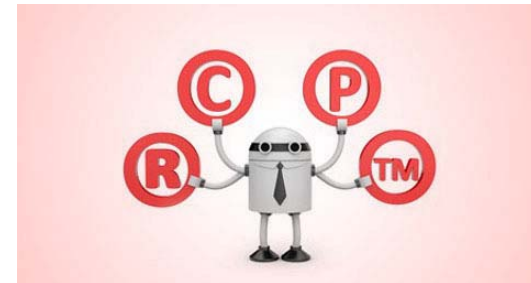
o Competitors

- Litigation (plaintiff / defendant)



What is Intellectual Property (IP)?

- o Country-specific monopolies providing exclusive rights to owner
- o Assets that can be used, asserted, acquired, sold, licensed
- o Types
 - Trademarks
 - Patents / Trade secrets
 - Industrial Designs
 - Copyrights



Trademarks



- o Protect brands/slogans from confusingly similar brands
- o Non-descriptive logos, names, slogans for goods and services



- o New product / service launches
 - e.g. Las Vegas Knights



Patents / Trade Secrets



o Patents

- Protect new, non-obvious and useful ideas
 - Devices, software, business methods, improvements
- 20 year term

o Trade secrets

- Confidential information
 - Client lists, business plans, formulations, processes
- Subject to reverse engineering

Copyright



- o Protects artistic works from copying
 - Literary, musical, dramatic works
 - website layouts, photographs, packaging, owner's manuals
 - Software and related works
 - software/website code, spreadsheets, some databases
- o Life of author + 50 years
- o Ownership + clearance
 - Employment/Service agreements



Industrial Designs



- o Protect appearance of an item from copying



vs.



- o Term – 10 years, non-extendable (Canada)

IP Issues @ Play

o Ownership

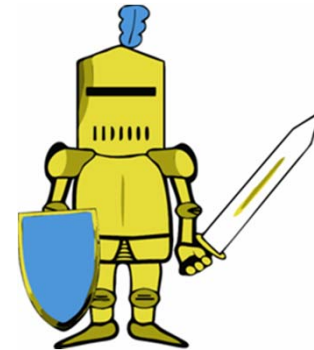
- Employee / contractors agreements
- Non-disclosure – vendors / suppliers

o Clearance / evaluation

- Searches
 - Databases for trademarks, domain names, patents, copyright
- Software – open source?

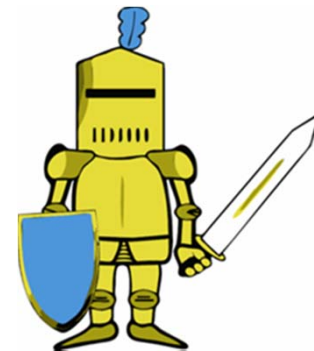
o Protection

- Patents / Trade secrets / Trademarks / Industrial Designs



What to consider

- o Monitor for infringers
 - Enforcement of IP rights
 - Injunctions / damages
- o Review and update IP portfolio
- o Notices (website/materials)
- o Commercialization review
 - Buy, sell, license IP rights
- o Re-evaluate for new releases



Summary of IP types

IP Right	Protects	Term
Trademarks	Brands/Slogans	Reg. trademarks (15 / 10 years)
Patents	Inventions	20 years
Trade Secrets	Confidential Info	Forever (?)
Copyright	Expressions / Software	Life + 50 years
Industrial Designs	Product Design Features	10 years



Questions?
Thank you!



Contact Us

Bob Nakano, Partner



T 416.865.2965



E bnakano@grllp.com



W grllp.com



[@grllp](https://twitter.com/grllp)





Cyber Risk Services

The Role Of In-House Counsel In Helping To Prevent Cyber Risk

November 2017

Paul Hanley



Agenda:

1. Overview
2. Emerging trends in Cyber
3. The future of Cyber now
4. A practical approach to Cyber risk reduction
5. The role of the In House counsel
6. Q&A



Secure



Vigilant



Resilient

Your Presenter – Paul Hanley

Paul Hanley

Partner | Deloitte LLP

Cyber Risk Services

22 Adelaide St. West, Toronto, ON, M5H 0A9, Canada

D: +1 (416) 956 9090 | M: +1 (416) 272 2003

phanley@deloitte.ca | deloitte.ca

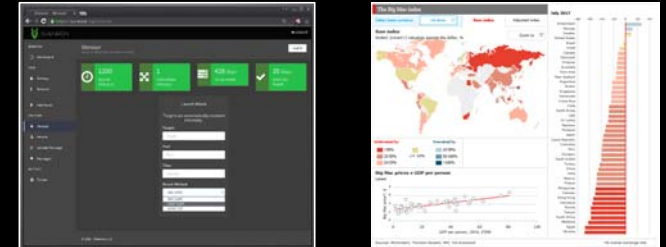


1. Overview

Current landscape of Cyber risk - Disruption:

- Crime-As-A-Service & the Dark Web are changing the game
- More prevalence & sophistication of Ransomware and other extortion attacks (Fatboy adaptive ransomware)
- Fileless attacks
- Slow, stealth attacks
- Increasing Cyber regulatory compliance requirements
- A lack of effective security can now be seen as corporate negligence
- DDoS and Dark DDoS
- As security is additive, you will not only have to deal with today's threats, but also yesterday's threats, as well as tomorrow's threats.
- Psychological warfare is a growing component of attacks
- Cyber resource constraints continue to compound the issue
- Defining attackers and attack vectors is no longer clear-cut; they cannot be placed in convenient 'buckets'

Where are things heading?



ENIGMA					
Search results					
HSBC UK	Posted on	6 March 2015	by	Godfather	category data
Caibank	Posted on	24 April 2015	by	Demand	category services
Air Berlin	Posted on	16 May 2015	by	Demand	category data
Bank of America	Posted on	8 June 2015	by	AMAZON	category services

Credits:

1. Radware.com
2. The Telegraph.co.uk
3. Google.ca
4. Krebssecurity.com

2. Emerging Trends in Cyber

Emerging state - These have happened but are not yet prolific:

- Super-extortion
- Brainwave hacking (EEG headset)
- Air-gap jumping malware
- Covert data corruption
- Adaptive malware to bypass monitoring control systems will rise in prevalence
- Nation State hacking capabilities used by anyone
- Criticality bloat: over reliant, under resilient
- Attacks will continue to evolve and move from espionage to sabotage
- Other disruptive technologies (such as sonic weapons, compromising of synthetic DNA)



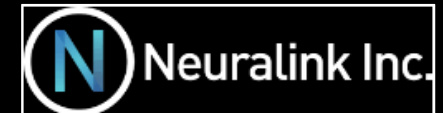
Credits:

1. Nayana.com
2. Emotiv.com

3. Future State

Future state Cyber considerations will see unprecedented Cyber challenges:

- Hyper-extortion
- The Cyber implications of Nano-bots
- The Cyber implications of brain-interface technology
- The Cyber implications of Quantum entanglement



Deloitte Cyber Risk Advisory are devising risk mitigation strategies for these now. We have the most advanced, forward thinking Cyber team globally, with innovative and effective risk mitigation for current, emerging and future Cyber risk.

Credits:

1. Slashgear.com
2. National Geographic
3. Neuralink.net
4. SkyNews.com

4. A practical approach to Cyber risk reduction

Don't panic but be prepared:

1. Recognise that effective security is a cost of doing business
2. Get the basics right:
 - Follow good practice
 - Have robust supplier assurance capabilities
 - Consider being secure, vigilant & resilient in equal measure
 - Be secure by design
3. Remember that security is additive
4. Recognise that you will have a security incident
5. Define your level of acceptable Cyber risk (your risk tolerance)
6. Implement a plan to address any gaps
7. Adapt the capabilities and competencies of your Cyber team
8. Monitor new and emerging security; agility and adaptability is key
9. Use more recent capabilities to deal with the risk



Secure



Vigilant



Resilient

5. The role of the In House Counsel

You must consider:

- Understand the new world of Cyber risk
- Be active not passive in your organisations Cyber posture
- Satisfy yourself that you have an appropriate Cyber Defensible Position
- Agility of dealing with Cyber issues and offering guidance is key
- Keeping up-to-date and informed on the risk and how to mitigate it
- Learn from your peers
- As a data aggregator, your firm is a risk – are you secure?
- Although Cyber can be a risk, Cyber is also an opportunity for you



Questions & Answers



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Avoiding Corporate Veil Piercing

Presented by: Stephen Thiele and Arlene O'Neill
November 9, 2017



The Corporate Veil



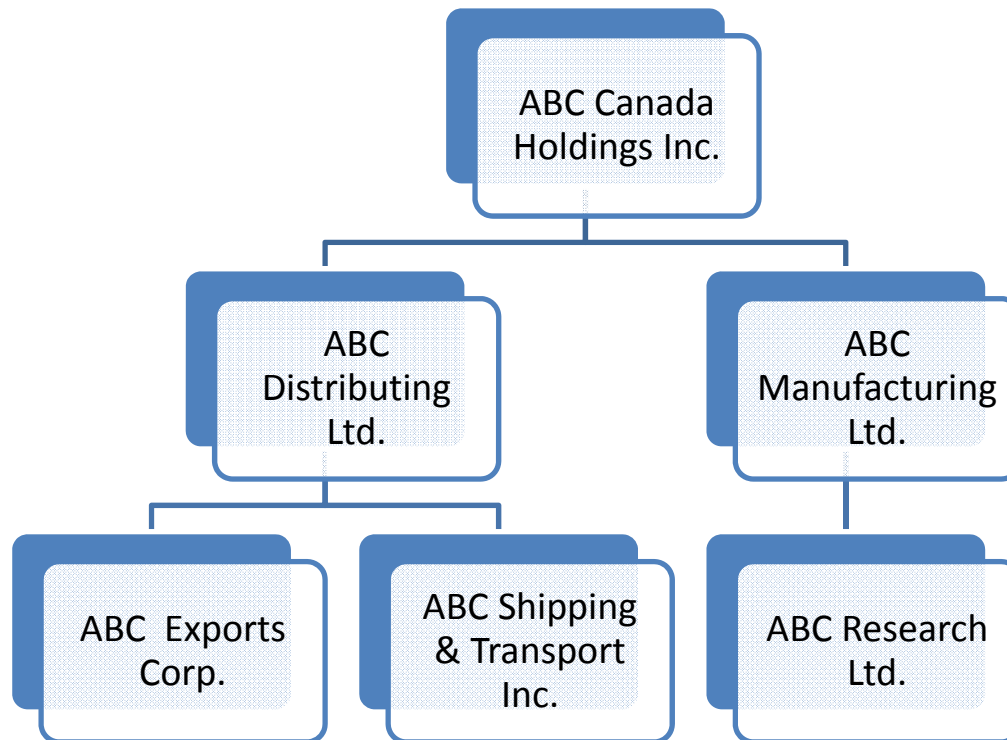
THE “ROCK”

**Salomon v.
Salomon**

[1897] A.C. 22 (H.L.)

Group Enterprise

A Corporate Hierarchy



The Traditional View

The Albazero, [1977] A.C. 774, Lord Roskill

“...Each company in a group of companies is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body.”

The Chevron Case

Yaiguaje v. Chevron Corporation, 2017 ONSC 135

- \$9.5 billion judgment enforcement action
- Judgment against Chevron Corporation
- Enforcement being sought against Chevron Canada despite no allegations of wrongdoing in Ecuador
- Plaintiffs allege that Chevron Canada under control of Chevron and that application of corporate separateness is unfair and unjust

The Chevron Case

The Test in Ontario

“Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated ‘those in control expressly direct a wrongful thing to be done’...Sharpe J. set out a useful statement of the guiding principle in *Transamerica Life Insurance Co. of Canada*...: ‘the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct.’ ”

The Two Parts

The Test in Ontario

- “Complete control” – this requires more than the same ownership
- Nature of the conduct

Just and Equitable Grounds Rejected

801962 Ontario Inc. v. MacKenzie Trust Co.

“These decisions do not support a claim that the test in *Salomon v. Salomon* has been superseded by a new “business entity” or “single business entity” test. They merely illustrate the principle that, in particular fact situations, where the nature of the legal issue in dispute makes it appropriate to have regard to the larger business entity, the court is not precluded by *Salomon* from doing so. In a few cases, there are statements that the court will lift the corporate veil “where injustice would otherwise result.” I am not able to conclude that such statements are intended to remove the authority of the *Salomon* principle. I think they may be more in the nature of shorthand formulation reflecting the approach of the Courts in the cases discussed above.”

The Agency Exception

Factors to be taken into account

- The capitalization of the subsidiary
- The degree of observance of corporate formalities
- The nature and extent of the relationship and business dealings between parent and subsidiary
- The corporate histories of the parent and subsidiary
- The relationship between the board of directors and upper management personnel of parent and subsidiary
- The extent of ownership between parent and subsidiary

The Group as a Single Entity

Corporate veil pierced

Teti v. Mueller Water Products Inc., 2015 ONSC 4434

Two categories of evidence established that four corporate defendants might be a single business entity

Motion for partial summary judgment to dismiss action against related corporate entities dismissed

Examples where corporate veil pierced



Use of the Company's Name

Singh v. Trump, 2015 ONSC 4461, rev'd, in part, on other grounds
2016 ONCA 747



Avoiding the Risk

Practical advice

- Ensure that parent does not capitalize subsidiary
- Maintain proper corporate formalities through maintenance of up to date corporate minute books
- Ensure that corporations in a corporate group maintain separate bank accounts, and file separate tax returns
- Properly document any transfers of property and money transfers between corporations

Avoiding the Risk

More practical advice

- May want variety in officers and directors between various affiliated corporations
- Ensure that Board meetings of affiliated companies are held at different times
- Ensure that business transacted by one affiliated company is not transacted by another affiliated company
- Have written service agreements between affiliated companies





Questions?

Contact Us

Stephen Thiele



T **416.865.6651**



E **sthiele@grllp.com**



W **grllp.com**



@Stephen_Thiele



Sex, and Money...

Post the Harvey Weinstein Era

Presented by:

Soma Ray-Ellis, Chair Employment Law Group
Prepared with the assistance of Madelena Viksne
November 9, 2017



We Have Been Weinsteined...



Not just a man,
**he has become a
movement...**



Since Weinstein...

Accused	Position	# of Accusations	Consequence
Harvey Weinstein	Movie Producer	57	Fired
James Toback	Screenwriter and producer	300+	None
Ben Affleck	Actor and director	1	None
George W. Bush Sr.	41 st POTUS	5	None
Chris Savino	Nickelodeon animator	12+	Fired
Roy Price	CEO Amazon	1	Quit after leave
Lockhart Steele	Ed. Director of Vox Media	1	Fired
Josh Besh	Celebrity chef	25+	Resigned
Mark Halperin	Journalist	5	Fired
Gilbert Rozon	Just For Laughs	9	Resigned

Since Weinstein...

Accused	Position	# of Accusations	Consequence
Jeremy Piven	Actor	1	None
Dustin Hoffman	Actor	1	None
Kevin Spacey	Actor	9	Fired, show & movie dropped
Brett Ratner	Director	1	None
Hamilton Fish	President, The New Republic	Multiple	Put on leave
Oliver Stone	Director	2	None
Danny Masterson	Actor	3	None
David Boies	Lawyer – hired investigation firm to spy	Conflict of Interest	Fired by New York Times

#METOO

- In its first week, #metoo was used on Twitter > **1 Million** times
- #metoo was used on Facebook by more than **4.7 million people** in **12 million posts** during the first 24 hours
- On Facebook, **more than 45% of people in the US** are friends with someone who posted a message using #metoo
- **Over 5 billion people** saw a #metoo tweet
- **30.1% of people** using the hashtag in the first week were men
- Canadians came behind only the US and UK for most #metoo tweets
- The tweet had global variations, all with the same purpose
- French #balancetonporc
- Spanish #YoTambien
- Arab countries, **وانا_ايضا#** and **وانا_كمان#**

A Question of Power

“I am a 28 year old woman trying to make a living and a career. Harvey Weinstein is a 64 year old, world famous man and this is his company. **The balance of power is me: 0, Harvey Weinstein: 10**”.

- Lauren O'Connor,
Former employee of The Weinstein Company

The Cost of Bad Behaviour

Criminal Charges

In the last few years, we have had plenty of reminders that there are many lessons to still be learned in the area of consent, sexual harassment and sexual assault.

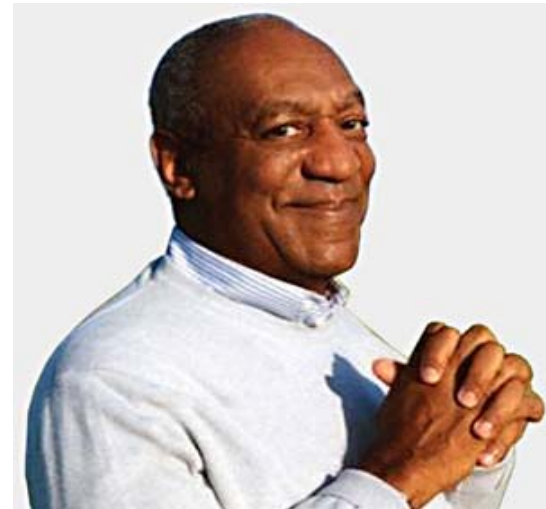
- Accused of physically and sexually assaulting multiple women on various occasions, including a colleague at CBC.
- Charged with four counts of sexual assault and one count of choking.
- Acquitted on 4 charges
- Subject to a peace bond without admission of guilt



The Cost of Bad Behaviour

Criminal Charges

- Accused of drugging and raping them, sexual battery, child sexual abuse and sexual misconduct.
- More than 30 women
- Between 1965 and 2008, Cosby took advantage of his position to assault young women, most within the film and television industry
- Trial ended in mistrial, new trial scheduled



The Cost of Doing (Bad) Business

Financial Penalties



Roger Ailes

At least 12 women over 20 years

\$45 million

(since July 2016)



Bill O'Reilly

At least 6 women over 15 years

\$45 million

(one settlement totalled \$32M)

FOX News has been involved in
\$90 million in settlements



Not Everyone Understands



Is This For Real?

George W. Bush Sr., the 41st President of the United States of America, has been accused of groping **at least 5 women**, and telling them his favourite magician is “David Cop-a-Feel”.

A statement released by the family said:

"To try to put people at ease, the president routinely tells the same joke - and on occasion, he has patted women's rears in what he intended to be a good-natured manner...Some have seen it as innocent; others clearly view it as inappropriate. To anyone he has offended, President Bush apologises most sincerely."

Where is the Line?

40% of Employees Have Had a Work Place Relationship

Human Rights Legislation

Prohibition Against Sexual Harassment and Reprisal

7. (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.

Where is the Line?

- (3) Every person has a **right to be free from,**
- a) **a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement** to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
 - b) **a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.**

Occupational Health and Safety Act

Section 32.0.1

- Employers with more than 5 employees must prepare **policies on workplace violence and harassment**
- Policies must be:
 - In writing
 - Reviewed at least annually
 - Posted visibly in the workplace

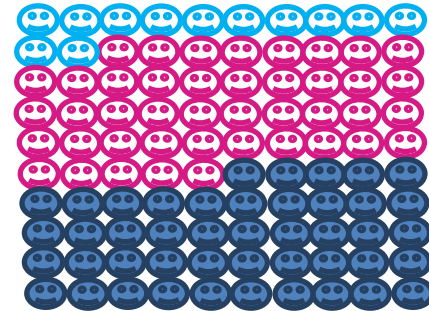
Occupational Health and Safety Act

Section 32.0.6

- Employers must develop a reviewable program for implementing the workplace harassment policy
- Program must include procedures for:
 - Reporting to the employer or supervisor
 - Reporting to someone else if the employer or supervisor is the harasser
 - Investigating complaints
 - Protecting complainant information where possible
 - Corrective action

The Canadian Context

- **43%** of Canadian women and **12%** of Canadian men say they have experienced sexual harassment at work
- **87%** of people believe the next generation will experience the same amount of sexual harassment as the current generation
- **4/5** people believe the next generation will experience the same amount sexual assault as the current generation



The Canadian Context

The Government of Canada conducted a self-selecting public consultation survey online in February-March 2017:

***all percentages are the percent of total respondents**

- **Respondents who reported workplace harassment or sexual harassment** in the past 2 years reported that they experienced these behaviours more than once
- 60% experienced general harassment, 30% sexual harassment, 21% violence, 3% sexual violence
- 94% who experienced sexual harassment were women
- 44% experienced harassing behaviour from a co-worker

The Canadian Context

- Men were more likely to experience non-sexual harassment than women
- People with disabilities or members of visible minorities were more likely to experience harassment than other groups

An Institutional Issue

- In many cases where powerful or influential individuals are accused, the **employer protects the harasser** (ex. Weinstein, O'Reilly)
- Ex. Weinstein's employment contract:
 - “You will pay the company liquidated damages of **\$250,000 for the first** such instance, **\$500,000 for the second** such instance, **\$750,000 for the third** such instance, and **\$1,000,000 for each additional** instance.”
- As long as he paid, he could keep his job.
- **Since the scandal, The Weinstein Company has been experiencing serious consequences, box office flops and reportedly contemplating a sale.**

Resolutions: The “Apology”

“I came of age in the 60’s and 70’s, when all the rules about behaviour and workplaces were different. That was the culture then...”

“...I want a second chance in the community but I know I’ve got work to do to earn it... I have been trying to do this for 10 years and this is a wake-up call...”

Excuse: I am an older man.

The “Older Men” Exception

Silvera v. Olympia Jewellery Corp. 2015

Michelle’s Story:

- Michelle Silvera
 - Administrative assistant at a jewellery store
 - Salary: \$28,000/year
- **Michelle experienced sexual harassment at work including her boss:**
 - Asking her to model pieces of jewellery and asking her to unbutton her shirt “so he could see the pendant clearly”



The “Older Men” Exception

Silvera v. Olympia Jewellery Corp. 2015

- Insisting on driving her home
- Showing her pictures of naked women on his computer
- Giving her uninvited massages
- Touching her breasts and buttocks without her consent
- After taking time off for surgery, Michelle was fired
- The business claimed she was terminated for cause due to her “prolonged absence from work”
- Michelle brought an action for wrongful dismissal, sexual assault and battery, racial and sexual harassment

The “Older Men” Exception

Silvera v. Olympia Jewellery Corp. 2015

The Ontario Superior Court awarded Ms. Silvera (who was a 1 ½ year employee earning \$28,000 a year) **\$312,056.56**.

\$ 90,000.00 - general and aggravated damages

\$ 30,000.00 - human rights general damages

\$ 33,924.75 - loss of future income

\$ 10,000.00 - punitive damages

\$ 42,570.00 - costs of future therapy and care

\$ 90,344.63 - wrongful dismissal

\$ 15,000.00 - Michelle’s daughter under Family Law Act

\$ 37.18 - subrogated OHIP claim

The “Kevin Spacey” Exception: Minors

E.T. v. Dress Code Express Inc. 2017

- E.T. was 14 years old.
- She worked at a retail store called Dress Code Express as a general helper.
- She worked 3-4 days a week for just under two months.
- E.T. was sexually harassed by her employer.
- Her employer (the owner) made comments about her body and her virginity

The “Kevin Spacey” Exception: Minors

E.T. v. Dress Code Express Inc. 2017

- E.T. was forced to give her employer massages.
- He would make comments of a sexual nature about customers and compare her to customers at the store.
- E.T.’s employer warned her not to engage in sexual activity with black people.
- Her employer would routinely enter her physical space, often brushing past her so that his crotch would touch her.

The “Kevin Spacey” Exception: Minors

E.T. v. Dress Code Express Inc. 2017

- The HRT found that E.T.’s employer had created a “poisoned work environment” in which she felt forced to give him a massage or lose her job and that E.T. experienced sexual and racial harassment.
- The HRT awarded E.T. **\$15,000** for the harm caused by the discrimination.
- For loss of dignity, injury to her feelings and self-respect
- The employer and the business were made jointly and severally liable
- The age of the applicant was an aggravating factor
- She was 14 and her employer was 65



What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnessh Dutta 2016

De Anna's Story:

- De Anna was a server at a restaurant called Houston Avenue Bar and Grill in Barrie.
- In September 2013, the restaurant got a new part owner, Mr. Dutta.



What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnessh Dutta 2016

- De Anna's new boss sat at the bar while she worked, and said things like
 - "I want to take you home"
 - "We are going to have our own party"
 - "You know I love you right?"
- Throughout her shift, De Anna's boss:
 - Grabbed her breast
 - Came up behind her and touched her
 - Caressed her arms, thighs and stomach
 - Grabbed her and backed her into a wall even though she said no to all of his advances.

What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnesh Dutta 2016

- The day after the incident, De Anna came into work and had a panic attack.
- She brought a complaint to the police but there was not enough evidence.
- De Anna told the General Manager, who attempted to help but was told by the owners “to make the issue go away” and was fired when he did not.
- The owners met with De Anna and told her:
 - “put on that pretty little smile of yours and do your job”
 - “take the hurt out of your heart and throw it away”

What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnesh Dutta 2016

- De Anna requested that Mr. Dutta not be there when she worked for a while, the owners refused.
- She was forced to resign as she was anxious and distraught, and the restaurant didn't accommodate her.
- De Anna made under minimum wage
 - Server wage - \$8.90/hour in 2014.
- All of the harassment happened on February 1, 2014.
- The restaurant failed to act, when the complaint was brought to it two days later

What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnessh Dutta 2016

- De Anna was awarded damages **\$29,440.52**
 - \$20,000 for injury to dignity, feelings and self-respect
 - **Exacerbated by the failure of the employer to act**
 - \$9,440.52 for wage loss
- Company faced consequences:
 - **Joint and severally liable** for the financial damages
 - Mr. Dutta was ordered to **complete Human Rights101 training**
 - The restaurant was required to adopt a **written policy for dealing with complaints and discrimination** within 3 months
 - The restaurant had to implement **mandatory training** within 6 months

Serious Consequences

Criminal Charges *R. v. J.P.* 2017

- A Halifax woman in her mid-20's came forward recently, alleging her supervisor sexually abused her for months
 - Repeatedly groping her
 - Making sexual comments under the guise of “fooling around”
 - Pulling her onto his lap
 - Putting his hand under her skirt
 - Touching her breasts
 - Opening her blouse
 - Repeatedly telling her he wants to have sex with her

Serious Consequences

Criminal Charges *R. v. J.P.* 2017

- One incident was caught on video
- Complaints were brought to other managers, who were unsupportive of her complaint and did nothing
- She filed criminal charges
- The supervisor was **sentenced to 8 months of house arrest and a year of probation for sexual assault**
- He is a permanent resident in Canada and **may face deportation.**

Is There a New Code? Is There a New Social Script?

Next Steps

- Recognize that HR issues are about the heart and soul of an organization
- Good corporate governance necessitates strong HR policies
- Annual review of complaints and Annual review of code of conduct
- Annual training
 - Training should be specific to every section of the protected ground but highlight gender, race and disability and harassment and bullying

Is There a New Code? Is There a New Social Script?

Next Steps

- Identify leaders, those who people feel comfortable with to address those issues
- Formal complaint process
- Informal complaint process
- Ensure employees know their complaints are held in confidence, though may not be confidential if action is required
- Message should be clear, a Company does not tolerate harassment, assault or abuse of power.

What are the Limits for Counsel?

- Conflict of Interest
- Rules of Professional Conduct
- Cannot subvert the law
- Front page of the STAR – media considerations
- Local and International law



Questions?

Contact Us

Soma Ray-Ellis



T 416.865.6709



E srayellis@grllp.com



W grllp.com



[@grllp](https://twitter.com/grllp)





Immigration Law 101

By: Gretchen Aylward

BARCLAY DAMON^{LLP}

ADMISSION CATEGORIES

IMMIGRANTS

- ▶ come to the U.S.
to take up
permanent residence

= PERMANENT

STAY IN THE U.S.

(ex. INA § 203(a) or (b) including
Immediate relatives, FB- or EB-
Preference categories)

NONIMMIGRANTS

- ▶ enter the U.S. for a
specific purpose for a
temporary period of time.

= TEMPORARY

STAY IN THE U.S.

(ex. INA § 101(a)(15)
including F-1 student, B-2/
B-1 business or pleasure visitor)

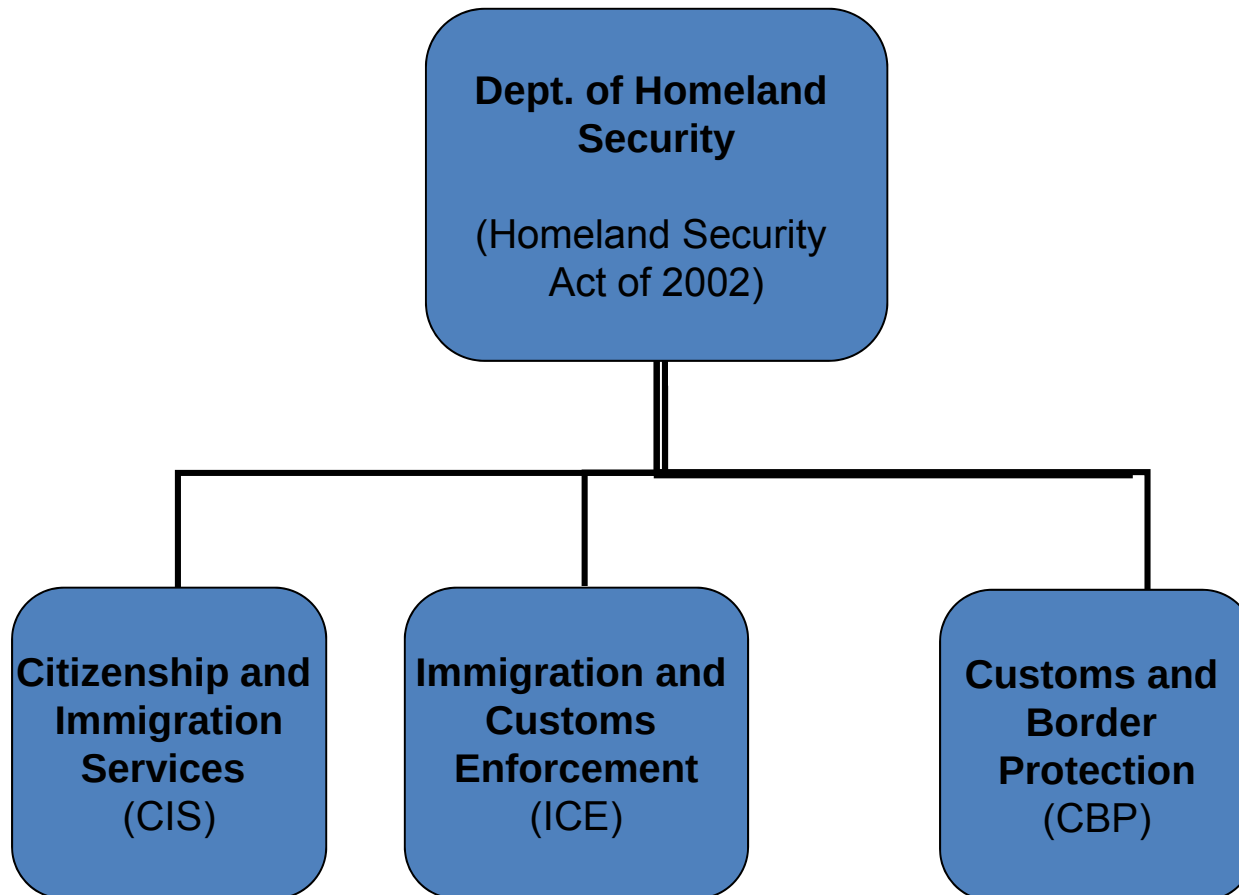
DEFINITION OF “ADMISSION”

- **INA §101(a)(3): “ALIEN”** = any person who is not a United States citizen or national of the United States.
- **INA §101(a)(4): “APPLICATION FOR ADMISSION”** = refers to application for admission to the United States (i.e., and not the application for the issuance of an immigrant or nonimmigrant visa.)



- **INA §101(a)(13)(A): “ADMISSION” or “ADMITTED”** = the lawful “entry” of an alien into the U.S. **after inspection and authorization** by an immigration officer.
- **INA §101(a)(13)(B): “PAROLED” INA 212(d)(5) or allowed to enter as a “crewman” ≠ “ADMISSION”**

The Agencies



U.S. CITIZENSHIP AND IMMIGRATION SERVICES (“CIS”)

- Adjudication of affirmatively filed immigration applications
(*ex. Forms I-130, I-140, I-485, N-400*)
- Application Support Centers (i.e., biometric/fingerprinting centers)
- Applications examined to determine
 - a. bonafide
 - b. INA statutory requirements are met

U.S. CUSTOMS AND BORDER PROTECTION ("CBP")

- Protects US ports of entry ("POE"'s) (i.e., land, water, air)
- Combines customs and immigration inspections at POEs
- Responsible for:
 - a. Inspection of persons and goods
 - b. Determines issues of admissibility for all aliens (INA § 212)
 - c. Adjudicates affirmatively-filed applications for admission (*i.e., nonadmissibility waivers, parole, etc.*)
- Examines all persons and their entry documents for evidence to support lawful "admission" (INA § 101(a)(13))
and
- admissibility (INA § 212)

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (“ICE”) (Interior Enforcement)

- Patrols U.S. interior to investigate immigration violators
- Authority to:
 - identify,
 - arrest,
 - detain and
 - remove(i.e., includes expedited removal) immigration violators
- Prosecute violators with the assistance of the Office of Chief Counsel (run by DHS)
- ICE = the principal investigative arm of the U.S. Department of Homeland Security and the second largest investigative agency in the federal government.

CATEGORIES OF IMMIGRANT ADMISSION

- **FAMILY-BASED PREFERENCE** (FB)
480,000
- **EMPLOYMENT-BASED PREFERENCE** (EB)
140,000
- **DIVERSITY IMMIGRANT PROGRAM** (D)
55,000
- **REFUGEES** (REF)
47,000 to 126,000 (range)
(i.e., includes overseas resettlement programs and asylum applications on US soil)

INA §201 (annual quotas), **INA §202** (state quotas) and **INA §203** (preference categories)

ADMISSION: FAMILY-BASED PREFERENCE

“IMMEDIATE RELATIVES” INA §201(b)(2)(A)(i)
(= SPOUSE, PARENT OR CHILD OF A U.S. CITIZEN)

- **“Spouse”** INA §101(a)(35)
= “CONDITIONAL LAWFUL PERMANENT RESIDENT” SPOUSE
(i.e., married to US citizen spouse for less than 2 years when lawful permanent residence granted based on marriage)
- **“Parent”** INA §101(b)(2)
= PARENTAL RELATIONSHIP ESTABLISHED WHEN SON/ DAUGHTER WAS A “CHILD”) (*Jus soli citizenship rules*)
- **“Child”** INA §101(b)(1)
= UNDER 21 YRS OF AGE AND UNMARRIED (see INA § 201(b))
(= **adopted “child”** if adoption completed before child is 16 years of age)

ADMISSION

FAMILY-BASED PREFERENCE

FIRST (1ST) FAMILY-BASED PREFERENCE	Unmarried Son or Daughter of USC	INA §203(a)(1)
SECOND (2ND) FAMILY-BASED PREFERENCE	LPR Spouse and “Child” & Unmarried Son or Daughter	INA§ 203(a)(2)
SECOND (2A) FAMILY-BASED PREFERENCE	Spouse and “Child” of LPR	INA § 203(a)(2)(A)
SECOND (2B) FAMILY-BASED PREFERENCE	Unmarried Son & Daughter of LPR	INA § 203(a)(2)(B)
THIRD (3RD) FAMILY-BASED PREFERENCE	Married Son & Daughter of USC	INA § 203(a)(3)
FOURTH (4TH) FAMILY-BASED PREFERENCE	Brother or Sister of USC (USC sibling must be 21 yrs old +)	INA § 203(a)(4)

EMPLOYMENT-BASED IMMIGRANT VISAS

1st Priority Worker	(a) Aliens w/Extraordinary ability (b) Outstanding Profs & Researchers (c) Multinational Execs & Managers	INA § 203(b) (No LC required)
*2nd Advanced Degree & Exceptional Ability Foreign Nationals	(a) Aliens with Advanced Degrees (b) Aliens with Exceptional Ability (Note: * National Interest Waiver)	INA §203(b)(2) (No LC if NIW granted)
3rd Skilled Workers, Professionals and Unskilled Workers	(a) Skilled Workers (b) Professionals (c) Unskilled Workers	INA §203(b)(3) (LC required)
4th Special Immigrant (defined in INA §101(a)(27)(C) –(M))	Includes reacquisition of citizenship and returning residents; religious workers; court-protected juveniles; and US Consulate employees in Hong Kong	INA §203(b)(4) (No LC required)
5th Investors (2 yr conditional LPR status)	Invest \$ 1 million+ (or \$500,000+ in target rural & high unemployment areas) in new or existing business and create 10+ jobs for USC's	INA §203(b)(5) (No LC required)

LABOR CERTIFICATION PROCESS

LABOR CERTIFICATION CRITERIA (INA § 212(a)(5)(A))

- (i) shortage of qualified US workers (cannot displace US workers) and
- (ii) hiring of alien does not adversely affect wages or working conditions of a US worker in similar occupation

****NOTE: LABOR CERTIFICATION NOT REQUIRED IN:
EB-1 (aliens with extraordinary ability)
EB-2 (w/national interest waiver)
EB-4 (special immigrant)
EB-5 (investor)***

PERM CRITERIA

EMPLOYER MUST ESTABLISH:

- **GOOD FAITH RECRUITING EFFORTS** to find:
- **Qualified US workers** willing and able to work in occupation
- Offer **prevailing wage**
- Job requirements are **not unduly restrictive**
- **Interviewed any US qualified workers** and rejected them for lawful job-related reasons

What is the “EB-5 Investor Visa”

- A Program created by U.S. Congress in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors.
- Invest as little as \$500,000 into a “for profit” commercial enterprise
- Take on “active managerial responsibility” (limited partnerships sufficient)
- Prove the lawful source for investment funds (documentation such as tax returns, mortgages, business records)
- Show that the investment will create at least 10 full-time jobs within 2 years of the investment

State Department Visa Bulletin

Family-Based, November 2017

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	22JAN11	22JAN11	22JAN11	01APR96	01JAN07
F2A	15NOV15	15NOV15	15NOV15	01NOV15	15NOV15
F2B	15NOV10	15NOV10	15NOV10	22JUL96	01JAN07
F3	15AUG05	15AUG05	15AUG05	08MAY95	01MAR95
F4	22MAY04	22MAY04	22OCT03	08OCT97	08JUN94

<http://www.travel.state.gov/visa/bulletin>

State Department Visa Bulletin

Employment-Based, November 2017

Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	15JUN13	C	08OCT08	C	C
3rd	C	01FEB14	C	15OCT06	C	15JAN16
Other Workers	C	01APR06	C	15OCT06	C	15JAN16
4th	C	C	01NOV15	C	01APR16	C
Certain Religious Workers	C	C	01NOV15	C	01APR16	C
5th Non-Regional Center (C5 and T5)	C	01JUL14	C	C	C	C
5th Regional Center (I5 and R5)	C	01JUL14	C	C	C	C

<http://www.travel.state.gov/visa/bulletin>

OBTAINING IMMIGRANT VISA FROM ABROAD

See INA §§ 204-206

Petitioner

**Files Family Based
Immigrant Petition with
USCIS**

**(i.e., Form I-130 Petition
for Alien Relative)**

**Files Labor Certification
with US Dept of Labor and
then Employment Based
Immigrant Petition with
USCIS**

**(i.e., Form I-140, Petition
for Alien Worker)**

Beneficiary

**Approval of Petition Goes
to US State Dept. National
Visa Center**

**US Consulate Abroad
Notified and Screening for
Admission and Statutory
Eligibility Conducted with
Beneficiary Abroad**

OBTAINING IMMIGRANT VISA FROM WITHIN US

See INA § 245

Petitioner

Files Family Based
Immigrant Petition with
USCIS (Form I-130 Petition)

(Exception: VAWA
applicant may self-petition)

Files Labor Certification
with US Dept of Labor and
then Employment Based
Immigrant Petition with
USCIS (Form I-140 Petition)

Beneficiary (i.e., if lawfully admitted as nonimmigrant)

Files Form I-485,
Adjustment of Status
Application with USCIS

US CIS Screens for
Admission and Statutory
Eligibility



“ADMISSION” PROCESS FOR NONIMMIGRANTS

BARCLAY DAMON LLP

***EXCEPTION TO VISA REQUIREMENT: VISA WAIVER PROGRAM**

Citizen or National of VWP Designated Country*

Citizens or nationals of the following countries* are currently eligible to travel to the United States under the VWP, unless citizens of one of these countries are also a national of Iraq, Iran, Syria, or Sudan.

Andorra	Hungary	Norway
Australia	Iceland	Portugal
Austria	Ireland	San Marino
Belgium	Italy	Singapore
Brunei	Japan	Slovakia
Chile	Latvia	Slovenia
Czech Republic	Liechtenstein	South Korea
Denmark	Lithuania	Spain
Estonia	Luxembourg	Sweden
Finland	Malta	Switzerland
France	Monaco	Taiwan*
Germany	Netherlands	United Kingdom**
Greece	New Zealand	

EXCEPTION TO VISA REQUIREMENT: VISA WAIVER PROGRAM

- **Only available for B-1/B-2 status**
(i.e., business/pleasure visitors pursuant to INA §101(a)(15)(B) and is evidenced by CBP issuance of Form I-94, Departure Record that is green in color)
- **NO VISITOR VISA REQUIRED FROM US CONSULATE PRIOR TO SEEKING ADMISSION**
- **ALLOWS ADMISSION FOR UP TO 90 DAYS MAXIMUM**
- **RESERVED FOR COUNTRIES WITH LOW VISA ABUSE RATES**

OTHER EXCEPTIONS TO NONIMMIGRANT VISA REQUIREMENTS for CANADIANS & MEXICANS

- **Mexican nationals** are required to use a border crossing card (DSP-150) for admission for up to 72 hours to travel within 25 miles of the border or 75 miles of Arizona POE's
- **Canadians** are visa-exempt but require a machine-readable, valid Canadian passport
(**Exception:** Require E visa for treaty trader or treaty investor status)

PRESUMPTION OF IMMIGRANT “INTENT” (INA § 214(b))

- **Every alien...shall be presumed** to be an **immigrant** until he has established to the satisfaction of the consular officer (at the time of applying for a visa) and to an immigration officer (at the time of applying for admission) that he is entitled to **nonimmigrant status...**
- **EXCEPTIONS:** L, V and H nonimmigrant visas
- Most important: ***“has a residence in a foreign country which he has no intention of abandoning.”*** (INA § § 101(a)(15)(B), (F), (J))
- **NOT A BONA FIDE NONIMMIGRANT** if intent from the beginning is to remain in the US permanently by any means possible, **legal or otherwise**

NONIMMIGRANT ARRIVAL AT US PORT OF ENTRY

- **CBP PRIMARY INSPECTION:** (i.e., initial inspection)
- **CBP SECONDARY INSPECTION:** (i.e., referral for further inspection/interview)
- **CBP DEFERRED INSPECTION:** (i.e., allowed “entry” upon condition to return to CBP or to report to nearest ICE District Office for further inspection as to admissibility or deportability)
- **CBP INSPECTION REQUIRED TO DETERMINE:**
 1. Statutory qualifying requirements are met and
 2. NOT inadmissible (pursuant to INA §212(a))

DENIAL OF ADMISSION AT THE US PORT OF ENTRY

- **EXPEDITED REMOVAL** = as part of IIRIRA (1996) CBP may refuse admission to “arriving aliens” suspected of:
 1. **lacking valid travel documents or**
 2. **attempting entry through fraud or misrepresentation.**
- **REMOVAL AT THE PORT OF ENTRY WITHOUT RIGHTS TO AN IMMIGRATION HEARING ACCOMPANIED BY A 5-YEAR BAR FROM ADMISSION TO THE U.S.**
- **REFERRED FOR REMOVAL PROCEEDINGS** (i.e., referral to ICE for detention or released pending proceedings)
- **WITHDRAW APPLICATION FOR ADMISSION** = applicant may ask CBP to be allowed to **withdraw application for admission** and depart US port of entry without referral for removal
(See INA §235(a)(4))



COMMON NONIMMIGRANT STATUS CATEGORIES

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VISITOR (B-1/B-2)

- Visitor for pleasure or business
- No intention of abandoning foreign residence
- max. 6 months admission
- **INA§ 101(a)(15)(B)**

STUDENT (F-1/F-2)

- Admitted for educational program (includes spouse/child)
 - (“D/S” = Duration of Status on I-94 Departure Record)
 - “residence in foreign country” w/no intention of abandoning
- **INA § 101(a)(15)(F)**

EXCHANGE STUDENT (J-1/J-2)

- Admitted to complete an exchange program (cultural, educational, etc. approved by State Department Bureau of Educational and Cultural Affairs)
- May require applicant return to native country for 2 years = “residency return requirement”
- **INA§ 101(a)(15)(J)**

E: Treaty Trader & Investor

- Allows a national of a treaty country to be admitted to the US to engage in “international trade” on his or her behalf

E-1: Must engage in substantial trade in qualifying activities between the US and treaty country; or

E-2: Develop and direct the operations of the enterprise in which substantial amount of capital is invested

L-1: Intra-company Transfer

- Non-immigrant status that allows a Canadian employer to transfer an executive, manager or employee with “specialized knowledge” to its affiliated US office
- **Qualifications:**
 - 1) Qualifying relationship; and
 - 2) Must be “doing business”
 - Regular, systematic and continuous provision of goods/services by a qualifying organization
 - Must have been working for the organization abroad for one year within immediate past 3 years

SPECIALTY OCCUPATION WORKER (H-1b)

- Requires: theoretical and practical application of a body of highly specialized knowledge and
- bachelor's or higher degree in the specific specialty (or its equivalent)
- Employer must file labor condition application with US Dept. of Labor (i.e., prevailing wage)
- ONLY nonimmigrant visas that has a cap on #

INA§ 101(a)(15)(H)(i)(b)

TN: NAFTA Professional

- Allows qualified Canadian and Mexican citizens to enter into the US to engage in professional activities
- Cannot be self-employed

Qualifications:

1. Citizen of Canada or Mexico
2. Be a professional under the regulations
3. Must be qualified to practice

O and P visa

- No intention abandoning foreign residence
- Reserved for noncitizens who have attained prominence in their field (i.e., “distinguished by his/her merit and ability.”) – for O visas in the field of science, arts, education, business or athletics and requires “extraordinary ability which has been demonstrated by sustained national or international acclaim.”
- P visas in the field of arts or entertainment

INA§101(a)(15)(O) and INA§ 101(a)(15)(P)

OTHER NONIMMIGRANT CATEGORIES

*S visa (Informant)	-Possesses critical reliable information concerning a criminal organization or enterprise -Willing to supply or has supplied information -Presence in the US essential for criminal prosecution as determined by the AG	INA § 101(a)(15)(S) (allows dual intent)
*T visa (Trafficking Victim)	-Victim of human trafficking -Willing to supply or has supplied such information to enforcement authorities or court -Brought to the US as a result of force, fraud or coercion and -Would suffer extreme hardship if removed from the U.S.	INA § 101(a)(15)(T)
*U visa (Victim of Crime)	-Victim of a serious crime -Willing to supply or has supplied such information to enforcement authorities -Needs to be certified by law enforcement or the court	INA § 101(a)(15)(U)

***Provides path to immigrant status.**

Thank You

Gretchen Aylward

Barclay Damon, LLP

(716) 566-1558

gaylward@barclaydamon.com

The Queen v. Gerard Comeau Case

Presented by: Ian Blue, Q.C.
November 9, 2017



R. v. Gérard Comeau

Background

On Saturday, October 6, 2012 Gerard Comeau of Tracadie, New Brunswick drove to Pointe-A-la-Croix and the Listiguj First Nation Indian Reserve in Quebec.

These communities are right across the J.C. Van Home Bridge from Tracadie where M. Comeau lived.

R. v. Gérard Comeau

Background

Once he arrived in Quebec, the RCMP were surveilling him.

Mr. Comeau purchased a quantity of beer, wine and liquor.

The RCMP followed him onto the bridge and radioed ahead to Campbellton RCMP who stopped, searched and charged him.

R. v. Gérard Comeau

The Charge

- He was charged under s. 134(1)(b) of New Brunswick's Liquor Control Act:

134(1)(b). Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall(b) have or keep liquor not purchased from the Corporation.

R. v. Gérard Comeau

M. Comeau's argument

- s. 134(b) of the LCA prevented the free movement of beer, wine and liquor from Quebec into new Brunswick
- It violated Canada's Constitution!
- s. 121 of the Constitution Act, 1867.

All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

R. v. Gérard Comeau

- No one had ever argued s. 121 successfully before
- In 1920, the SCC had said that the only thing s. 121 prohibited was custom duties at the provincial border.
- It did not prohibit other types of trade barriers

Gold Seal Limited v The Attorney General of the Province of Alberta (1921), 62 SCR 424 [Gold Seal Case].

R. v. Gérard Comeau

- Gold Seal Case was followed in three subsequent SCC decisions.
- *Atlantic Smoke Shops Ltd v Conlon*, [1943] 4 DLR 81 (JCPC)
- *Murphy v CPR*, [1958] SCR 626
- *Re Agricultural Products Marketing Act*, [1978]

R. v. Gérard Comeau

Comment on Subsequent Cases

- In all three decisions, the Court applied the Gold Seal interpretation.
- What has changed since 1978?

R. v. Gérard Comeau

What Changed to cast doubt on Gold seal?

- The SCC 's decision on The Charter have provided new rules for interpreting our Constitution.
- In 2003 the Supreme Court said that the living tree principle is “a fundamental tenet of constitutional interpretation.”

[R v Blais, [2003] 2 SCR 236 at para 40].

R. v. Gérard Comeau

What Changed to cast doubt on Gold seal? ...cont'd

- The Court also said that the Constitution must be interpreted “purposefully”.
- A purposive interpretation of a provision requires the court to consider:
 - the wording of the act,
 - the legislative history of the provision,
 - the scheme of the act, and
 - the legislative context of the provision.

[R v Kapp, 2008 SCC 41, [2008] 2 SCR 483 at para 82.]

R. v. Gérard Comeau

Wording

- S. 121 said that goods “shall be admitted free”.
- This was a change from the older provisions that had said goods “shall be admitted free from duty”.
- This change was made because the U.S. government had used non tariff trade barriers against Canada during the Civil war.

R. v. Gérard Comeau

Legislative History

- Confederation was greatly influenced by the prospect of interprovincial free trade with no trade barriers of any kind.
- s. 121 was therefore an important provision of the BNA, 1867 and for the Confederation.

R. v. Gérard Comeau

Scheme of the Act

- Section 121 is found in a Part of the Constitution that contains the financial deal underlying Confederation.
- S. 121 therefore was needed to provide provinces with a new revenue source to replace their tariffs.
- Revenue would come from the increased prosperity that interprovincial-trade profits would provide.

R. v. Gérard Comeau

- In 1920, s. 121 was misinterpreted by the SCC in *Gold Seal*.
- *Gold Seal* was about whether the CTAA had been properly proclaimed in Alberta.
- It was not really about s. 121.

R. v. Gérard Comeau

Gold Seal Concluded

- The Gold Seal interpretation of s. 121 was an expedient decision.
- It is doubtful that the Supreme Court will follow it.

R. v. Gérard Comeau

The Trial before Judge Ronald LeBlanc

- The Defence argued that s. 134(b) of the LCA violated a purposive and progressive interpretation of s. 121
- The Defence called one of Canada's foremost historians of the Constitutional era, Dr. Andrew Smith, as a witness.
- The Crown called a political scientist, Dr. Tom Bateman of St. Thomas University.

R. v. Gérard Comeau

The Crown Arguments

- There exists a presumption of total legislative competence or "exhaustiveness" which allows the Parliament of Canada and the provincial legislatures between them to legislate on any topic exhaustively.
- The purposive and progressive interpretation would be contrary to cooperative federalism.

R. v. Gérard Comeau

Crown Arguments Continued

- A one size fits all approach to s. 121 is wrong.
- Political history shows that s. 121 should not be inviolable.

R. v. Gérard Comeau

What the Crown Did Not Argue

- The Crown did not and never has suggested that the Defence analysis of s. 121 was wrong or overlooked any point of law.
- They did not dispute our analysis of the Gold Seal Case.
- They not cite any contrary decision on point.
- Their arguments were political rather than legal.

R. v. Gérard Comeau

- On April 29, 2016 Judge LeBlanc dismissed the charge against Gerard Comeau.
- He held that s. 121 permits the free movement of goods among the provinces without barriers, tariff or non-tariff.
- His Judgment was an impressive piece of judicial scholarship of which any provincial court of appeal or the Supreme Court of Canada would be proud.

R. v. Gérard Comeau

Judge LeBlanc's Decision

- He held that If the evidence that was presented before him at this trial had been brought to the attention of the justices of the Supreme Court of Canada
- In their deliberations on the Gold Seal case the result would have been different.
- He held that the Gold Seal case was wrongly decided.

R. v. Gérard Comeau

Judge LeBlanc's decision

- Interpreting section 121 of the Constitution Act, 1867 as permitting the free movement of goods among the provinces without barriers, tariff or non-tariff will have a resounding impact.

R. v. Gérard Comeau

Judge LeBlanc's Decision

- Section 134(b) of the Liquor Control Act of New Brunswick is a trade barrier which violates section 121 of the Constitution Act, 1867 and is therefore of no force or effect as against Gérard Comeau.

R. v. Gérard Comeau

The Crown Seeks Leave to Appeal to the NBCA

- On October 20, 2016 the Crown's application for leave to appeal to the Court of Appeal under 116 of the POPA was dismissed.
- This was a surprise to both the Crown and the Defence.

R. v. Gérard Comeau

The SCC Case

- On January 16, 2017, the Crown sought leave from the SCC to appeal the refusal of leave to appeal by the NBCA and, if leave is granted, to appeal Judge LeBlanc's decision directly to the SCC.
- The Defence supported this request so that s. 121 could be clarified by the SCC.
- On May 4, 2017 all nine judges of the SCC granted leave to the New Brunswick Crown to appeal directly from Judge Le Banc's decision.

R. v. Gérard Comeau

The SCC Case

- All governments in Canada except Yukon and Manitoba have intervened to attempt to set aside Judge LeBlanc's Decision.
- Twelve non-government interveners are also participating, some supporting the decision and others opposing it.
- The Court will hear the case on December 6 and 7, 2017

R. v. Gérard Comeau

The SCC Case

- Trade barriers have resulted in Canadians paying higher prices for Canadian goods than would otherwise be required.
- In one study, it has been estimated that inter-provincial trade barriers add between 8% and 14% to the cost of all goods and services in Canada.

R. v. Gérard Comeau

The SCC Case

- Eliminating those costs would lead to a real GDP gain of between 3% to 7% or between \$50 and \$130 billion annually.
- Another study shows that there is an implied tariff equivalent of 6.9% due to provincial trade barriers.
- This contrasts with the United States where there are few comparable inter-jurisdictional trade barriers.

R. v. Gérard Comeau

The SCC Case

- We are optimistic that the Court will hold that it is time to allow the Gold Seal Interpretation and the plethora of internal trade barriers that it has generated to creep quietly into history.
- The Court will likely provide Canadians with a progressive and purposive interpretation of s. 121 so that it may fulfill its proper and intended constitutional role.

R. v. Gérard Comeau

The SCC Case

- This would release enormous economic potential that would benefit Canadians and Canada for generations to come.
- Stand by!
- Thank you for your attention.

Contact Us

Ian Blue, Q.C.



T 416.865.2962



E ibblue@grllp.com



W grllp.com



[@grllp](https://twitter.com/grllp)



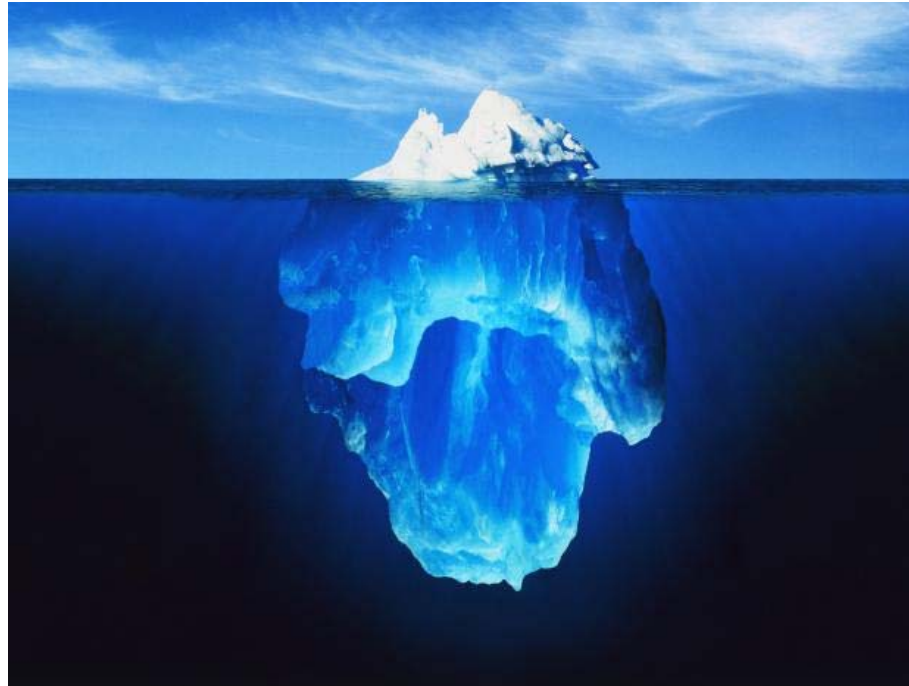
Corruption of Foreign Public Officials Act

Presented by: Kenneth Jull
November 9, 2017



The Nordion Case Study

Risks Below the Surface



UNITED STATES OF AMERICA before the SECURITIES
AND EXCHANGE COMMISSION, March 3, 2016 in the
matter of NORDION (CANADA) INC.

1. Nordion was, and Respondent now is, a leading provider of medical isotopes and sterilization technologies. Nordion provided, and Respondent now provides, medical isotopes for molecular and diagnostic imaging, radiotherapeutics and sterilization technologies.

UNITED STATES OF AMERICA before the SECURITIES
AND EXCHANGE COMMISSION, March 3, 2016 in the
matter of NORDION (CANADA) INC.

2. Gourevitch, an engineer employed by Nordion during the relevant time period, represented to Nordion that his purported childhood friend from Russia, who was now a Russian businessman, knew how to navigate the business landscape in Russia and might be able to help Nordion obtain contracts for cobalt-60 supply in Russia.

UNITED STATES OF AMERICA before the SECURITIES
AND EXCHANGE COMMISSION, March 3, 2016 in the
matter of NORDION (CANADA) INC.

3. Based solely on Gourevitch's recommendation, in or around the summer of 2000, a department manager at Nordion informally authorized Gourevitch's friend and one of his companies (referred to hereinafter, along with another one of those companies, as "Agent") to meet with Russian officials on behalf of Nordion in an effort to procure cobalt-60 supply contracts.

UNITED STATES OF AMERICA before the SECURITIES
AND EXCHANGE COMMISSION, March 3, 2016 in the
matter of NORDION (CANADA) INC.

4. Nordion had little or no experience using third-party agents in Russia prior to Gourevitch's suggestion. Historically, Nordion obtained cobalt-60 directly from the Canadian government and sold its products directly to health care institutions. It also had little experience operating in jurisdictions with a high-risk of corruption. Nordion provided little, if any, anticorruption compliance training to its employees about how to conduct business in countries well known for corruption.

UNITED STATES OF AMERICA before the SECURITIES
AND EXCHANGE COMMISSION, March 3, 2016 in the
matter of NORDION (CANADA) INC.

5. The Agent had no experience in the nuclear power industry, nuclear medicine or medical isotopes. However, in or around March 2002, Nordion executed the first written consulting agreement which retained the services of the Agent to obtain medical isotopes from a Russian government instrumentality. As of that time, Nordion had performed virtually no due diligence on the Agent.

UNITED STATES OF AMERICA before the SECURITIES
AND EXCHANGE COMMISSION, March 3, 2016 in the
matter of NORDION (CANADA) INC.

6. After the Agent was able to help Nordion obtain medical isotopes from Russia, Nordion expanded its relationship with the Agent. In or around 2004, Nordion procured the services of the other Agent to help Nordion obtain government approval for a liver cancer treatment, TheraSphere.

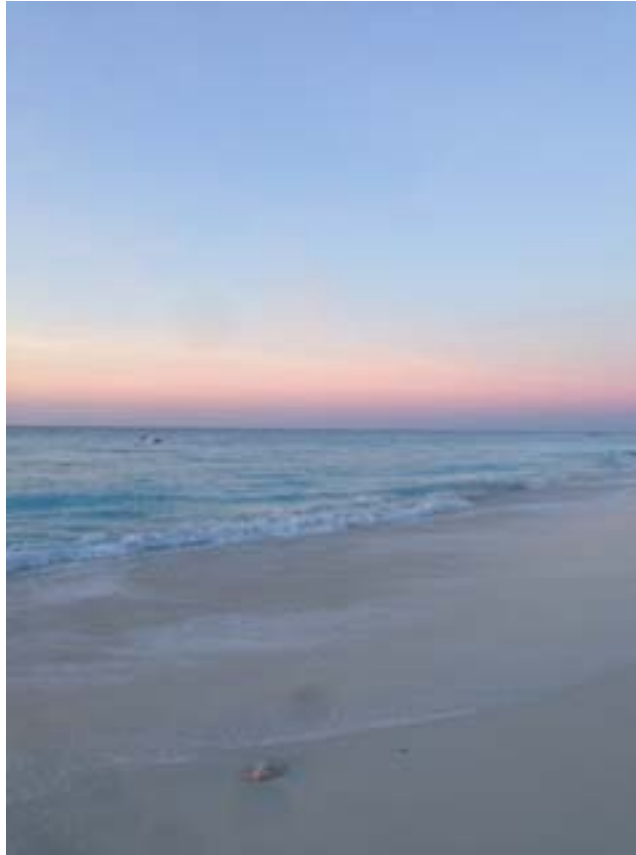
UNITED STATES OF AMERICA before the SECURITIES
AND EXCHANGE COMMISSION, March 3, 2016 in the
matter of NORDION (CANADA) INC.

7. Nordion entered into a contract with that Agent to register, license, and distribute its liver cancer treatment, TheraSphere, in Russia. Gourevitch again played a principal role in the relationship between Nordion and the Agent.
8. Gourevitch and the Agent conspired to use a portion of the funds Nordion paid the Agent to bribe Russian government officials to obtain approval for TheraSphere. The Agent also paid Gourevitch some of the money it received.

An Internal Audit in Relation to Employee Loyalty Leads to a Wider Discovery

- Nordion suspected that Gourevitch was running a business on the side, in competition with Nordion and potentially in breach of his employment agreement
- A routine audit of the e-mail account of Gourevitch revealed a spreadsheet in Russian that had been sent by Gourevitch to the Russian agent with a note that the agent was behind in his payments
- It appeared from the spreadsheet that this was a kick back scheme
- Nordion retained counsel to conduct an internal investigation

Keyword Searches of Emails Included Caribbean Islands Which Revealed Offshore Bank Accounts



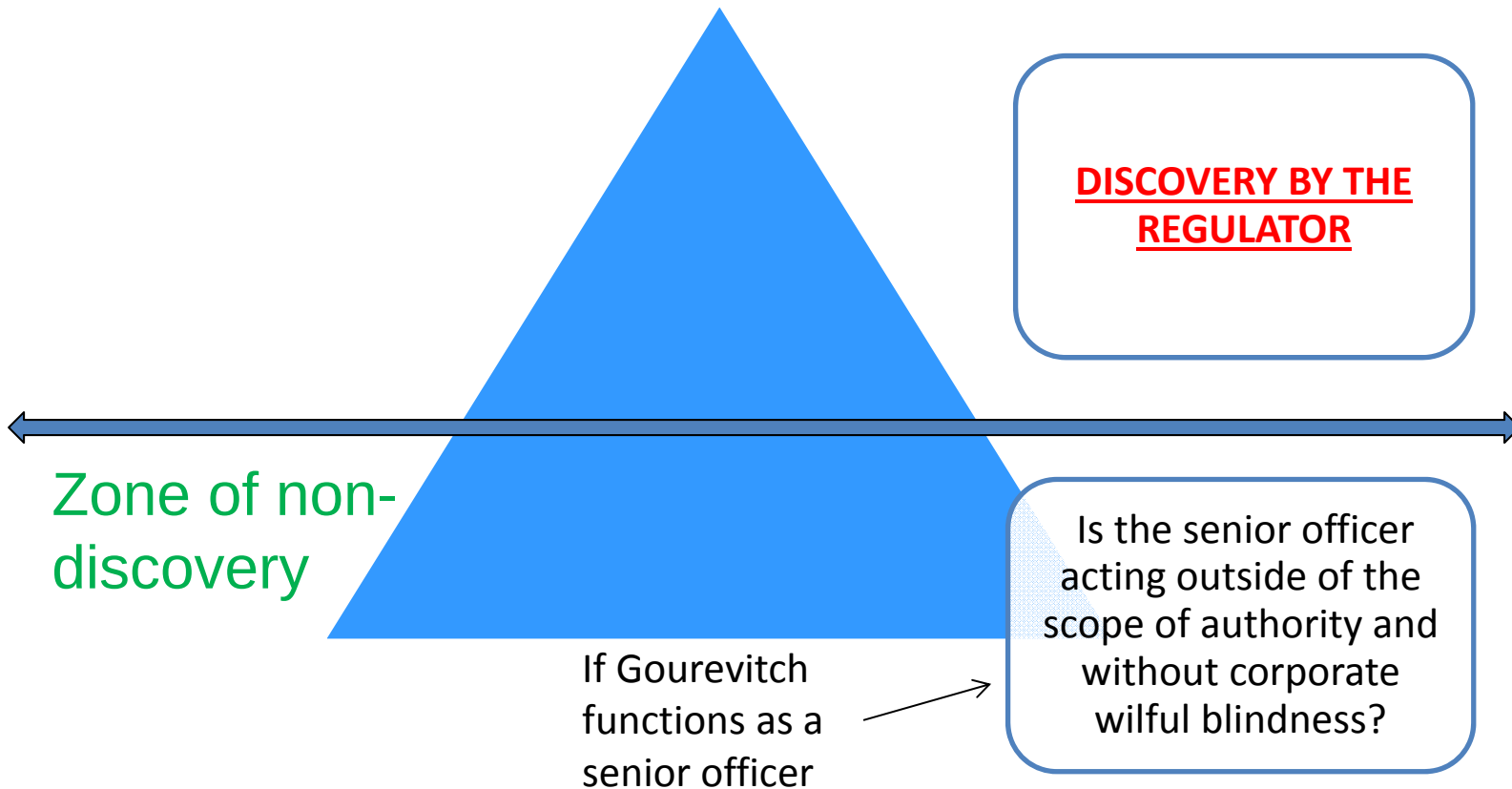
UNITED STATES OF AMERICA before the SECURITIES
AND EXCHANGE COMMISSION, March 3, 2016 in the
matter of NORDION (CANADA) INC.

9. Email communications (primarily in Russian) between Gourevitch and the Agent documented their contemplated bribe scheme. For example, the Agent emailed cost estimates to Gourevitch for each step of the process required to register and license Therasphere in Russia. These cost estimates noted the payment of “unofficial costs” or bribes to Russian government officials. “Official” government fees were listed and then additional agent fees were

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AND EXCHANGE COMMISSION, March 3, 2016 in the
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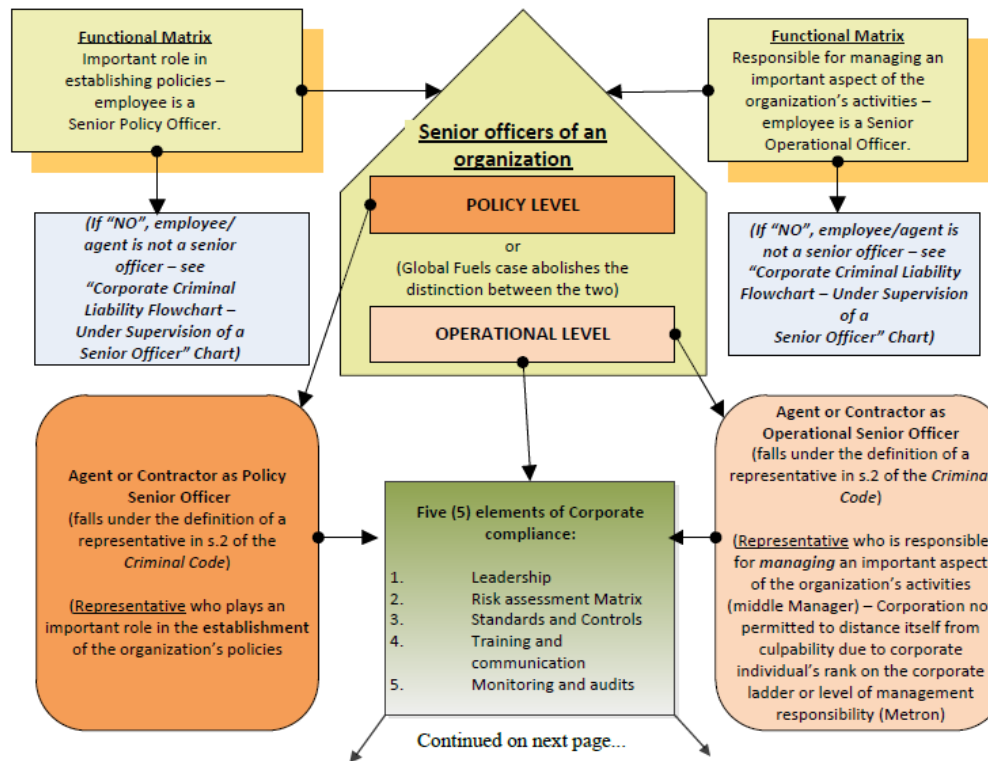
9. (cont'd) added to “manage” the approval process or to “ensure the favorable acceptance of TheraSphere” by the Russian government. However, Gourevitch revised the cost estimates before any other Nordion employee reviewed it to increase the budget estimates to hide the costs of the bribes and remove any reference to “unofficial costs” or bribes. In an email, Gourevitch told the Agent, “**Nordion does not want to see the bribes in your cost estimate and justification.**” [emphasis added].

Zone of Non-Discovery



Corporate Criminal Liability Flowchart

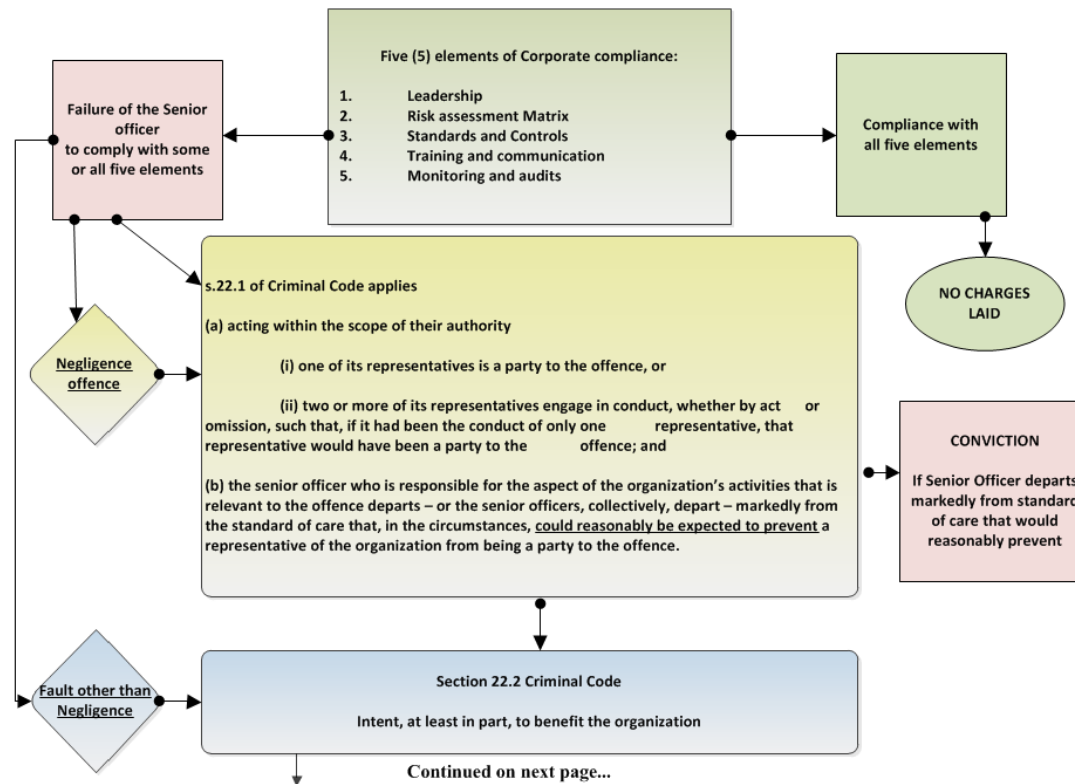
Senior Officer Level



Corporate Criminal Liability Flowchart

Senior Officer Level

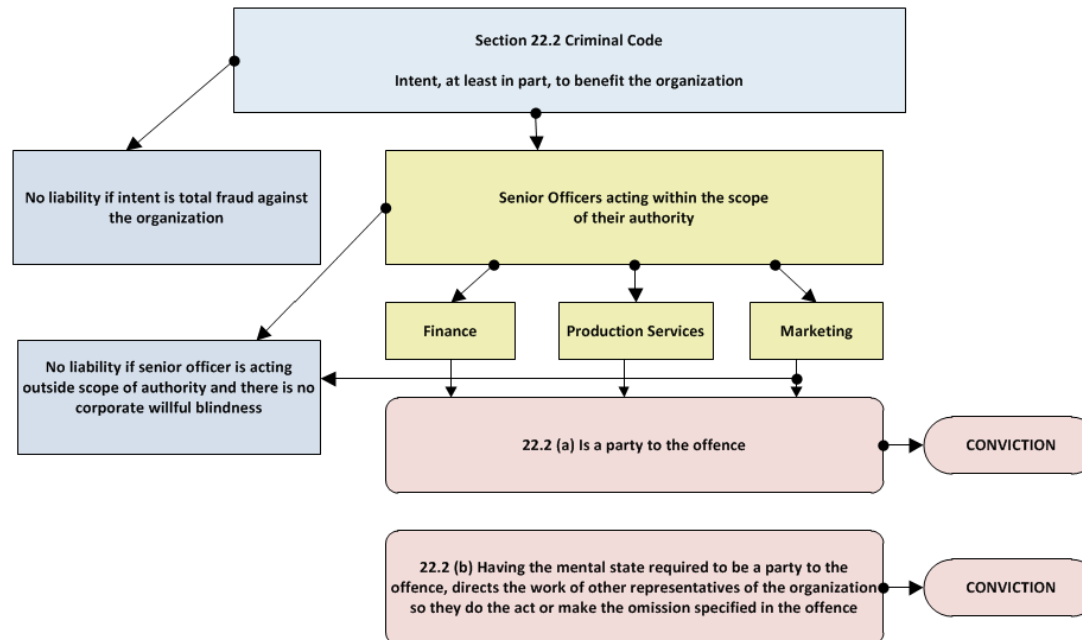
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Corporate Criminal Liability Flowchart

Senior Officer Level

...cont'd



Senior Officer Level

Preventing senior offices from committing offences

If a senior officer with intent, at least in part, to benefit the organization acting within the scope of his/her authority, is a party to an offence of subjective intent, such as bribery, liability is established. The organization's compliance systems have failed at this level and are only relevant as a mitigating factor on sentencing.

Senior Officer Level

Preventing senior offices from committing offences

...cont'd

It is important therefore for organizations to re-think the type of compliance systems that are specifically directed to preventing offences being committed by the wider category of senior officer. Leadership, risk assessment and training must be specifically designed for senior officers at both the policy and operational levels and there must be monitoring and auditing at both of these senior officer levels.

Senior Officer Level

Archibald and Jull, *Risk Management, Financial Crimes and Corporate Compliance*

We submit that the wording "scope of authority" should be narrowly construed in accordance with the concept of willful blindness. For example, it is not acceptable for an organization to permit bribery by permitting the finance department to look the other way while a bribe is paid from the marketing department. On the other hand, where corporate due diligence establishes that an anomalous payment was made outside the scope of a senior officer's job description and without complicity from those in other departments, the scope of authority requirement may not have been met to establish criminal liability.



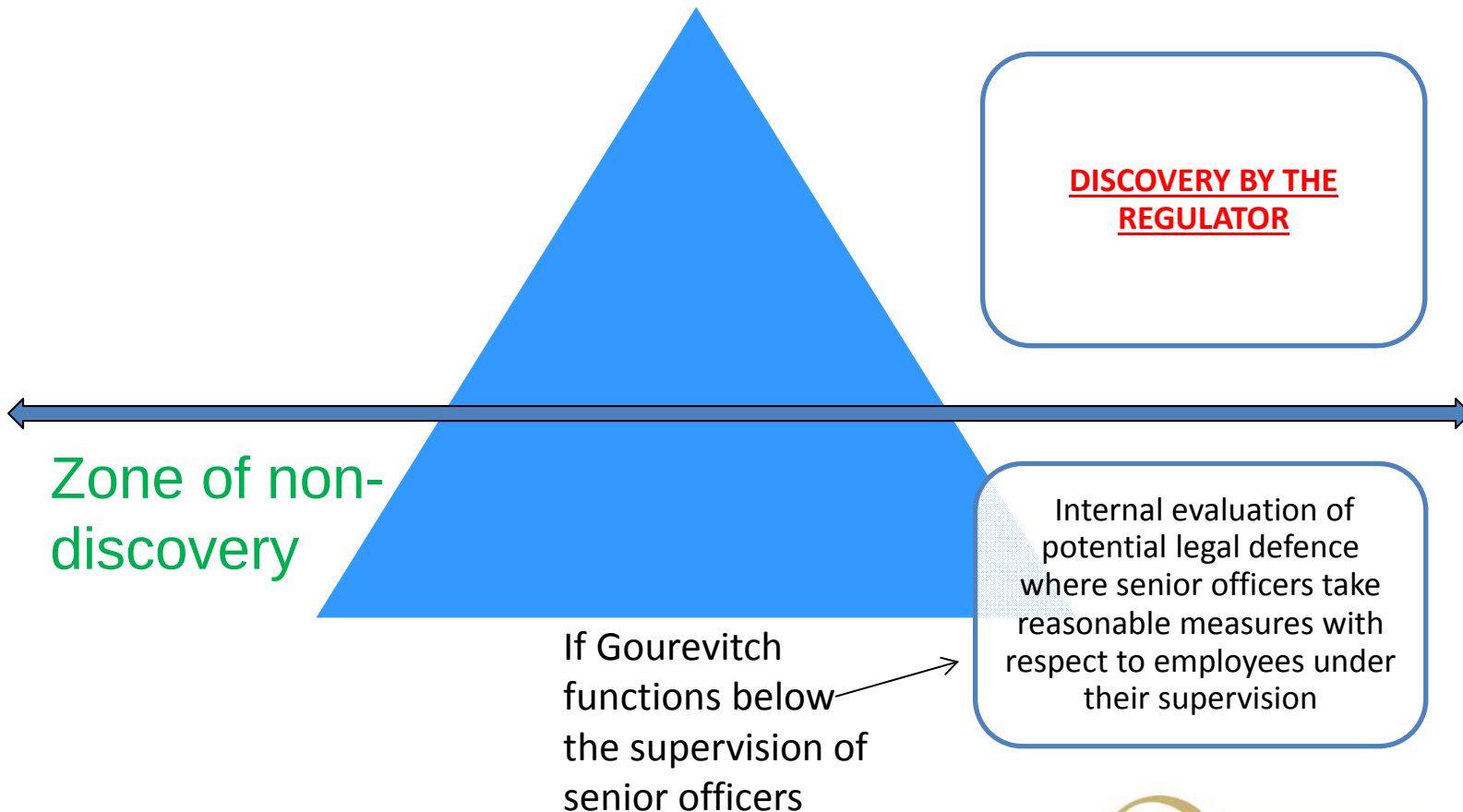
Why They Do It?

Eugene Soltes, a Harvard business professor, interviewed famous and infamous perpetrators of white collar crime, and found that many of them did not view their crimes as causing serious harm and in some cases did not think that their actions even qualified as criminal. Soltes' book, *Why They Do It: Inside the Mind of the White Collar Criminal* includes an interview with Carl Kotchian, president of Lockheed, who admitted paying millions in bribes to foreign dignitaries which lead to the imprisonment of Japan's prime minister. Kotchian felt little in the way of guilt, as reflected in the following admissions and reflections:

Some call it gratuities. Some call them questionable payments.
Some call it grease. Some call it bribery. I looked at these payments as necessary to sell a product. I never felt I was doing anything wrong.

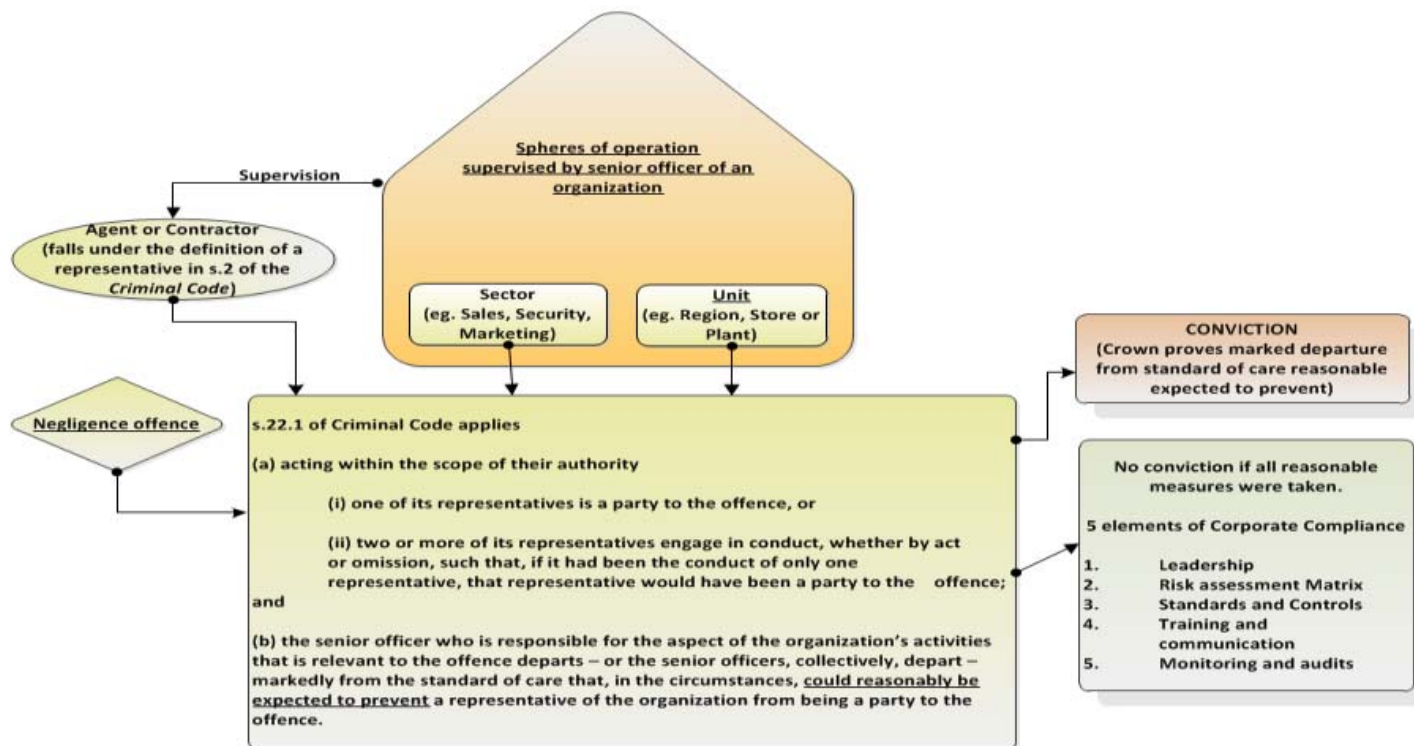


Zone of Non-Discovery



Corporate Criminal Liability Flowchart

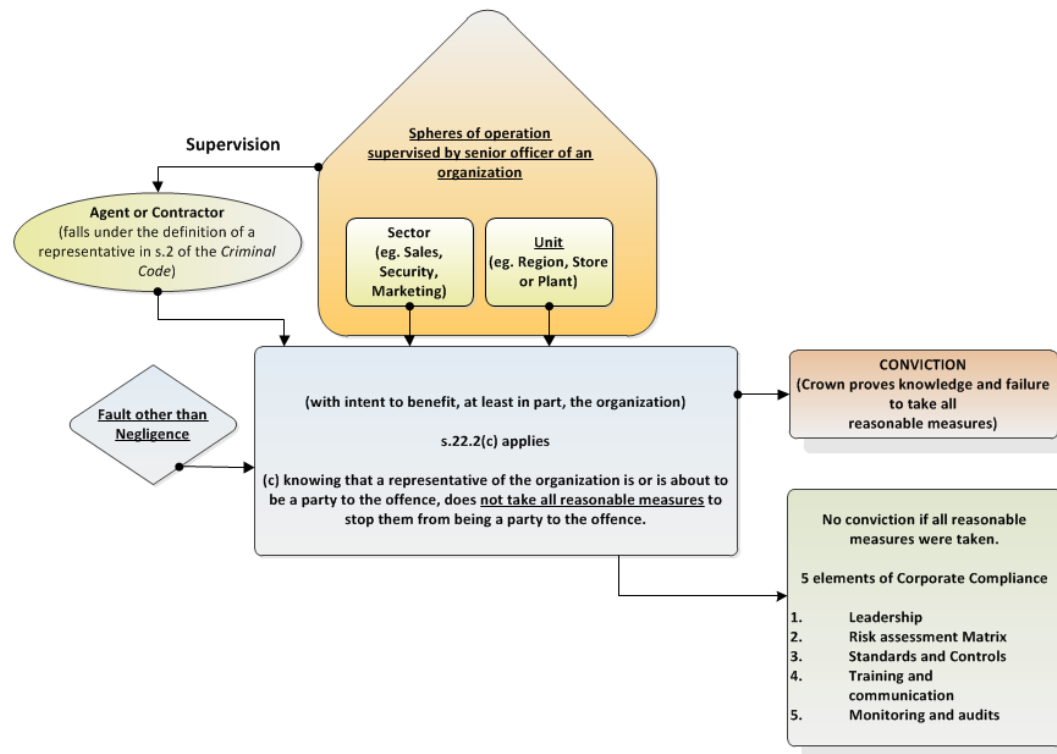
Under Supervision of a Senior Officer



Corporate Criminal Liability Flowchart

Under Supervision of a Senior Officer

...cont'd



Under the Supervision of a Senior Officer

Due diligence in spheres of activity supervised by senior officers

At the level below in the sphere of activities that are supervised by senior officers, a compliance program may qualify as reasonable measures that could constitute a defence to the charge. The reason for this lies in the wording of section 22.2(c): "knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence."

Below Senior Officer Level

Archibald and Jull, *Risk Management, Financial Crimes and Corporate Compliance*

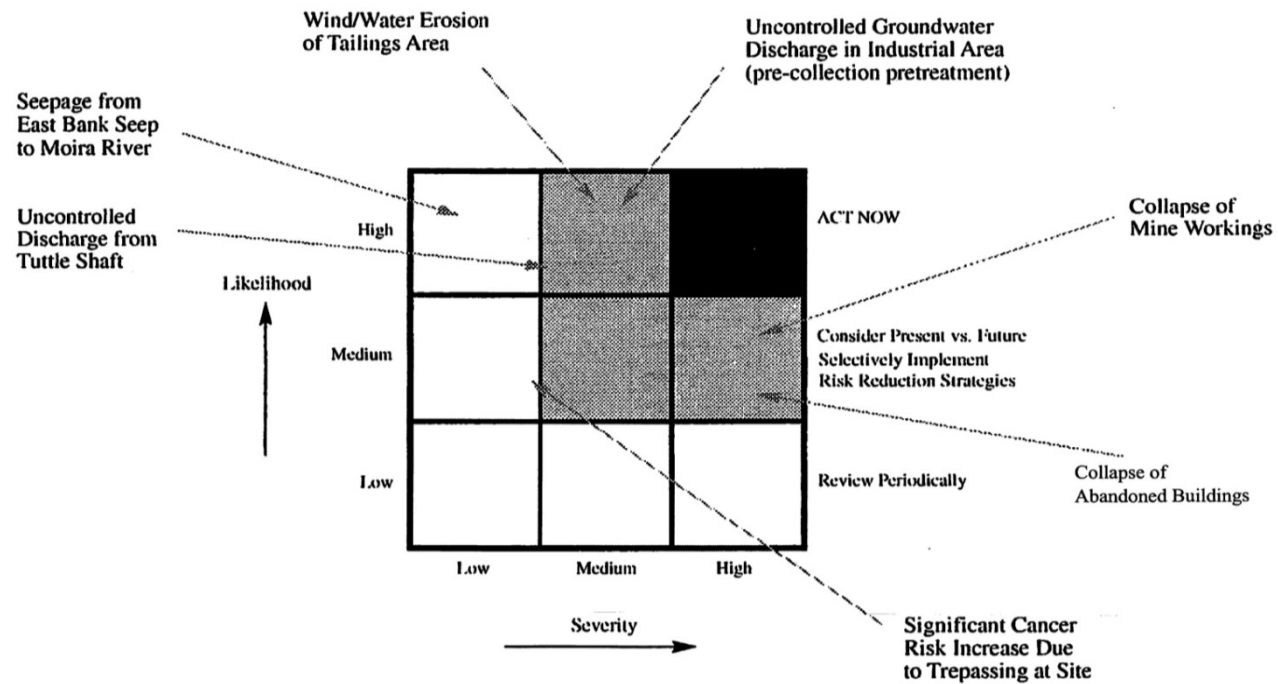
How will courts determine what senior officers should do to satisfy the new and onerous "all reasonable steps" requirement in s. 22.2(c)? Here the blurring of lines between regulatory offences and criminal offences of subjective fault becomes obvious. Courts will look to industry standards, risk management techniques and other factors that have traditionally been relevant to the determination of the due diligence defence. Many of the same factors and evidence of corporate conduct that determines the due diligence defence now will be relevant when the corporation is charged with a serious criminal offence of subjective fault.

Below Senior Officer Level

Archibald and Jull, *Risk Management, Financial Crimes and Corporate Compliance*

We have argued in Chapter 4 that the various factors of due diligence in regulatory law can be divided into two competing categories: "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. This risk management matrix can apply to any given area, whether it be environmental, health and safety, competition or securities, in accordance with standard risk management.

FIGURE 2
RISK MANAGEMENT PRIORITIES — HISTORICAL SCENARIOS
THAT HAVE BEEN MITIGATED



UNITED STATES OF AMERICA before the SECURITIES AND EXCHANGE COMMISSION, March 3, 2016 in the matter of NORDION (CANADA) INC.

10. Gourevitch and the Agent hid the scheme from Nordion by communicating in Russian, preparing multiple drafts of documents to conceal the true use of funds, and misrepresenting how the Agent would use the funds it received from Nordion. However, Nordion failed to conduct adequate due diligence on the Agent or follow its own internal controls procedures in place at the time. For example, Nordion paid the Agent's invoices even though they lacked detail and directed Nordion to make payment to offshore bank accounts for entities that were unknown to Nordion and appeared to be unrelated to the Agent.



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11. From 2005 through 2011, Nordion paid the Agent approximately USD \$235,043 for consulting work in Russia to obtain government approval for TheraSphere. Ultimately, Nordion was unable to distribute TheraSphere in Russia and, as a result, did not earn any profits on the sale of the product in Russia.
12. Gourevitch and the Agent communicated via email about the amount of money the Agent would pay to Gourevitch, which was not disclosed to Nordion.

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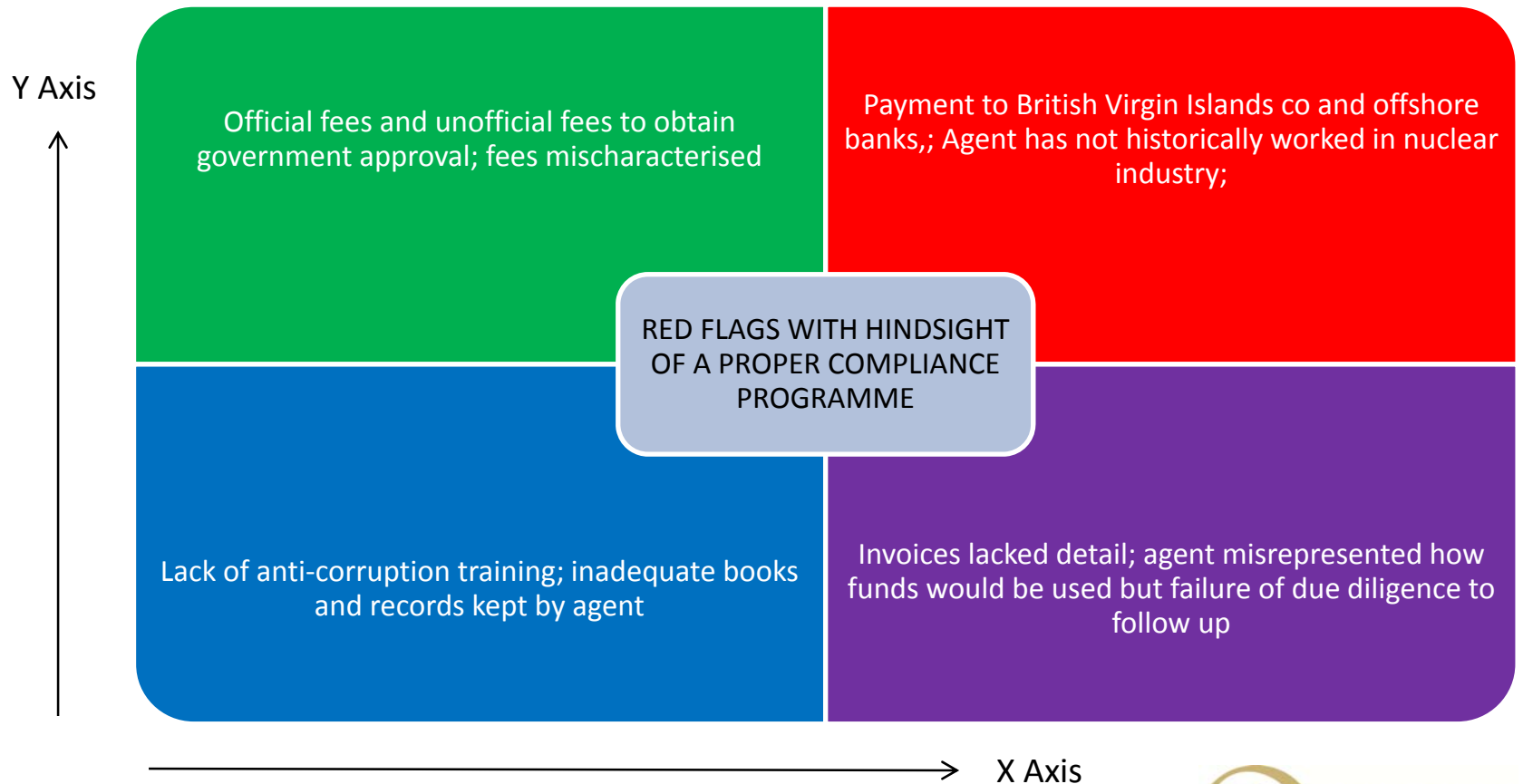
13. Nordion's applicable internal accounting controls were deficient. Nordion failed to detect or prevent Agent expenditures which the Agent delineated as both official fees and unofficial fees required to obtain Russian government approval to distribute TheraSphere. Nordion also lacked sufficient internal accounting controls to ensure it made payments to entities with which it had contractual arrangements.

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14. Nordion did not have adequate policies and procedures in place to detect corruption risks and provided little, if any, anti-corruption compliance training to its employees during the relevant time about how to detect corruption and how to conduct business in a high risk jurisdiction.
15. 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 and to pay kickbacks to Gourevitch.

Case Study

Y AXIS =likelihood of corruption; X AXIS= harm caused by corruption;
reference FC-Schedule B “Red Flags”

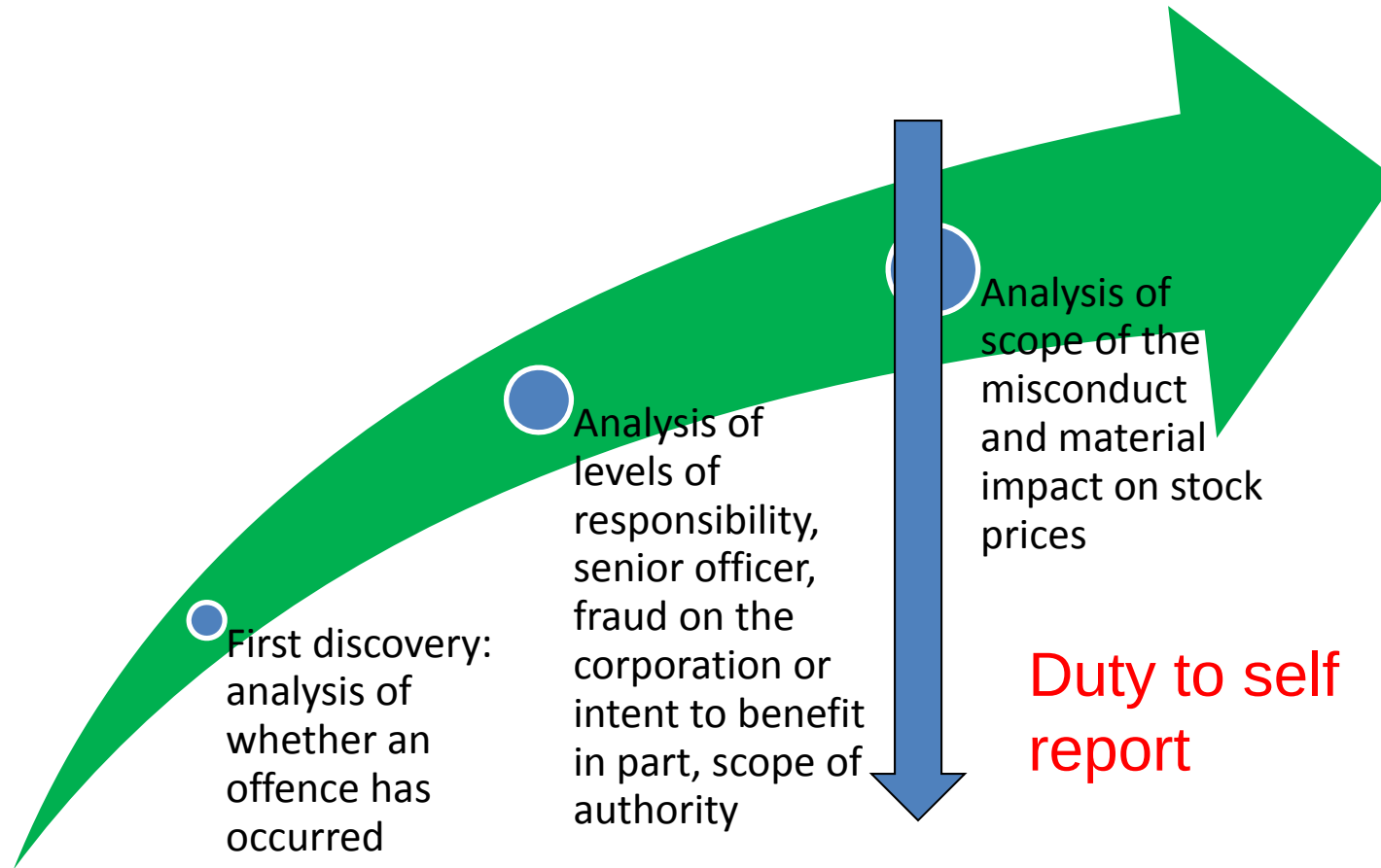


Is there a duty to self-report?

Archibald and Jull, *Risk Management, Financial Crimes and Corporate Compliance: 17:100*

In Canada, there are some statutory requirements to report violations of the law to the authorities. Examples of this include the obligation to report spills and the obligation to report any material change that could affect a publicly traded company's share value. (*Securities Act*, R.S.O. 1990, c. S-5, Part XVIII, "Continuous Disclosure")

Spectrum of Timeline and Material Change



Early self –reporting in the Zone
of Non-Discovery: Can this
constitute Due Diligence?

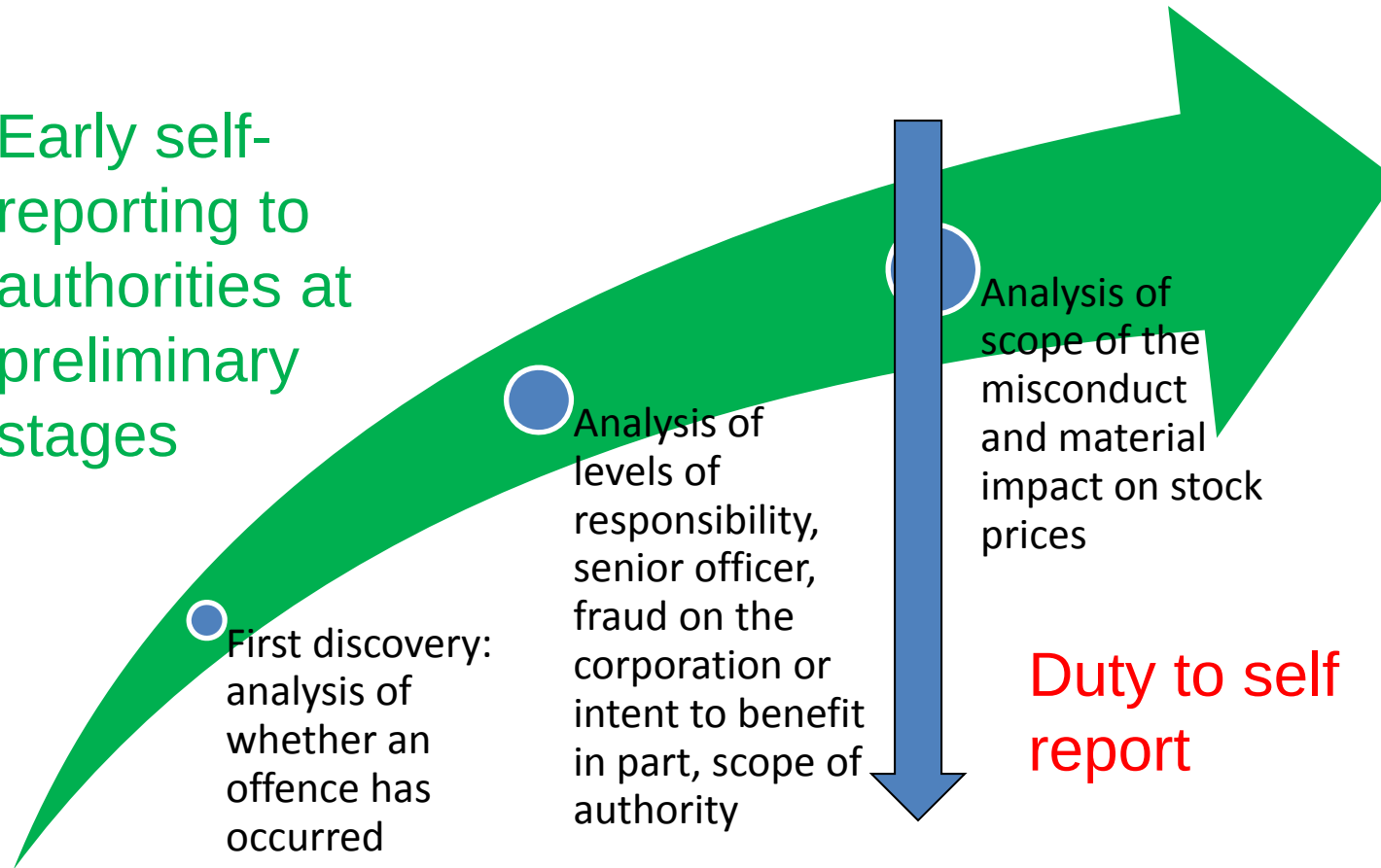
Archibald and Jull, *Risk Management, Financial Crimes and Corporate Compliance: 17:100*

Moreover, if the organization has a compliance system that results in the self reporting, this act of self reporting is some evidence in and of itself of compliance. Where the authorities would not have discovered the event (assume that there is no legal obligation to report) there should be an incentive for organizations to self report.

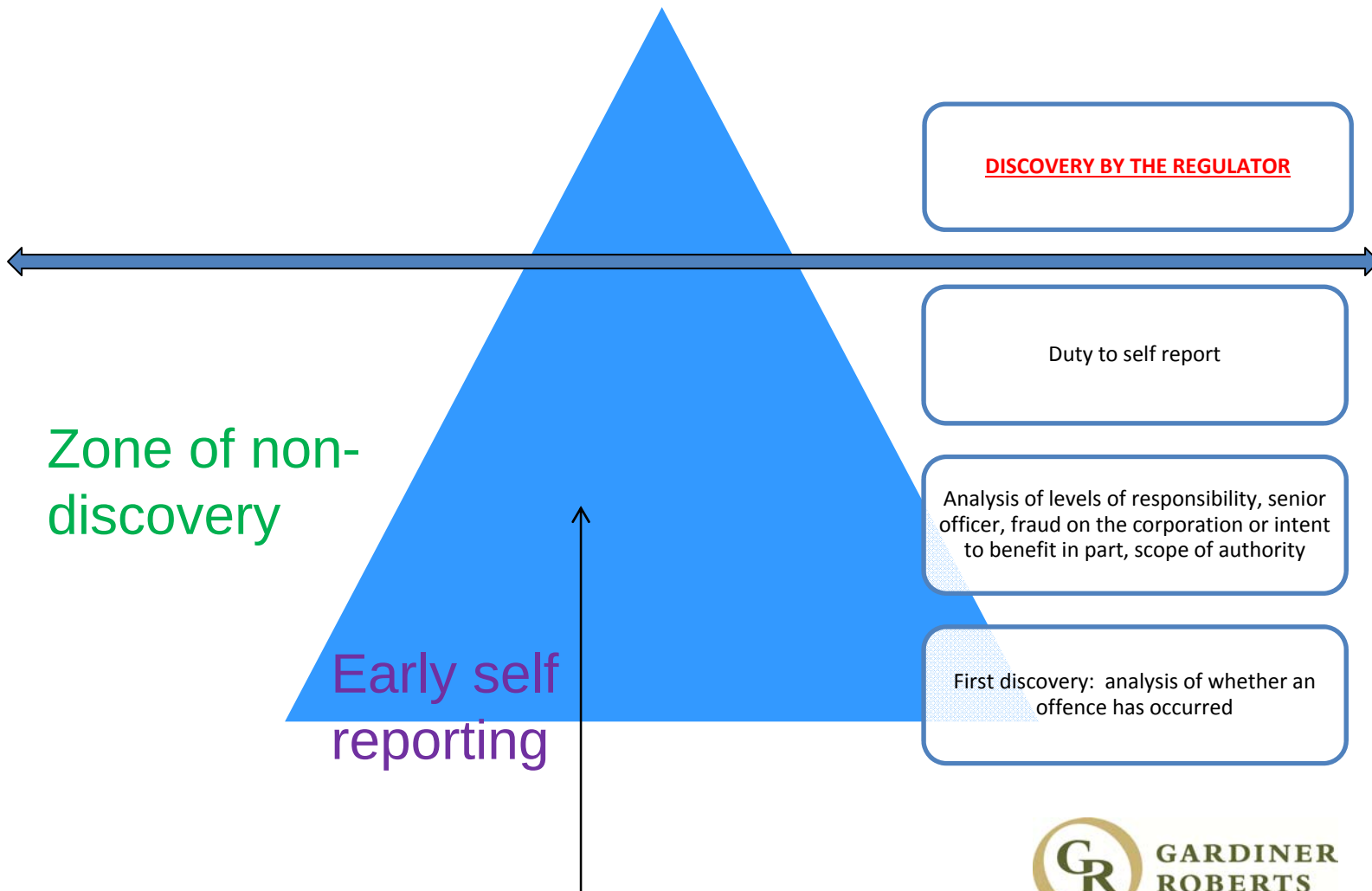
The key here is a system. If an organization does not have a compliance system, the mere self reporting of an improper payment will not constitute reasonable measures but rather in that scenario would be a mitigating factor on sentencing.

Spectrum of Timeline and Material Change

Early self-reporting to authorities at preliminary stages



Zone of Non-Discovery



UNITED STATES OF AMERICA before the SECURITIES AND EXCHANGE COMMISSION, March 3, 2016 in the matter of NORDION (CANADA) INC.

Discovery, Internal Investigation and Self Report

16. When Nordion discovered evidence which suggested that payments may have been made to a Russian government official, Nordion self-reported to authorities in both Canada and the U.S., fully cooperated with parallel investigations, and implemented extensive remedial measures.

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17. Nordion hired both outside counsel and forensic auditors to examine and revise its policies, procedures and internal controls and conduct an independent investigation to determine the scope of potential compliance issues related to Nordion's business in Russia.

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18. As the internal investigation progressed, Nordion shared the results of the investigation with Commission staff and undertook significant remedial measures, including: hiring a new Director for Corporate Compliance and staffing additional compliance personnel; including a compliance-based assessment as a component of its annual employee performance reviews; and providing anti-corruption, internal accounting controls and finance trainings to Board members, management, and ...cont'd



UNITED STATES OF AMERICA before the SECURITIES
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18. (cont'd) employees throughout the Company.

Nordion terminated all contracts with the Agent and enacted a strict protocol governing the use of and payment to thirdparty agents and implemented policies and procedures to conduct third-party risk assessments. The company also requires all agents to enter contracts that include FCPA warranties and representations and to adopt its anti-corruption policies.

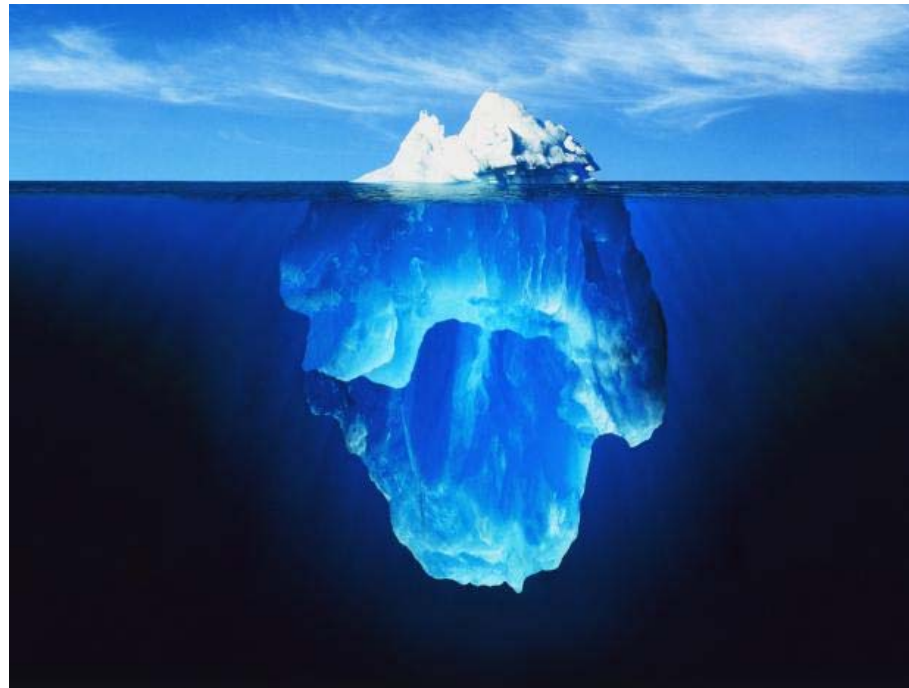
UNITED STATES OF AMERICA before the SECURITIES AND EXCHANGE COMMISSION, March 3, 2016 in the matter of NORDION (CANADA) INC.

The SEC imposed a civil money penalty in the amount of \$375,000. The SEC fine reflects the civil requirement in the United States to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions.

UNITED STATES OF AMERICA before the SECURITIES AND EXCHANGE COMMISSION, March 3, 2016 in the matter of NORDION (CANADA) INC.

The SEC Order, released on March 3, 2016, states that the Commission “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.”

If there is no defence is there an incentive to self-report in the Zone of Non-Discovery?



Canada Does Not Have Deferred Prosecution Programme But Is Consulting On The Issue



Deferred prosecution agreements consultation:
Expanding Canada's toolkit to address corporate wrongdoing

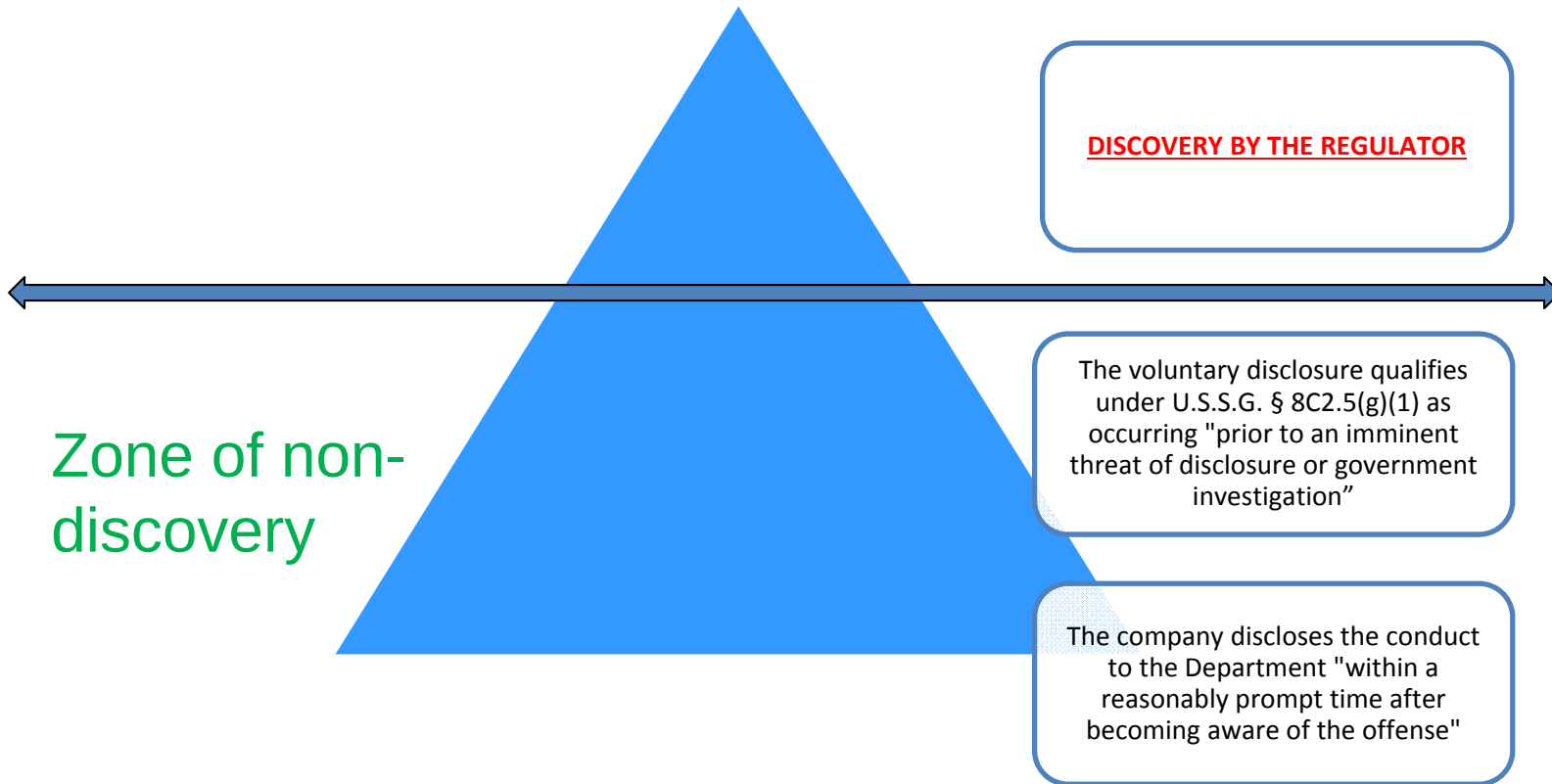
The Government of Canada invites you to comment on a discussion guide to help inform a possible Canadian deferred prosecution agreement (DPA) regime. This consultation takes place between September 25 and November 17, 2017 (11:59 pm Pacific time).

Canada Does Not Have Deferred Prosecution Programme But Is Consulting On The Issue



This consultation is an opportunity to consider the possibility of introducing a Canadian DPA regime as an additional tool for prosecutors, to be used in appropriate circumstances, to address corporate crime. Under a DPA, criminal prosecution is suspended on the accused agreeing to fulfill certain requirements including admitting to facts that would support a conviction, paying a significant financial penalty and cooperating with authorities, on completion of which, charges will be withdrawn.

U.S Deferred Prosecution Agreements



DOJ is Reviewing and Re-evaluating Numerous Corporate Enforcement Policies, October 2017

On October 6, 2017, Deputy Attorney General of the United States Rod J. Rosenstein announced that the Department of Justice (DOJ) is actively reviewing a wide range of existing corporate enforcement policies.

Rosenstein said that DOJ will review several significant corporate enforcement policies, with the Yates Memo among them. The Yates Memo outlined principles for enhancing DOJ's enforcement efforts against individual wrongdoers in the corporate context, including conditioning corporate cooperation credit on companies' willingness to turn over relevant information about such individuals.



DOJ is Reviewing and Re-evaluating Numerous Corporate Enforcement Policies, October 2017

Rosenstein stated that he agreed with an overarching principle of the Yates Memo — that prosecutors should avoid resolving investigations by corporate settlement without pursuing individual offenders. But he questioned whether “existing memos, talking points, and ‘F.A.Q.’ documents got it exactly right.”

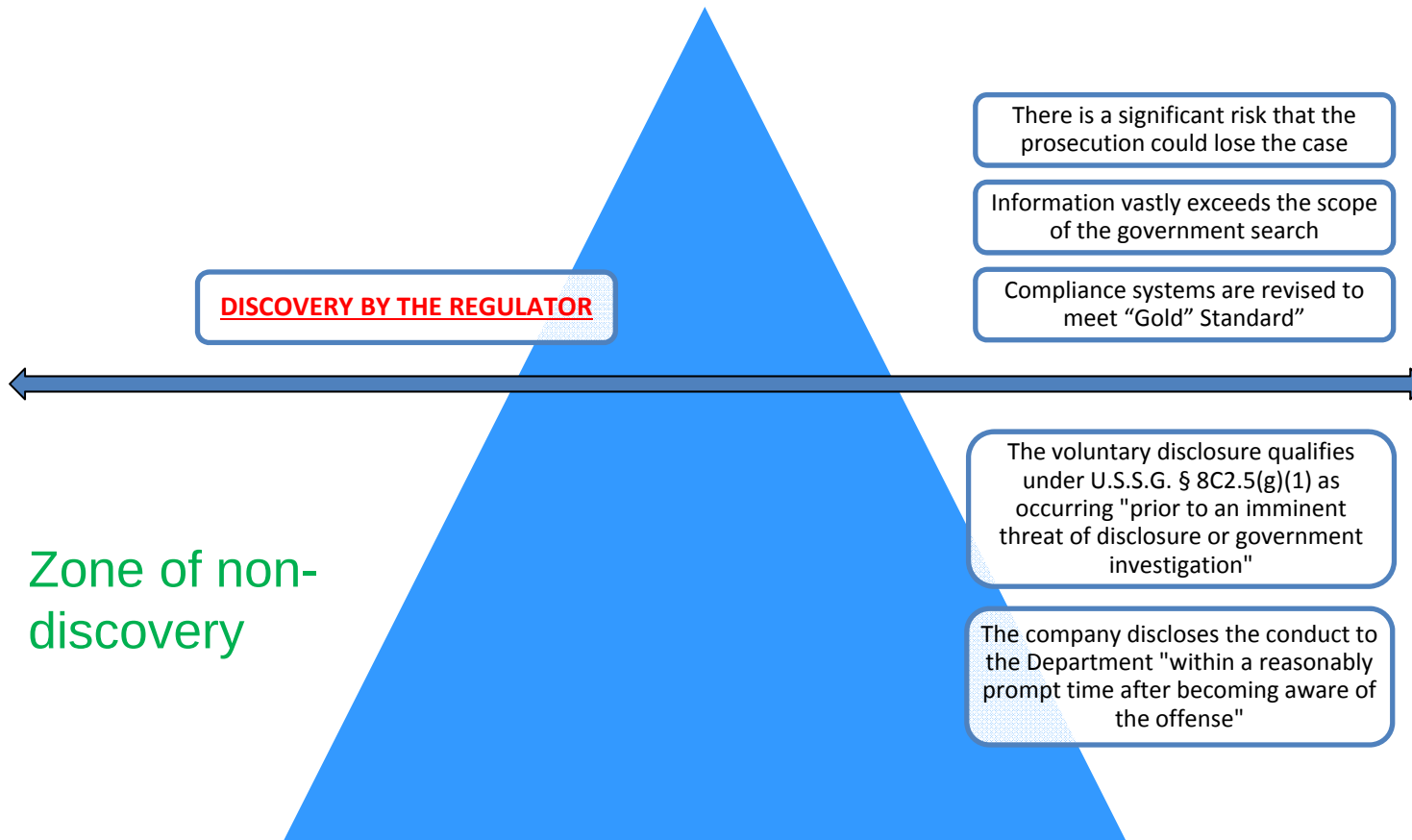
Source: Latham & Watkins Litigation & Trial and White Collar Defense & Investigations Practices October 12, 2017 | Number 2226

U.K. Deferred Prosecution System



In contrast to the U.S. DPA system, the U.K. has judicialized the approval process, requiring a court to determine whether the proposed DPA is in the interests of justice and whether its terms are fair, reasonable and proportionate. If approved, the court is required to ultimately give reasons in open court outlining its decision to support the DPA in the particular circumstances.

Is A DPA Ever Appropriate Post Discovery By The Government?



Theoretical Perspectives

Theoretical perspectives: rationales for anti-corruption legislation 17:140

1. Level playing field
2. Worker safety and consumer safety
3. Moral theory
4. Protectionism

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"Agrees" and conspiracy: *R. v. Karigar* 2013 ONSC 5199; 2017 ONCA 576

The first litigated case under the CFPOA concerns individual liability in the context of paid agents. A conviction was entered in the case of *R. v. Karigar* decided on August 15, 2013.

Smoking Gun E-mail From a Potential Whistleblower

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)

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.

Smoking Gun E-mail From a Potential Whistleblower

3. The People involved are Mr. Robert Barra, US citizen, CEO of Crypto-metrics 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?

Importance of Facial Recognition Software

Until Sept. 11, 2001, the 1985 bombing of Air India flight 182 was the deadliest terrorist attack anywhere, ever. It remains the worst mass murder in Canadian history.

On June 23 of that year, 329 people were killed, including 280 Canadians and 86 children. The flight left Toronto, then Montreal bound for London, then India. It disappeared from radar off the coast of Ireland where the search for survivors and answers began.

Role of Biometric Security

Malaysia Air and Fake Passports



Stolen Passports and the Potential Role of Facial Recognition Software

Two Iranians travelling on forged passports on the Malaysian Airways flight MH370, which has disappeared, had no links to terror, Interpol has revealed.

The international police organisation, Interpol, has released an image of the two men, identified as Pouria Nour Mohammad, 19, and Seyed Mohammed Rezar Delawar, 29. They were friends and were hoping to seek asylum in [Europe](#), according to Malaysian officials.

"The more information we get, the more we are inclined to conclude it was not a terrorist incident," said Interpol's head, Ronald Noble.

Karigar: Conspiracy Fills Gaps

It is not necessary to establish a violation of s. 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. In *Karigar*, 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 RCMP.

Sentencing Judgment: 3 Years in the Penitentiary

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 issues 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".

Real Jail

Beaver Creek Institution – 2 Years Plus



Real Jail

Millhaven Institution: Penitentiary – over 2 Years



Appeal: *R. v. Karigar* 2017 ONCA 576

[17] On May 15, 2007, the appellant and Berini met with Annie Dubé at the Consulate General for Canada in Mumbai. During the meeting, the appellant stated that Cryptometrics had paid a bribe to Praful Patel (Minister of Civil Aviation - India) through an agent in order to clear the process and obtain the Air India contract. The appellant also stated that their agent confirmed the bribe money had been received by Patel. The appellant did not disclose the identity of the agent, nor the amount of money that was paid. The appellant also talked about corruption in general in India and ...cont'd

Appeal: *R. v. Karigar* 2017 ONCA 576

[17] (cont'd) specifically how government figures would get up to eight percent of the value of a contract as a bribe payment. The appellant stated “but we know he received the money” and “you didn't hear that from us”. He continued that “we went to an agent and he received something. And we got information from the agent that the Minister received it.” Dubé testified that she was shocked and expressed that they could be prosecuted (or sued);

Karigar

Territorial Jurisdiction

[23] This offence was committed prior to the enactment of Bill S-14, which includes a new provision, s. 5, to establish territorial jurisdiction based on Canadian nationality or permanent residency of a person who has committed an offence under the Act.

[24] The trial judge observed that this new basis for jurisdiction was not retroactive and did not apply to the present case. He referred instead to the test for territorial jurisdiction stated by the Supreme Court in *Libman*.... it is sufficient that there be a “real and substantial link” between an offence and this country,

Karigar

Territorial Jurisdiction

[32] The other facts were, as noted above, that because 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. I see no error in the trial judge's approach or his analysis.

Karigar

Interpretation of s. 3 of the Act

[39] The Supreme Court of Canada recently commented on the significance of corruption in international business practices in *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 1:

Corruption is a significant obstacle to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity. Corruption often transcends borders. In order to tackle this global problem, worldwide cooperation is needed.

Karigar

Interpretation of s. 3 of the Act

[40] The *Convention* provides the legislative and policy background to the Act, which Canada enacted in 1998 (and which came into force in 1999) in response to its enforcement obligations as a member of the Organisation for Economic Cooperation and Development (OECD) and as a signatory to the *Convention*. As the trial judge stated at para. 41: “[t]he convention seeks to promote a level playing field for the pursuit of international business among member states.”

Karigar

Interpretation of s. 3 of the Act

[43] In s. 3, the offence is committed when a person “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 the appellant submits, 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 ...cont’d

Karigar

Interpretation of s. 3 of the Act

[43] (cont'd) language on who must “agree”, prescribing the parties to the agreement. It does not say that the agreement must be with the foreign official, only 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***. On the language alone, there is no basis to read in a limitation on who must be parties to an agreement.[emphasis added]

Karigar

Co-conspirators' Exception to the Hearsay Rule

[46] The appellant makes two submissions under this heading. He does not dispute the finding of a conspiracy among Barra, Berini and himself. He disputes the trial judge's finding that the witness Bell was an unindicted co-conspirator. In oral argument, counsel explained that his position is that the trial judge erred in this regard because Bell testified that after he understood what was being proposed in one of the meetings, he absented himself from the meeting and from the discussions. However, the evidence is clear that Bell continued to assist ...cont'd

Karigar

Co-conspirators' Exception to the Hearsay Rule

[46] (cont'd) the company to carry out the bribery scheme by, for example, preparing profit projections based on the chart that showed the amounts to be paid to the Air India officials as part of the bid for the contract. I see no error in the trial judge's acceptance that Bell was an unindicted co-conspirator who could give in evidence against the appellant the statements of other co-conspirators. Of course, his evidence as a witness recounting events from his own knowledge was not hearsay and was admissible as direct evidence.

Level of Intent Required: 17:20:30

With respect to the *mens rea* of the offence set out in s. 3 of the *CFPOA*, the Department of Justice Guide to the *CFPOA* Guide 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.

Level of Intent Required: 17:20:30

The concept of *mens rea* includes the doctrine of willful blindness, which has been reviewed by the Supreme Court of Canada in the *Briscoe* decision. 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".

Facilitation Payments: 17:20:50

October 30, 2017 - Ottawa, Ontario - Global Affairs
Canada

Canada plays a leadership role in fighting corruption and creating a level playing field for Canadian businesses at home and abroad. The Government of Canada expects Canadian organizations operating overseas to act in accordance with Canadian laws and the laws of the countries in which they do business.

Facilitation Payments: 17:20:50

Today, Global Affairs Canada announces the removal of the facilitation payments exception from the Corruption of Foreign Public Officials Act (CFPOA). The facilitation payments exception was repealed by Bill S-14: An Act to amend the Corruption of Foreign Public Officials Act. The repeal is to come into force on October 31, 2017.

Facilitation payments, also known as “grease payments,” are payments made to foreign government officials to speed up or facilitate routine transactions such as permits. These payments were not previously covered by the bribery offence in the CFPOA.





Questions?

Contact Us

Kenneth Jull



T 416.865.2964



E kjull@grllp.com



W grllp.com



@grllp

The views are those of the author and are not meant to represent the views of the Competition Bureau, Department of Justice or of Gardiner Roberts LLP

