Transparency International Canada Inc.

TI-Canada

Second Annual
Spotlight on Anti-Corruption: Current Issues Day of Dialogue

Rapporteur Reports

19 Apr 2012

Introduction

Transparency International Canada (TI-Canada) held its Second Annual *Spotlight on Anti-Corruption: Current Issues Day of Dialogue*, on 19 April 2012, in Toronto. There were twelve Roundtables addressing relevant anti-corruption issues. Each Roundtable was chaired by TI-Canada Board Members and included two to three Discussion Leaders who led off the dialogue with members of the Roundtable audience.

Topics included the Niko Resources probation order and issues in creating and operating a compliance program; scandals as motivators for change and the role of media; corruption risk for lender and investor; corruption in the construction industry: Quebec and beyond; is corruption a human rights issue?; corruption, competitiveness and sustainability: Dilemma for Directors?; prosecutions and investigations of anti-corruption offenses: Canadian and international perspectives; the role of export credit agencies and international financial institutions in combating corruption; best practices in mergers and acquisitions compliance due diligence; a debate on facilitation payments - the good, the bad and the ugly; recent anti-corruption developments in the extractive sector; and the effectiveness of municipal anti-corruption institutions. Participants included members from the business community, government officials, academics and members of civil society.

The *Day of Dialogue* Roundtables are meant to explore and move forward the discussion on current anti-corruption issues. Included here are summaries and full Rapporteur Reports of each Roundtable, which were held under the Chatham House Rule, allowing for information to be reported without attribution.

We hope you will find this information interesting and look forward to participating in further discussions with you .

James M. Klotz
Chair and President

For any questions/suggestions or further information, please contact:
ti-can@transparency.ca; or 416-488-3939.

Table of Contents

Agenda

Transparency International Canada Inc.

presents
Second Annual

Spotlight on Anti-Corruption: Current Issues
Day of Dialogue

Thursday, 19 April 2012
08:00 – 16:15
Fasken Martineau DuMoulin, 333 Bay Street, Suite 2400, Toronto

AGENDA

PD credits are available for Ontario CAs

This program can be applied towards the 9 Substantive Hours of Continuing Professional Development (CPD) required by the Law Society of Upper Canada. Please note that this program is not accredited for Professionalism hours or for the New Member Requirement.

08:45 – 10:15

1. **The Niko Resources probation order and issues in creating and operating a compliance program – Rideau Room**
   Moderator: James Klotz, Co-Chair, International Business Transactions Group, Miller Thomson
   Richard Brait, Senior Counsel, Siemens Canada Ltd.
   H. Maura Lendon, Vice Pres., Chief General Counsel & Corporate Sec., Primero Mining Corp.
   Martin Mueller, Vice President & Chief Compliance Counsel, Nexen Inc.
   Rapporteur: Melissa Ghislanzoni, Associate, Miller Thomson LLP
2. **Scandals as motivators for change and the role of media – St. Lawrence Room**
   Moderator: Susan Reisler, Vice President, Media Profile
   Harvey Cashore, Senior Producer, CBC News' Investigative Content Unit
   Anita Mielewczyk, Lawyer, media law
   Julian Sher, Investigative Journalist and book author
   Rapporteur: Ken Mark, Ken Mark Freelance Writer
3. **Corruption risk for lender and investor – Huron Room**
   Moderator: Peter Dent, Part. & Nat'l Leader, Forensic & Dispute Services, Deloitte & Touche
   Zachariah Ezekiel, Director, Business Conduct & Chief Privacy Officer, Scotiabank
   Edward A. Rial, Principal, Forensic & Dispute Services, Deloitte Financial Advisory Services
   Signi Schneider, Chief CSR Advisor, Export Development Canada
   Rapporteur: Moez Bawania, Manager, Financial Advisory, Deloitte & Touche

10:15 – 10:45 Nutrition Break – Escarpment Room

10:45 – 12:15

4. Corruption in the construction industry: Quebec and beyond - Rideau Room

Moderator: Milos Barutciski, Partner, Bennett Jones, LLP
John Ritchie, Consultant
Julian Sher, Investigative Journalist and book author
Rapporteur: Elliot J. Burger, Associate, International Trade and Customs, Bennett Jones LLP

5. Is corruption a human rights issue? – St. Lawrence Room

Moderator: Janet Keeping, Rule of Law Fellow, Sheldon Chumir Foun. for Ethics in Leadership
Nathalie Des Rosiers, General Counsel, Canadian Civil Liberties Association
Bruce Moore, Director, Institute for Active Citizenship
Michael Robinson, Q. C., Counsel, Fasken Martineau DuMoulin
Rapporteur: Kaitlin Meredith, Counsel, International Legal Programs, Department of Justice

6. Corruption, Competitiveness and Sustainability: Dilemma for Directors? – Huron Room

Moderator: Peter Dent, Part. & Nat'l Leader, Forensic & Dispute Services, Deloitte & Touche
John Dalla Costa, Founding Director, Centre for Ethical Orientation (CEO)
Michael Jantzi, CEO, Sustainalytics
James Klotz, Co-Chair, International Business Transactions Group, Miller Thomson
Rapporteur: Alan Willis, President, Alan Willis & Associates

12:15 – 13:15 Lunch – Escarpment Room

13:15 – 14:45

7. Prosecutions and investigations of anti-corruption offenses: Canadian and international perspectives – Rideau Room

Moderator: Kernaghan Webb, Associate Professor, Law and Business, Ryerson University
Mark Morrison, Partner, Blake, Cassels & Graydon LLP
Danforth Newcomb, Of Counsel, Shearman & Sterling LLP
Jeff Richstone, Senior General Counsel & Director General, Public Prosecution Service of Canada
Rapporteur: Margaret Cappa, Master of Public Policy Candidate, University of Toronto

8. The role of export credit agencies and international financial institutions in combating corruption – St. Lawrence Room

Moderator: Michael Robinson, Counsel, Fasken Martineau DuMoulin LLP
Merly Khouw, Lead Investigator, Integrity Vice Presidency, The World Bank
Signi Schneider, Chief CSR Advisor, Export Development Canada
Rapporteur: Ava-Dayna Sefa, Master of Global Affairs Candidate, University of Toronto

9. Best practices in mergers and acquisitions compliance due diligence – Huron Room

Moderator: Bruce N. Futterer, Vice President and General Counsel, GE Canada
Uma Annamalai, ExecutiveCounsel, GE Canada
John Boscariol, Partner & Head, Int'l Trade & Investment Law Group, McCarthy Tetrault LLP
Patricia A. Etzold, Partner, Forensic Services Group, PricewaterhouseCoopers, U.S.
Rapporteur: Prakash Narayanan, Associate, Blake, Cassels and Graydon LLP

14:45 – 15:15 Nutrition Break – Escarpment Room

15:15 – 16:45

10. Debate on facilitation payments – the good, the bad and the ugly – Rideau Room

Moderator: Bruce N. Futterer, Vice President and General Counsel, GE Canada
Milos Barutciski, Partner, Bennett Jones LLP
Peter Dent, Partner & National Leader, Forensic & Dispute Services, Deloitte & Touche LLP
James Klotz, Co-Chair, International Business Transactions Group, Miller Thomson
Rapporteur: Ken Mark, Ken Mark Freelance Writer

11. Recent anti-corruption developments in the extractive sector – St. Lawrence Room

Moderator: Kernaghan Webb, Associate Professor, Law and Business, Ryerson University
The Honourable John McKay, MP, Scarborough-Guildwood
Mark Morrison, Partner, Blake, Cassels & Graydon LLP
Joe Ringwald, Vice President, Mining, Selwyn Resources Ltd.
Rapporteur: Beth Elder, Master of Public Policy Candidate, University of Toronto

12. The effectiveness of municipal anti-corruption institutions – Huron Room

Moderator: Thomas C. Marshall, Q.C., former General Counsel, Attorney General of Ontario
Linda Gehrke, Lobbyist Registrar, City of Toronto
Andre Marin, Ombudsman of Ontario
David Nitkin, President, EthicScan Canada Ltd.
Rapporteur: Garrett MacSweeney, PhD Candidate, Dept. of Philosophy, York University

Roundtable Summaries

The following are short summaries of 12 roundtable sessions held at the Second Annual Spotlight on Anti-Corruption: Current Issues *Day of Dialogue*, 19 April 2012, in Toronto.

1. The Niko Resources probation order and issues in creating and operating a compliance program

The Niko Resources case and the 13 compliance program elements that Niko was ordered to implement were used as the framework for the panel's discussion about corporate compliance programs. Niko is a Canadian oil & gas company that had a well in Bangladesh which exploded when Niko started drilling, causing damage and poisoning water supplies. Niko plead guilty to one count of breach of Section 3 of the *Corruption of Foreign Public Officials Act*. Niko was found to have gifted a Toyota to the Bangladeshi Minister in charge of determining the compensation claims of the villagers who had been harmed in the explosion and of paying for the Minister and his family to visit New York City. As a result, a $9.5 million dollar penalty and a probation order were imposed against Niko. The terms of the probation order required the company to report to the RCMP for three years as well as to set up a compliance program. The 13 points required in the compliance program dictated by the probation order were taken, almost verbatim, from a U.S. decision called *U.S. v Panalpina*. Many topics relevant to corporate compliance challenges and best practices were discussed, including the role of the board of directors in ensuring and policing compliance; the level of detail that should be contained in an anti-corruption policy; the importance of the culture of a company at preventing and reporting suspected corruption; working with third parties to ensure compliance; the role that culture may play in training and policing anti-corruption measures; and training on anti-corruption practices. The role of senior management in providing strong, explicit and visible support as well as commitment to its corporate policy against violations of its compliance program was cited as one of the most important elements of a successful compliance program as well as the importance of addressing the individual circumstances of the company and its interactions with other parties.

2. Scandals as motivators for change and the role of media

The role of investigative reporters is not to uncover scandals or motivate change but to ignite public interest in the topic. In fact, the media have been woefully inadequate in reporting white-collar crime. Wrongdoers have a large group of enablers – lawyers, bankers, accountants and others – to help them keep their secrets. Business executives, political leaders and others prefer to shoot the messenger rather than listen to the message when faced with media stories about alleged scandals. Rather than re-examining past errors and setting the record straight, many

organizations simply stonewall further media inquiries. Although perplexed at why current office holders continue to defend earlier decisions and protect long-gone colleagues, the discussion leaders concluded that officials do not want to disturb their personal comfort zones. Lawyers prepared to sue on their clients' behalf are a major impediment to greater transparency. At the same time, those toiling for media firms are often the best editors. They help ensure that stories meet the legal test of "beyond a reasonable doubt" in court. Independent documentary film makers face a higher hurdle since many TV contracts now require assurances that the production will not attract lawsuits. That's impossible. "You can be right and still get sued." Investigative journalists can make a difference, but we can expect to see fewer investigative reports in future. That's because of recent government budgetary cutbacks, tighter freedom-of-information rules and media downsizing. While the Web makes information gathering easier, it has also spawned demand for short, instant reports. Social media is great for providing eye-witness coverage of live events such as the Arab Spring. "But we should not lose sight of the bigger picture. It's not just about the details." Investigative journalism is laborious, time-consuming and expensive. No technology can change that.

3. Corruption risk for lender and investor

Lenders and investors are increasingly becoming cognizant of risks related to bribery and corruption; these risks must be considered as part of both acquisition and credit granting due diligence processes. Three broad categories of bribery and corruption risks should be considered: a) Legal and regulatory exposure, which includes potential civil litigation, as well as fines, penalties and/or non-monetary remediation measures imposed by regulators; b) Credit and investment risk in cases where the target or borrower is generating a percentage of revenue from certain projects or regions where it paid bribes. These are potentially non-recurring revenue streams if bribery payments cease for any reason; c) Reputational risk – if a target or borrower is subject to media exposure with respect to allegations of bribery, its reputation will be negatively impacted, and consequently, the reputation of the acquirer or lender will be similarly impacted. Reputational risk is significant, as all future transactions executed by the acquirer or lender may be cast in a negative light, and be subject to a greater degree of scrutiny by regulators and stakeholders. To mitigate the above risks, lenders and investors need to ensure that they do not enter into a transaction with knowledge that bribery or corruption exists at the target, and that transactional due diligence always includes consideration of bribery and corruption risk. It is not enough during due diligence to simply "make inquiries" with respect to the target's bribery/corruption compliance programs, but further reviews must be undertaken to specifically evaluate such programs. Regulators have also indicated that board oversight should be considered as part of due diligence processes. For an acquirer/lender, it is important to document the steps taken to address bribery/corruption risk both pre and post transaction. Also, any scope limitations experienced when conducting pre or post acquisition reviews should be clearly documented so as to provide evidence of the

thoroughness of the review. Financial institutions are becoming increasingly aware of corruption risk when lending in certain jurisdictions. It is prudent to have borrowers sign anti-corruption and anti-bribery declarations. In the area of project finance, there is currently no standard agreed upon by lenders for addressing bribery/corruption risk the way there is for environmental risk. At a minimum, most large-scale lenders will consider the local jurisdiction involved, history of bribery/corruption allegations made against the borrower, the political ties of the individuals involved and the level of transparency into books and records afforded by the borrower.

4. Corruption in the Construction Industry: Quebec and Beyond

Corruption in the construction industry is a systemic but important issue and can be expanded because there are certain aspects of the way business is done in the construction industry which are common across borders. With regard to Quebec, the discussion revolved around the Ouimet "Casper" case and the infiltration of Hell's Angels into municipal, provincial and public private partnership bodies. Some suggestions for remedies for corruption in the construction industry include the need for due diligence, along with the need for monitoring throughout a project; the need for full time compliance, rather than merely initial monitoring; and the important role investigative journalists and other journalists play in Quebec exposing corruption. This, however, is not necessarily true in Toronto, or in Vancouver, where it is believed not one journalist is dedicated to investigating the Hell's Angels in the latter. Even in Quebec it was well known that there was a relationship between Saif Gadhafi and SNC-Lavalin, but no one ever investigated it until recently. Politics and public perception can also change, urging remedies for corruption. However, government and police will sometimes step in and stop investigations for geopolitical reasons. Construction and engineering corruption have the same root causes at both the regional and national levels, although the issues and amounts involved vary depending on the size of the contract. Most construction corruption happens at the municipal level. This is often because these contracts are handed out on a relationship basis and are much lower in quantum. There are a number of unique aspects to the construction industry. The extent of subcontracting makes due diligence and ongoing monitoring more difficult. Business relationships are often complex. A company is not always dealing with a competitor during the bidding process, but, if one party wins they typically subcontract certain work out to the other party. Employees tend to move between companies on a regular basis. It is a boom and bust industry. Engineers have a huge role in Request for Proposal (RFP) process. With regard to construction corruption in Asia, the level of construction corruption has risen dramatically. In British Columbia, there is a Provincial Fairness Commissioner who signs off on most public procurement projects. Audit rights contained in an RFP are a level of insurance against corruption. These rights are also typically included in World Bank contracts. Ultimately,

corruption rewards poor performance. It creates a downward cycle, which results in bad value for the economy.

5. Is corruption a human rights issue?

Yes, corruption is a human rights issue. Corruption is defined as the abuse of public goods or authority for private gain. Such abuses divert state funds into the pockets of a few to the detriment of the broader population, which can be understood as discriminatory, unequal and degrading treatment. Corruption drains the state's economy, causing poverty and threatening the right to development. Corruption also undermines democratic governance, discourages transparency, and weakens the rule of law and public confidence in it. In all of these ways, corruption can be framed as a human rights issue. Given the commonalities between the struggles to combat corruption and protect human rights, there is significant opportunity for learning and exchanges of experience in understanding the problems and in designing the strategies to address them. At the same time, while an underlining association with human rights violations might amplify the message of corruption, some people feel it also risks diluting it. In this perspective, the subject of human rights is broad and ill-defined, one in which the issue of corruption, which is more specific, could get lost. Anti-corruption work needs to be focused, and the messaging kept simple: "Say no, or you'll go to jail." Nevertheless, it is worth asking "*What might fighting corruption within a human rights framework look like?*" Due diligence frameworks such as "The Guidance," set out in the UK Bribery Act, can be important motivators to encourage businesses to build legitimate and responsive internal anti-corruption programs that would, if fulfilled, encourage integrity in dealings with outside actors. An instrument that regularizes and mandates social ethical audits – if destined for a critical and influential audience –may similarly be capable of positively influencing corporations' practices. Trade agreements and their negotiations are good fora to forward and impose Canada's stance on integrity. Laws and stricter criminalization cannot alone solve the problem of corruption. If the only tool is criminalization, people are disempowered. Sometimes convictions are not achieved and sometimes convictions are not enough. A change in culture is key. Culture can be changed if people are taught how to act when faced with difficult situations. When dealing in countries with a weak rule of law or an elite-serving legal framework, additional considerations need to be taken. Legal systems can be created with the interests of a small, powerful group in mind, which can create a façade of legality, when legitimacy is lacking and the powerless are repressed. In this regard, institution-building that focuses on creating a space for dialogue, and providing access to legal support to the voiceless will empower them to have an effect on the political system and accountability. Creating better standards for free, prior and informed consent, removing confidentiality clauses in impact-benefit agreements and mandating Publish-what-you-Pay participation would also help to promote human rights and ward off corruption.

6. Corruption, Competitiveness and Sustainability: Dilemma for Directors?

To tell or not to tell? To ask or not to ask? To risk or not to risk? Such are the dilemmas for directors revealed today. To "act honestly and in good faith with a view to the best interests of the corporation" is expected by law of every director and officer. Indeed, the Supreme Court of Canada judgment in the 2008 BCE case indicated that this points to long term best interests, not just short term return maximization for shareholders. Time frames are a key consideration. The longer-term time horizon of mainstream institutional investors for considering risks to sustainable value creation contrasts with that of shorter-term investors. Institutional investors are increasingly looking to environmental, social and governance (ESG) factors and risks in their analysis of a company's value creation prospects. Bribery and corruption in particular and ethical business conduct generally are subsets of ESG considerations that can affect revenue streams and license to operate (legal and social), as well as reputation and trust on the street and in communities. Companies engaging in bribery and corruption in pursuit of short-term gains may even be undermining their own long-term sustainability. And there is emerging evidence that "good" companies outperform their peers over longer-term time frames. Questions are being asked today in boardrooms and CEO selection that were unheard of five years ago. National cultures traditionally pervaded by corruption are slowly opening up to public questioning. Failure by a board to expect, oversee and reward ethical behaviour, including compliance both with anti-corruption laws and with internal codes of business conduct, that results in questionable or illegal management conduct would seem to put the company's interests at risk in the longer term, even if commercial gains are achieved in the short term. Boards clearly have to signal their support, indeed their expectations, about how business is to be done, through codes of conduct (and effective oversight thereof), CEO selection, performance evaluation practices and executive compensation packages. But a particular challenge for directors today, in the face of these seemingly contradictory and competitive pressures for short-term gain versus longer-term value creation and risk minimization, is that they often don't know what they should be doing for the best results. Director education and guidance is lacking on the tough situations they may face regarding corruption and questionable practices that come to their attention – or should come to their attention. Perhaps the most difficult dilemmas for directors occur when they must decide "to tell or not to tell." The dilemma is arguably greater when chances are that the matter can be resolved internally and is unlikely to be found out externally. The dominant view seemed to favour timely, suitable disclosure – if only because secrets always come out in the open eventually, so better to set the record straight from the outset on the board's own well-informed terms rather than those of other, less informed parties. Plus, non-disclosure may send wrong signals internally, and disclosure, while perhaps unpleasant in the short term, may represent an opportunity to avoid surprises and build long-term trust in the company's integrity.

7. Prosecutions and investigations of anti-corruption offenses: Canadian and international perspectives

In light of increased enforcement of Canada's anti-bribery legislation, and significant enforcement in the United States, it is incumbent upon any pragmatic Canadian company to have in place an effective anti-corruption strategy and program. The recent Niko Resources conviction is a sign of things to come in terms of Canadian enforcement. Canadians can expect not only more cases under the CFPOA, but also the likelihood that fines will increase. At present, the Royal Canadian Mounted Police (RCMP) has indicated that it has at least 34 investigations underway. In Canada, there is a distinction between the prosecution and investigation of cases under the CFPOA. The Royal Canadian Mounted Police conducts the investigation, and Public Prosecution Service Canada (PPSC) prosecutes criminal offences such as the CFPOA on behalf of the Attorney General of Canada. Given that investigations related to the CFPOA are complex – involving the Canadian Charter of Rights and Freedoms, the Criminal Code, case law, domestic and international law – it is useful that indictable offenses such as those in the CFPOA have no limitation period in Canada. Thus, investigators have unrestricted time to gather evidence before prosecution. While Canada has made strides in enacting and utilizing the CFPOA, opportunities to improve the legislation remain. Recent activity suggests that the federal government is moving to address the issue of nationality jurisdiction. In comparison with the United States, Canada is a laggard in establishing Mutual Legal Assistance Treaties (MLATs), which allows for the collection and sharing of information and evidence in a foreign jurisdiction for the purpose of enforcing law. Another critique of the Canadian process is that there is no resolution available to defendants other than a guilty plea. In the U.S., there are a number of other options. For instance, one can negotiate without a guilty plea under a deferred prosecution agreement. Also, it was posited that Canada should adopt a books and records provision akin to the American example. If charges are laid against a firm, or a firm has learned of internal corruption and wishes to address it, due diligence and voluntary disclosure of issues of corruption may be useful in a company's defence. However, the place of due diligence and voluntary disclosure in cases of corruption is complex and requires important judgment calls. As Canadian cases of corruption under the CFPOA continue to arise, and other jurisdictions continue to investigate and prosecute firms for similar criminal offenses, it is clear that a convergence of policy and legal process is needed at least among the United States, the United Kingdom and Canada. Investigation and enforcement requires major resource allocations, and so coordination would likely be a more efficient way of using limited resources.

8. The role of export credit agencies and international financial institutions in combating corruption

The role of export credit agencies (ECAs) and international financial institutions (IFIs) in combating corruption is multi-faceted and far-reaching. Due to the fact that corruption is a pervasive presence in the global economy, it has the potential to substantially affect many aspects of the business initiatives undertaken by these institutions. While the prevalence of corruption complicates the role of these institutions in combatting corruption, essentially, export credit agencies and international financial institutions must do their best to "turn off the tap" and prevent illicit funds from spreading throughout the global economy. Turning off the tap has greater implications than just circumventing the supply of illicit funds. While the mere threat of turning off the tap is enough to dissuade corruption to some extent, the more stringent policies and extensive plans of execution are necessary to mitigate corruption more earnestly. The formulation of these plans and policies are important, but they can only be implemented when the mentality of the organization allows it. Initially, the World Bank considered corruption a political issue (which was beyond the Bank's mandate of economic development and poverty alleviation) and did not warrant action by the Bank. However, when then-World Bank president James Wolfensohn referred to "the cancer of corruption" in a speech given in 1996, the World Bank as a whole came to the realization that corruption substantially affects its poverty alleviation initiatives and must be addressed. The role of IFIs and ECAs is first to cultivate an institutional culture that acknowledges the adverse effects of corruption and the need to fight back. Policies can then be put in place to address situations in which corruption is suspected. However, the distinction must be made between those procedures that detect corruption and those that prove the existence of corruption. IFIs and ECAs are responsible for ensuring that the policies put forth are effective in addressing and mitigating corruption. Effective detection policies and guidelines are those that are far-reaching and incorporate multiple areas of business within IFIs and ECAs. These institutions are also responsible for ensuring that the policies undertaken facilitate the mitigation of corruption in the global economy as whole. In order to ensure this happens effectively, IFIs and ECAs must initiate formal collaboration mechanisms with other institutions to ensure policies do not clash. As corruption becomes more prevalent in the global economy, international financial institutions and export credit agencies will be forced to take on a more pronounced role in its eradication. As corrupt activities become more complex and sophisticated, simply 'turning off the tap' will not be enough to prevent its expansion. Moving beyond the simplistic supply-side concentrated solution to corruption by addressing the policy implications of methods including public shaming of both bribe donors and recipients is a new way in which the role of IFIs and ECAs can be realized.

9. Best Practices in mergers and acquisitions compliance due diligence

A key reason for undertaking compliance due diligence in mergers and acquisitions (M&A) is to identify major risks. This may have an impact on valuation and also determine what steps may need to be taken post-acquisition. In addition, during investigations in a M&A situation, law enforcers consider whether appropriate due diligence was conducted. When retained to conduct compliance due diligence, the focus should be not just on the existence of a robust compliance program but also the compliance culture of the target, which is important because it may be difficult to change the culture, at least quickly. Also, the culture may manifest itself in different ways. Even though anti-corruption compliance due diligence in the M&A context is not yet common in Canada, a common concern is if the process is commenced too close to the scheduled closing of the transaction rather than adequately in advance. In such situations, it is important to prioritize areas for due diligence and identify the big issues and assess risk on that basis. It may then be possible to conduct a more thorough analysis immediately post-closing to minimize further risk. An important aspect of compliance due diligence, which is complementary to legal due diligence, is accounting forensics. It is important to develop a strong relationship with the target before suggesting that they permit forensic due diligence as this may be a difficult issue to broach with the target. In situations where the target is a small company, there may often not be dedicated resources relating to anti-corruption compliance, but due diligence can still be conducted. Compliance due diligence is also appropriate in the JV context, though the sensitivity is increased in such situations. When a compliance due diligence raises concerns, the company doing the due diligence needs to determine how to deal with it. For example, it may be difficult to change the culture of the JV partner in a JV situation, so it may be appropriate for the JV partners to agree to a compliance plan upfront.

10. Debate on facilitation payments – the good, the bad and the ugly

The good is that Canadian law permits such payments. The bad is the uncertainty of interpreting the law. The ugly is rising prosecutorial zeal to enforce the uncertainties. The U.S. Foreign Corrupt Practices Act (FCPA) 1977 does not prohibit "facilitating or expediting payment[s] . . . to expedite or to secure the performance of a routine governmental action." Often called "low-grade shakedowns," such demands come from officials seeking payments for stamping passports or visas, etc. Canada agreed to harmonize its relevant laws with those of the US since it did not want to not introduce rules imposing a higher standard than US legislation required. Such payments are considered different from those remitted to win contracts. Uncertainty stems from the FCPA's lack of a dollar-figure limit distinguishing a facilitation payment from a bribe.

Consequently, firms and their employees are unsure of what to do when faced with payment demands. There are also ethical and moral issues involved. If it is a criminal act to make such payments within Canada, why should the law permit citizens to make them overseas? But now that such payments are increasingly becoming a grey issue, alleged law-breakers must respond appropriately to authorities' queries or face unforeseen consequences. As well, international organizations may have their own agendas. In practical terms, firms need to train employees to exercise proper judgment when faced with such demands. To eliminate employee confusion, firms need to establish realistic and flexible policies. However, if employees ever fear for their personal safety, they should just pay up and move on. But if they do pay, they must formally disclose the transaction to the corporate compliance office and ensure the expense is properly accounted for. It is absolutely essential that organizations have in place an active and effective anti-corruption program. To eliminate corruption, we all need to focus on what really matters -- grand corruption. Over time these other, low-grade demands will disappear.

11. Recent anti-corruption developments in the extractive sector

The focal point of this panel was the linkage between corruption and transparency relating to the extractive industry, including the disclosure of taxes, royalties, and licence (TRL) payments. The suggestion was made that there is a lack of TRL payment transparency with Canadian extractive sector companies operating overseas and domestically, particularly when working with Indigenous communities. The extractive sector is important to all Canadians, so companies have a responsibility to act accountably and transparently. The extractive industry faces some particular challenges, as resource development often takes place in countries with a weak regulatory environment and companies are dependent on local governments that might not be accountable or transparent. There are several ways to address or encourage transparency in extractive companies such as legislation, increased enforcement of existing regulations, voluntary compliance, and through the financial sector. Canada was described as lagging behind our peers on corruption legislation. Enforcement of existing regulations should be significant enough for companies to take notice. When a company develops a compliance regime, they must clearly communicate expectations to all employees. Voluntary compliance and disclosure can be valuable, but not all companies will comply. Disclosing government payments will give investors full information to invest responsibly. Financial disclosures and legal compliance could improve a junior company's chances to get financing or be bought. There is considerable public support in Canada for imposing more stringent government regulations on mining companies. One participant suggested that while transparency is not the whole answer to corruption, it is 75 per cent of the solution. Corruption erodes public trust and a few unscrupulous companies have given the industry a bad reputation. Companies almost always want to do the right thing, but regardless of whether companies feel that compliance is

the right thing, or they are just being pragmatic, it is in their interest to comply with anti-corruption norms and meet the terms of TRL disclosure initiatives.

12. The Effectiveness of Municipal Anti-Corruption Institutions

While anti-corruption is not necessarily the intent or sole mandate of each public institution, each office deals with problems of corruption in some way, shape, or form. From the public's perspective, there is an increasing dissatisfaction and lack of confidence with the process by which public servants and office holders go about discharging their public duties. While transparency is expected, the interpretation of what constitutes transparent governing and decision-making varies widely between municipal jurisdictions and ministries within the province and between provinces. Thus, these institutions seek to set the tone for transparency by clarifying expectations both through rules guiding processes for public administration and precedent setting decisions in particular hard hitting or high profile cases. Institutions offer to the public an avenue by which to access investigative measures and voice particular concerns, which in turn opens a dialogue and gives power back to the public at large, hopefully improving the dissatisfaction and lack of confidence along the way. Success and effectiveness can be measured empirically and culturally. The former is easier and the latter more difficult. Unfortunately, all too often, the reaction is to pick from low hanging fruit as a quantitative measure of success, and this can hinder greater cultural and systemic change. While improving governance is hard to define, we need to see transparency, openness, and a realization of expectations, along with a lack of corruption, fraud, and faulty governing practices, if we are to succeed. The solution of one-size fits all is itself problematic, as it fails to address the nuances and situational factors on the ground. Current legislation and official mandates are often not clear, or limited in investigative scope or authority. While it is the case that accountability institutions are capable of questioning the system, they are not there to undermine the system. there still needs to be greater integration of an overall accountability network; an integration that would allow for more substantial communication, cooperation, and a common effort between offices, as this would increase the overall ability to help fight corruption at the municipal level, provide education, and support and strengthen the effectiveness of the office holder in changing the culture of public administration across Canada.

Full Rapporteur Reports

1. The Niko Resources probation order and issues in creating and operating a compliance program

Moderator: Jim Klotz, President and Chair of Transparency International Canada Inc., Partner and Co-Chair, International Business Transactions Group, Miller Thomson LLP
Richard Brait, Senior Counsel, Siemens Canada Ltd.
H. Maura Lendon, Vice President, Chief General Counsel & Corporate Secretary Primero Mining Corp.
Martin Mueller, Vice President and Chief Compliance Counsel, Nexen Inc.
Rapporteur: Melissa Ghislanzoni, Associate, Miller Thomson LLP

The moderator introduced the Niko Resources case and used the 13 compliance program elements that Niko was ordered to implement as the framework for the panel's discussion about corporate compliance programs. Niko is a Canadian oil & gas company that had a well in Bangladesh which exploded when Niko started drilling, causing damage and poisoning water supplies. Niko plead guilty to one count of breach of Section 3 of the *Corruption of Foreign Public Officials Act*. Niko was found to have gifted a Toyota to the Bangladeshi Minister in charge of determining the compensation claims of the villagers who had been harmed in the explosion and of paying for the Minister and his family to visit New York City. As a result, a $9.5 million dollar penalty and a probation order were imposed against Niko. The terms of the probation order required the company to report to the RCMP for three years as well as to set up a compliance program. The 13 points required in the compliance program dictated by the probation order were taken, almost verbatim, from a U.S. decision called *U.S. v Panalpina*. The moderator took the panelists through each of the 13 points of the probation order to assess whether a compliance program containing all 13 points would constitute the "gold standard" of compliance programs. The moderator also asked the panelists for their views on the most crucial of the 13 points.

The lively discussion canvassed many topics relevant to corporate compliance challenges and best practices, including the role of the board of directors in ensuring and policing compliance; the level of detail that should be contained in an anti-corruption policy; the importance of the culture of a company at preventing and reporting suspected corruption; working with third parties to ensure compliance; the role that culture may play in training and policing anti-corruption measures; and training on anti-corruption practices. The audience and panelists debated the correct disciplinary action that should be taken by companies to address violations, remedy harm and prevent recurrences. The issue of how to address violations tied in very closely to the idea and importance of creating a strong culture of compliance.

The role of senior management in providing strong, explicit and visible support as well as commitment to its corporate policy against violations of its compliance program was cited by

both the panelists and audience members as one of the most important elements of a successful compliance program. The importance of addressing the individual circumstances of the company and its interactions with other parties was another of the 13 points that featured strongly in the discussion.

The interest of the audience in soliciting advice and opinions from the panelists meant that the time allotted to the session expired before all of the 13 points were canvassed in full. However, the depth of the conversation on compliance programs and the best practices for implementing such programs was comprehensive and thought-provoking.

2. Scandals as motivators for change and the role of media

Moderator: Susan Reisler, Vice President, Media Profile
Harvey Cashore, Senior Producer, CBC News' Investigative Content Unit
Anita Mielewczyk, Lawyer, media law
Julian Sher, Investigative Journalist and book author
Rapporteur: Ken Mark, Ken Mark Freelance Writer

The role of investigative reporters is not to uncover scandals or motivate change but to ignite public interest in the topic.

In fact, the media have been woefully inadequate in reporting white-collar crime. "We have a long way to go. We missed all the shenanigans on Wall Street." Wrongdoers have a large group of enablers – lawyers, bankers, accountants and others – to help them keep their secrets.

A prime example is the Oliphant Inquiry into the Airbus scandal and the sources of Karl-Heinz Schreiber's cash payments to former Prime Minister Brian Mulroney. The CBC obtained bank records, other documents and interviews with Schreiber and Swiss-based enablers outlining the payment streams. Such dogged legwork became irrelevant after the Harper government specifically excluded questioning Airbus officials from the inquiry's mandate. That left many crucial questions about the affair unanswered.

Business executives, political leaders and others prefer to shoot the messenger rather than listen to the message when faced with media stories about alleged scandals. The list includes Ontario Lottery & Gaming's (OLG's) aggressive refusal to pay lottery winners whose tickets were stolen by retailers as well as other denials and cover-ups.

Rather than re-examining past errors and setting the record straight, many organizations simply stonewall further media inquiries. Although perplexed at why current office holders continue to defend earlier decisions and protect long-gone colleagues, the discussion leaders concluded that officials do not want to disturb their personal comfort zones.

Lawyers prepared to sue on their clients' behalf are a major impediment to greater transparency. At the same time, those toiling for media firms are often the best editors. They help ensure that stories meet the legal test of "beyond a reasonable doubt" in court.

Or as one lawyer told a journalist, "You better be (expletive) sure!"

Independent documentary film makers face a higher hurdle since many TV contracts now require assurances that the production will not attract lawsuits. That's impossible. "You can be right and still get sued."

And yet, investigative journalists can make a difference. One panelist cited a story on NGO plans to rebuild homes destroyed in the 2004 Southeast Asian tsunami. Some agile charities found ways to work within the system in affected countries to provide new housing. However, the Red Cross did nothing for fear of contravening Canadian financial reporting and other regulations involving legal and ethical issues. After realizing that when dealing with overseas disasters, "our way is not the only way," the Red Cross amended its operations and updated reports to donors about the changes.

We can expect to see fewer investigative reports in future. That's because of recent government budgetary cutbacks, tighter freedom-of-information rules and media downsizing.

While the Web makes information gathering easier, it has also spawned demand for short, instant reports. Social media is great for providing eye-witness coverage of live events such as the Arab Spring. "But we should not lose sight of the bigger picture. It's not just about the details."

Investigative journalism is laborious, time-consuming and expensive. No technology can change that.

3. Corruption risk for lender and investor

Moderator: Peter Dent, Partner and Nat'l Leader, Forensic & Dispute Services, Deloitte & Touche
Zachariah Ezekiel, Director, Business Conduct & Chief Privacy Officer, Scotiabank
Edward Rial, Principal, Forensic & Dispute Services, Deloitte & Touche
Signi Schneider, Chief CSR Advisor, Export Development Canada
Rapporteur: Moez Bawania, Manager, Financial Advisory, Deloitte & Touche

Lenders and investors are increasingly becoming cognizant of risks related to bribery and corruption; these risks must be considered as part of both acquisition and credit granting due diligence processes. Three broad categories of bribery and corruption risks should be considered:

a) Legal and regulatory exposure, which includes potential civil litigation, as well as fines, penalties and/or non-monetary remediation measures imposed by regulators.

b) Credit and investment risk in cases where the target or borrower is generating a percentage of revenue from certain projects or regions where it paid bribes. These are potentially non-recurring revenue streams if bribery payments cease for any reason.

c) Reputational risk – if a target or borrower is subject to media exposure with respect to allegations of bribery, its reputation will be negatively impacted, and consequently, the reputation of the acquirer or lender will be similarly impacted. Reputational risk is significant, as all future transactions executed by the acquirer or lender may be cast in a negative light, and be subject to a greater degree of scrutiny by regulators and stakeholders.

To mitigate the above risks, lenders and investors need to ensure that they do not enter into a transaction with knowledge that bribery or corruption exists at the target, and that transactional due diligence always includes consideration of bribery and corruption risk. Regulators and law enforcement appear to be increasingly focused on the level of granularity of the due diligence performed, including whether the acquirer or lender considered the industries and countries in which the target or borrower operates. It is not enough during due diligence to simply "make inquiries" with respect to the target's bribery/corruption compliance programs, but further reviews must be undertaken to specifically evaluate such programs. Regulators have also indicated that board oversight should be considered as part of due diligence processes – i.e., has the board of the target/borrower considered corruption risk as part of its compliance program?

Due diligence procedures should be proportional to the size of the transaction as cost and time will inevitably be constraints. For example, if an organization is acquiring less than 20% of a

target, the level (and perhaps the granularity) of due diligence performed would be lower than for an acquisition greater than 50%. This proportionality equally applies to due diligence with respect to bribery/corruption risk.

For an acquirer/lender, it is important to document the steps taken to address bribery/corruption risk during a transaction: stakeholders understand that not all cases of bribery/corruption will necessarily be uncovered through pre and post transaction due diligence, but there must be demonstrable steps taken by the acquirer/lender to address such risks. In this regard, although a certain level of pre-transaction due diligence is expected by regulators, post-transaction reviews and remediation steps are also viewed positively and would strengthen the acquirer/lender position if legacy bribery/corruption issues surfaced in the future. Also, any scope limitations experienced when conducting pre or post acquisition reviews should be clearly documented so as to provide evidence of the thoroughness of the review.

A review of the past few years of regulatory and law-enforcement activity suggests that "industry sweeps" are being made. For example, the Securities and Exchange Commission sent letters to financial services institutions querying the existence and thoroughness of their anti-corruption programs and investigations. Therefore, financial institutions are becoming increasingly aware of corruption risk when lending in certain jurisdictions. It is prudent to have borrowers sign anti-corruption and anti-bribery declarations; in certain instances, the detailed nature of such declarations has caused borrowers to revisit their compliance programs to ensure bribery/corruption risks are considered before signing the declaration.

In the area of project finance, there is currently no standard agreed upon by lenders for addressing bribery/corruption risk the way there is for environmental risk. For example, in the case of environmental risk, project finance banks maintain a minimum standard that an independent party must conduct a review of the borrower's environmental risk and related compliance program. With regard to bribery/corruption risk, at a minimum, most large-scale lenders will consider the local jurisdiction involved, history of bribery/corruption allegations made against the borrower, the political ties of the individuals involved and the level of transparency into books and records afforded by the borrower. If bribery allegations surface post-transaction, and if the lender brings a "halo effect" to the deal, it can ask detailed questions and conduct investigations as necessary. However, if the lender has less influence on the borrower, it will revert to its contractual rights, which would include conducting further reviews or audits of the borrower.

4. Corruption in the Construction Industry: Quebec and Beyond

Moderator: Milos Barutciski, Partner, Bennett Jones LLP
John Ritchie, Consultant
Julian Sher, Investigative Journalist and book author
Rapporteur: Elliot J. Burger, Associate, International Trade and Customs, Bennett Jones LLP

The topic was modified slightly from original intention of looking just at Quebec to "Quebec and beyond. It is a systemic but important issue and can be expanded because there are certain aspects of the way business is done in the construction industry which are common across borders. It was difficult to find Discussion Leaders on the topic given that systemic corruption is not something people are typically comfortable talking about.

With regard to Quebec, the discussion revolved around the Ouimet "Casper" case and the infiltration of Hell's Angels into municipal, provincial and public private partnership bodies. Construction firm LM Sauvé had a contract to renovate the Parliament buildings in Quebec and its boss, Paul Sauvé, became a whistleblower re. the involvement of the Hell's Angels in construction. As a result, Hell's Angels' Normand Ouimet was recently charged with 22 counts of murder and 143 counts of money laundering. This was the first time a Hell's Angels member was charged with Criminal Code charges for corruption.

Project Shark is a provincial initiative in Quebec launched to monitor corruption in the public sector. This initiative has uncovered Hell's Angels infiltration into the construction industry in Mascouche, where the Mayor has been arrested as well as prominent members of Simon Beaudry, a construction firm. The Surete du Quebec wanted to build new headquarters in Mascouche. Due to poor due diligence, it happened to hire a contractor with ties to Hell's Angels. Radio Canada uncovered ties between the Hell's Angels, Quebec Solidarity Fund (a public/private construction funding agency) and Simon Beaudry executives.

Some suggestions for remedies for corruption in the construction industry include the need for due diligence, along with the need for monitoring throughout a project; the need for full time compliance, rather than merely initial monitoring; and the important role investigative journalists and other journalists play in Quebec exposing corruption. This, however, is not necessarily true in Toronto, or in Vancouver, where it is believed not one journalist is dedicated to investigating the Hell's Angels in the latter. Even in Quebec it was well known that there was a relationship between Saif Gadhafi and SNC-Lavalin, but no one ever investigated it until recently.

Politics and public perception can also change, urging remedies for corruption. However, government and police will sometimes step in and stop investigations for geopolitical reasons.

Construction and engineering corruption have the same root causes at both the regional and national levels, although the issues and amounts involved vary depending on the size of the contract.

It was noted that while the Quebec Municipal Procurement law has changed, actual change has not yet been noticed. Most construction corruption happens at the municipal level. This is often because these contracts are handed out on a relationship basis and are much lower in quantum. Small local newspapers cannot cover this kind of corruption as local newspapers are completely funded by local businesses.

It was felt that the newly established Quebec corruption investigation inquiry was developed because of good journalism and public pressure for the government to do something it didn't want to do. Activity has gone up on international issues. Just as the federal government has been pressured to act, so has the Quebec government. Charest did not want a Royal Commission as he was of the belief that it would harm police investigations. The present inquiry gives subpoena powers and powers of immunity which can encourage people to come forward. However, there was doubt this will be able to deal with the entrenched issues of corruption; rather, it will only identify certain individuals. A Royal Commission, on the other hand, would deal with the entrenched issues. While the Quebec Inquiry is not a Royal Commission, it will lead to prosecutions.

There are a number of unique aspects to the construction industry. The extent of subcontracting makes due diligence and ongoing monitoring more difficult. Business relationships are often complex. A company is not always dealing with a competitor during the bidding process, but, if one party wins they typically subcontract certain work out to the other party. Employees tend to move between companies on a regular basis. It is a boom and bust industry. Engineers have a huge role in Request for Proposal (RFP) process. When a bid is being prepared by a contractor, they attempt to maximize profit while still being able to win the bid. In order to do so, they often "try to be clever" with their accounting. There are several pressure points on engineers when drafting an RFP, i.e., when writing specifications, there is pressure on an engineer to maximize profit but still meet the RFP requirements. Engineers are typically poorly paid but have large role in outcome. During the selection of the contractor, the engineer can be influenced by the owner, and during the adjudication of claims by the contractor, the engineer is often the first point of contact.

With regard to construction corruption in Asia, the level of construction corruption has risen dramatically. For example, the Indian government has established "Vigilance Commissioners" to monitor procurements. However, they have found that this creates too much bureaucracy, and it is expensive and slow to develop any project. In public procurement the government can draft the specifications in a particular way as to have an impact on the supply chain in order to influence the outcome, i.e., create more labour intensive projects so there is more work for unions. If you allow corruption to infiltrate at a municipal level, for example, it can easily seep up because they supply larger projects, too.

In British Columbia, for example, there is a Provincial Fairness Commissioner who signs off on most public procurement projects. Audit rights contained in an RFP are a level of insurance against corruption. These rights are also typically included in World Bank contracts.

Ultimately, corruption rewards poor performance. It creates a downward cycle, which results in bad value for the economy.

5. Is corruption a human rights issue?

Moderator: Janet Keeping, Rule of Law Fellow, Sheldon Chumir Foundation for Ethics in Leadership
Nathalie Des Rosiers, General Counsel, Canadian Civil Liberties Association
Bruce Moore, Director, Institute for Active Citizenship
Michael Robinson, Q. C., Counsel, Fasken Martineau DuMoulin
Rapporteur: Kaitlin Meredith, Counsel, International Legal Programs, Department of Justice

Is corruption a human rights issue?

Yes, corruption is a human rights issue. Corruption is defined as the abuse of public goods or authority for private gain. Such abuses divert state funds into the pockets of a few to the detriment of the broader population, which can be understood as discriminatory, unequal and degrading treatment. Corruption drains the state's economy, causing poverty and threatening the right to development. Corruption also undermines democratic governance, discourages transparency, and weakens the rule of law and public confidence in it. In all of these ways, corruption can be framed as a human rights issue.

But, is it beneficial to frame corruption as a human rights issue?

Given the commonalities between the struggles to combat corruption and protect human rights, there is significant opportunity for learning and exchanges of experience in understanding the problems and in designing the strategies to address them. For example, professionals in both fields are facing the same challenge in strategy: criminal convictions only get you so far; there is a need for change in culture and policy. In this way, one can see that a whistleblowing mechanism could prove a valuable tool to address both corruption and human rights abuses. More avenues for cooperation should be explored.

At the same time, while an underlining association with human rights violations might amplify the message of corruption, some people feel it also risks diluting it. In this perspective, the subject of human rights is broad and ill-defined, one in which the issue of corruption, which is more specific, could get lost. Anti-corruption work needs to be focused, and the kept messaging simple: "Say no, or you'll go to jail."

What might fighting corruption within a human rights framework look like?

Formal guidelines and rules

Due diligence frameworks such as "The Guidance," set out in the UK Bribery Act, can be important motivators to encourage businesses to build legitimate and responsive internal anti-

corruption programs that would, if fulfilled, encourage integrity in dealings with outside actors. This is not something Canada has yet imposed, but it should. Transparency International UK has created a compliance checklist that can help companies to operationalize the elements set out in "The Guidance." An instrument that regularizes and mandates social ethical audits – if destined for a critical and influential audience –may similarly be capable of positively influencing corporations' practices.

Trade agreements and their negotiations are good fora to forward and impose Canada's stance on integrity. This could be through providing for nationality jurisdiction for corruption offences, guarantees of access to justice or an alien tort provision that would afford access to Canadian courts.

Cultural change

Laws and stricter criminalization cannot alone solve the problem of corruption. If the only tool is criminalization, people are disempowered. Sometimes convictions are not achieved and sometimes convictions are not enough. A change in culture is key.

There are many levers for cultural change. People know what is right and what is wrong, but they do not know what to do when they come across corruption. Culture can be changed if people are taught how to act when faced with difficult situations. Storytelling is another powerful tool that can drive cultural change. The Indian website ***www.ipaidabribe.com***, for example, allows stories of petty corruption to be told, giving power to the previously powerless masses to collectively bring about change and fight complacency.

Rule of law and access to justice

When dealing in countries with a weak rule of law or an elite-serving legal framework, additional considerations need to be taken. Legal systems can be created with the interests of a small, powerful group in mind, which can create a façade of legality, when legitimacy is lacking and the powerless are repressed. With regard to land rights, for example, some governments have instituted formalized and complex land laws that legitimize ill-gotten lands and are inaccessible to locals familiar only with traditional tenure systems. In such situations, you must look under the surface to find the corruption.

In this regard, institution-building that focuses on creating a space for dialogue, and providing access to legal support to the voiceless will empower them to have an effect on the political system and accountability. Creating better standards for free, prior and informed consent, removing confidentiality clauses in impact-benefit agreements and mandating Publish-what-you-Pay participation would also help to promote human rights and ward off corruption. To

avoid future conflict, both the investor and the community need to know if and under what conditions free and informed consent was given. To gain a legitimate social license, the community must be assured that they will receive fair compensation for any foreseen expropriation, that the conditions of any work offered will be fair and safe; and that the political elite will not capture their foreseen gains. Recognizing the community's rights to know and participate in negotiating will help to dispel such fears.

6. Corruption, Competitiveness and Sustainability: Dilemma for Directors?

Moderator: Peter Dent, Part. & Nat'l Leader, Forensic & Dispute Services, Deloitte & Touche
John Dalla Costa, Founding Director, Centre for Ethical Orientation (CEO)
Michael Jantzi, CEO, Sustainalytics
James Klotz, Co-Chair, International Business Transactions Group, Miller Thomson
Rapporteur: Alan Willis, President, Alan Willis & Associates

To tell or not to tell? To ask or not to ask? To risk or not to risk? Such were the dilemmas for directors revealed today.

To "act honestly and in good faith with a view to the best interests of the corporation" is expected by law of every director and officer, we were reminded. Indeed, the Supreme Court of Canada judgment in the 2008 BCE case indicated that this points to long term best interests, not just short term return maximization for shareholders. How does this square with corruption in a competitive environment and perhaps in a country where corruption is part of the culture1?

Time frames are a key consideration. The longer-term time horizon of mainstream institutional investors for considering risks to sustainable value creation contrasts with that of shorter-term investors. Institutional investors are increasingly looking to environmental, social and governance (ESG) factors and risks in their analysis of a company's value creation prospects.

Bribery and corruption in particular and ethical business conduct generally are subsets of ESG considerations that can affect revenue streams and license to operate (legal and social), as well as reputation and trust on the street and in communities. Companies engaging in bribery and corruption in pursuit of short-term gains may even be undermining their own long-term sustainability. And there is emerging evidence that "good" companies outperform their peers over longer-term time frames.

Does corruption pay? Traditionally yes, if you aren't caught. But thanks to anti-corruption legislation being more widely introduced in most major countries (if not always well enforced), programs like the European Bank for Reconstruction and Development, and now the pervasive global light of the social media shining on corporate behavior, the chances of "getting away with it" are lower, and the risks and consequences of being caught can be significant, if not enormous.

[1] Three days after the above panel session and after this Synopsis was written, the story of corruption at Walmart in Mexico was published in the New York Times (April 22, 2012).

"There are signs of something different going on in the last two years." Questions are being asked today in boardrooms and CEO selection that were unheard of five years ago. National cultures traditionally pervaded by corruption are slowly opening up to public questioning.

So is there a conflict between directors' duty and ethical behavior? Failure by a board to expect, oversee and reward ethical behaviour, including compliance both with anti-corruption laws and with internal codes of business conduct, that results in questionable or illegal management conduct would seem to put the company's interests at risk in the longer term, even if commercial gains are achieved in the short term.

Management can be effective in saying "No" persistently to invitations or solicitations to engage in corrupt practices. Business can be done without bribes when other parties and officials see a firm line being taken (and do not wish to be exposed themselves as parties to illegal conduct.) Boards clearly have to signal their support, indeed their expectations, about how business is to be done, through codes of conduct (and effective oversight thereof), CEO selection, performance evaluation practices and executive compensation packages. It's not just "what did you achieve this past year" that should be asked in performance evaluation, but also "how did you achieve it?"

But a particular challenge for directors today, in the face of these seemingly contradictory and competitive pressures for short-term gain versus longer-term value creation and risk minimization, is that they often don't know what they should be doing for the best results. Director education and guidance is lacking on the tough situations they may face regarding corruption and questionable practices that come to their attention – or should come to their attention. Indeed, they may not always receive, or even ask for, information they need in order to monitor business practices and respond in a timely and prudent fashion to sensitive matters they become aware of. Indeed, there's no "qualification" for directors' competence in dealing with corruption!

Perhaps the most difficult dilemmas for directors occur when they must decide "to tell or not to tell." Should external disclosure of some kind be made about an alleged corruption situation that has been brought to their attention – perhaps by management, perhaps by established whistleblowing procedures, perhaps from external sources? The dilemma is arguably greater when chances are that the matter can be resolved internally and is unlikely to be found out externally.

While there are cases where board investigation has revealed allegations as being false, in fact the product of external political forces, the dominant view seemed to favour timely, suitable disclosure – if only because secrets always come out in the open eventually, so better to set the

record straight from the outset on the board's own well-informed terms rather than those of other, less informed parties. Plus, non-disclosure may send wrong signals internally, and disclosure, while perhaps unpleasant in the short term, may represent an opportunity to avoid surprises and build long-term trust in the company's integrity.

7. Prosecutions and investigations of anti-corruption offenses: Canadian and international perspectives

Moderator: Kernaghan Webb, Associate Professor, Law and Business, Ryerson University
Mark Morrison, Partner, Blake, Cassels & Graydon LLP
Danforth Newcomb, Of Counsel, Shearman & Sterling LLP
Jeff Richstone, Senior General Counsel & Director General, Public Prosecution Service of Canada
Rapporteur: Margaret Cappa, Master of Public Policy Candidate, University of Toronto

Much of the discussion revolved around differences between the Canadian enforcement approach and that of the United States. The suggestion was made that in light of increased enforcement of Canada's anti-bribery legislation, and significant enforcement in the United States, it is incumbent upon any pragmatic Canadian company to have in place an effective anti-corruption strategy and program. While Canada has been late to adopt anti-corruption legislation compared to the United States, Canada is now devoting considerable resources to enforcement of the Corruption of Foreign Public Officials Act (CFPOA).

The recent Niko Resources conviction is a sign of things to come in terms of Canadian enforcement. Canadians can expect not only more cases under the CFPOA, but also the likelihood that fines will increase. At present, the Royal Canadian Mounted Police (RCMP) has indicated that it has at least 34 investigations underway.

In Canada, there is a distinction between the prosecution and investigation of cases under the CFPOA. The Royal Canadian Mounted Police conducts the investigation, and Public Prosecution Service Canada (PPSC) prosecutes criminal offences such as the CFPOA on behalf of the Attorney General of Canada. It is advisable for firms charged under the CFPOA, or those attempting to mitigate corruption charges prior to/to prevent an investigation, to communicate with both bodies. Given that investigations related to the CFPOA are complex – involving the Canadian Charter of Rights and Freedoms, the Criminal Code, case law, domestic and international law – it is useful that indictable offenses such as those in the CFPOA have no limitation period in Canada. Thus, investigators have unrestricted time to gather evidence before prosecution.

While Canada has made strides in enacting and utilizing the CFPOA, opportunities to improve the legislation remain. From the investigation and prosecution standpoint, Canada only has territorial jurisdiction to lay charges, whereas the United States has national and territorial jurisdiction. Recent activity suggests that the federal government is moving to address this issue. Next, in comparison with the United States, Canada is a laggard in establishing Mutual Legal

Assistance Treaties (MLATs), which allows for the collection and sharing of information and evidence in a foreign jurisdiction for the purpose of enforcing law.

Another critique of the Canadian process is that there is no resolution available to defendants other than a guilty plea. In the U.S., there are a number of other options. For instance, one can negotiate without a guilty plea under a deferred prosecution agreement. Also, it was posited that Canada should adopt a books and records provision akin to the American example. The suggestion was made that it should be codified in a manner that adequately defines what constitutes "adequate books and records" and internal control and compliances. By doing so, the Government could set up an inducement for firms to enhance their anti-corruption strategies.

If charges are laid against a firm, or a firm has learned of internal corruption and wishes to address it, due diligence and voluntary disclosure of issues of corruption may be useful in a company's defence. In Canada, firms must be cognizant of the fact that the Criminal Code of Canada contains anti-bribery legislation beyond the CFPOA outlining that bribery is defined as providing a benefit to a government official with whom one has dealings, meaning, when dealing with public officials any benefits can get one into trouble. When prosecutors make a decision on whether or not to prosecute, the entire due diligence framework is taken into account. It is considered not as a defence or absolution, but for assessing the public interest test and other considerations. From the Crown's viewpoint, the investigator and prosecutors ought not to make that determination prior to the case because it can help the defence, but, from the firm's perspective, it may have a mitigating effect. Nonetheless, the place of due diligence and voluntary disclosure in cases of corruption is complex and requires important judgment calls.

As Canadian cases of corruption under the CFPOA continue to arise, and other jurisdictions continue to investigate and prosecute firms for similar criminal offenses, it is clear that a convergence of policy and legal process is needed at least among the United States, the United Kingdom and Canada. When it comes to bribery and corruption crimes, there is no double jeopardy – a number of countries can lay charges simultaneously. While some coordination does occur at present between jurisdictions laying charges against the same firm, it is not a formalized process. Jurisdictions should more seamlessly align their processes or create an holistic approach to litigating corruption charges. Investigation and enforcement requires major resource allocations, and so coordination would likely be a more efficient way of using limited resources.

8. The role of export credit agencies and international financial institutions in combating corruption

Moderator: Michael Robinson, Counsel, Fasken Martineau DuMoulin
Merly Khouw, Lead Investigator, Integrity Vice Presidency, The World Bank
Signi Schneider, Chief CSR Advisor, Export Development Canada
Rapporteur: Ava-Dayna Sefa, Master of Global Affairs (MGA) Candidate, University of Toronto

The role of export credit agencies (ECAs) and international financial institutions (IFIs) in combating corruption is multi-faceted and far-reaching. Due to the fact that corruption is a pervasive presence in the global economy, it has the potential to substantially affect many aspects of the business initiatives undertaken by these institutions. While the prevalence of corruption complicates the role of these institutions in combatting corruption, essentially, export credit agencies and international financial institutions must do their best to "turn off the tap" and prevent illicit funds from spreading throughout the global economy.

Given the complicated nature of corruption, "turning off the tap" seems like a reasonably simple approach to combating corruption with respect to IFIs and ECAs, but many questions remain regarding how the fight against corruption can be undertaken. What does "turning off the tap" entail? What kinds of formal decisions need to be made in order for anti-corruption initiatives to be officially implemented? What kinds of policies and actions do these institutions employ once the decision to combat corruption has been made? All of these questions are essential to understanding the role of ECAs and IFIs play in fighting corruption.

Turning off the tap has greater implications than just circumventing the supply of illicit funds. When large international financial institutions (such as the World Bank, Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development and the Inter-American Development Bank) and export credit agencies decide to implement stringent policies against corruption, the mere threat of turning off the tap is enough to dissuade corruption to some extent. However, more stringent policies and extensive plans of execution are necessary to mitigate corruption more earnestly.

While the formulation of these plans and policies are important, they can only be implemented when the mentality of the organization allows it. In the case of the World Bank, a formal declaration was needed in order to permit the official implementation of anti-corruption initiatives. Prior to 1996, the World Bank considered corruption a political issue (which was beyond the Bank's mandate of economic development and poverty alleviation) and did not warrant action by the Bank. However, when then-World Bank president James Wolfensohn referred to "the cancer of corruption" in a speech given in 1996, the World Bank as a whole came

to the realization that corruption substantially affects its poverty alleviation initiatives and must be addressed. In this sense, the role of IFIs and ECAs is first to cultivate an institutional culture that acknowledges the adverse effects of corruption and the need to fight back.

Once the organization as a whole has come to the realization that corruption is a force to be mitigated, policies can then be put in place to address situations in which corruption is suspected. However, the distinction must be made between those procedures that detect corruption and those that prove the existence of corruption. The role of IFIs and ECAs with respect to crafting anti-corruption policies is to ensure that both sides of the policy coin are addressed. In this sense, IFIs and ECAs are responsible for ensuring that fraud can be detected within an organization, remediating and then ensuring preventative strategies are instituted. But what kinds of detection, remediation and preventative policies produce the most effective outcomes with respect to anti-corruption?

IFIs and ECAs are responsible for ensuring that the policies put forth are effective in addressing and mitigating corruption. Effective detection policies and guidelines are those that are far-reaching and incorporate multiple areas of business within IFIs and ECAs. These institutions are also responsible for ensuring that the policies undertaken facilitate the mitigation of corruption in the global economy as whole. In order to ensure this happens effectively, IFIs and ECAs must initiate formal collaboration mechanisms with other institutions to ensure policies do not clash. One example of this is the agreement between the five major IFIs made in 2010 to formally recognize the debarment of a particular entity for a particular period of time made by each other. In this sense, the cohesion between these entities increases.

As corruption becomes more prevalent in the global economy, international financial institutions and export credit agencies will be forced to take on a more pronounced role in its eradication. As corrupt activities become more complex and sophisticated, simply 'turning off the tap' will not be enough to prevent its expansion. Moving beyond the simplistic supply-side concentrated solution to corruption by addressing the policy implications of methods including public shaming of both bribe donors and recipients is a new way in which the role of IFIs and ECAs can be realized.

9. Best Practices in mergers and acquisitions compliance due diligence

Moderator: Bruce N. Futterer, Vice President and General Counsel, GE Canada
Uma Annamalai, Executive Counsel, GE Canada
John Boscariol, Partner & Head, Int'l Trade & Investment Law Group, McCarthy Tetrault LLP
Rapporteur: Prakash Narayanan, Associate, Blake, Cassels & Graydon LLP

A key reason for undertaking compliance due diligence in mergers and acquisitions (M&A) is to identify major risks. This may have an impact on valuation and also determine what steps may need to be taken post-acquisition. In addition, during investigations in a M&A situation, law enforcers (e.g. in the US Foreign Corrupt Practices Act (FCPA) context) consider whether appropriate due diligence was conducted.

When retained to conduct compliance due diligence, the focus should be not just on the existence of a robust compliance program but also the compliance culture of the target. It also involves understanding what compliance sensitive transactions occur and validating or testing that the compliance program is effective. When conducting due diligence, the target's relationships with the government, third party agents, JV partners and authorities (e.g. customs officers) is relevant to examine.

The compliance culture of a target is important because it may be difficult to change the culture, at least quickly. Also, the culture may manifest itself in different ways – for instance, if a target says that it has had no instances of red flags being raised in the last 10 years, that may in fact be a cause for concern since it may indicate that the compliance mechanisms are not functioning adequately.

Anti-corruption compliance due diligence in the M&A context is not yet common in Canada, though it is more common in the United States. Even where such due diligence occurs, a common concern is if the process is commenced too close to the scheduled closing of the transaction rather than adequately in advance. In such situations, it is important to prioritize areas for due diligence and identify the big issues and assess risk on that basis. It may then be possible to conduct a more thorough analysis immediately post-closing to minimize further risk.

An important aspect of compliance due diligence, which is complementary to legal due diligence, is accounting forensics. Whether forensics is conducted as part of the due diligence is based on a cost-benefit analysis and depends on a case-by-case basis.

When forensic due diligence is being conducted on the target it involves having auditors and accountants go into the target's offices to review their books and records, such as time and expense sheets, cash accounts, interactions with third parties and marketing expenses. It is important to develop a strong relationship with the target before suggesting that they permit forensic due diligence as this may be a difficult issue to broach with the target.

In situations where the target is a small company, there may often not be dedicated resources relating to anti-corruption compliance, but due diligence can still be conducted, for instance, by interviewing senior management to understand the compliance culture and compliance processes. The questions asked of senior management are often not focussed on anti-corruption compliance, but deal with compliance from a broader perspective, for instance, privacy issues, trade controls, anti-money laundering and also anti-corruption. If some concerns are raised, then there could be more focussed discussion on a particular aspect.

Compliance due diligence is also appropriate in the JV context, though the sensitivity is increased in such situations – the JV partner conducting the due diligence should be prepared to answer the same questions that it raises. When a compliance due diligence raises concerns, the company doing the due diligence needs to determine how to deal with it. For example, it may be difficult to change the culture of the JV partner in a JV situation, so it may be appropriate for the JV partners to agree to a compliance plan upfront.

10. Debate on facilitation payments – the good, the bad and the ugly

Moderator: Bruce N. Futterer, Vice President and General Counsel, GE Canada
Milos Barutciski, Partner, Bennett Jones LLP
Peter Dent, Partner & National Leader, Forensic & Dispute Services, Deloitte & Touche LLP
James Klotz, Partner and Co-Chair, International Business Transactions Group, Miller Thomson
Rapporteur: Ken Mark, Ken Mark Freelance Writer

The good is that Canadian law permits such payments. The bad is the uncertainty of interpreting the law. The ugly is rising prosecutorial zeal to enforce the uncertainties.

The U.S. Foreign Corrupt Practices Act (FCPA) 1977 does not prohibit "facilitating or expediting payment[s] . . . to expedite or to secure the performance of a routine governmental action." Often called "low-grade shakedowns," such demands come from officials seeking payments for stamping passports or visas, etc.

Canada agreed to harmonize its relevant laws with those of the US since it did not want to not introduce rules imposing a higher standard than US legislation required. Such payments are considered different from those remitted to win contracts.

Uncertainty stems from the FCPA's lack of a dollar-figure limit distinguishing a facilitation payment from a bribe. Nevertheless, a US official says that he would be suspicious of any single claim exceeding US$1,000. Consequently, firms and their employees are unsure of what to do when faced with payment demands.

There are also ethical and moral issues involved. If it is a criminal act to make such payments within Canada, why should the law permit citizens to make them overseas? Some believe that a crime is a crime, irrespective of the amount of money involved.

But now that such payments are increasingly becoming a grey issue, alleged law-breakers must respond appropriately to authorities' queries or face unforeseen consequences. Such arbitrariness is attributed to prosecutorial "piling on" by US regulators seeking to extort guilty pleas from corporations to feed their careers.

As well, international organizations may have their own agendas. One speaker cited the example of a World Bank official taking exception to a global multinational's claims of a minor figure -- around $20,000 -- for its annual total of facilitation payments. The alleged wrongdoer had to

spend many times that amount in legal and other expenses to satisfy all the Bank's regulatory requirements. So far, no similar cases of bureaucratic heavy-handedness have arisen in Canada.

In practical terms, firms need to train employees to exercise proper judgment when faced with such demands. They need to weigh the consequences of not paying, such as the inconvenience of having to wait for several hours or missing a flight.

To eliminate employee confusion, firms need to establish realistic and flexible policies. However, if employees ever fear for their personal safety -- stories abound of requestors having AK 47s slung over their shoulder -- they should just pay up and move on.

But if they do pay, they must formally disclose the transaction to the corporate compliance office and ensure the expense is properly accounted for. This helps avoid future penalties related to a books-and-records violation. It is absolutely essential that organizations have in place an active and effective anti-corruption program.

One proposed solution is issuing a daily travel allowance to employees travelling in countries where such payments are part of the culture.

To eliminate corruption, we all need to focus on what really matters -- grand corruption. Over time these other, low-grade demands will disappear.

11. Recent anti-corruption developments in the extractive sector

Moderator: Kernaghan Webb, Associate Professor, Law and Business, Ryerson University
The Honourable John McKay, MP, Scarborough-Guildwood
Mark Morrison, Partner, Blake, Cassels & Graydon LLP
Joe Ringwald, Vice President, Mining, Selwyn Resources Ltd.
Rapporteur: Beth Elder, Master of Public Policy Candidate, University of Toronto

The focal point of this panel was the linkage between corruption and transparency relating to the extractive industry, including the disclosure of taxes, royalties, and licence (TRL) payments. Discussion revolved around disclosure initiatives – in particular, proposed laws and non-law instruments. The suggestion was made that there is a lack of TRL payment transparency with Canadian extractive sector companies operating overseas and domestically, particularly when working with Indigenous communities. The extractive sector is important to all Canadians, so companies have a responsibility to act accountably and transparently.

The extractive industry faces some particular challenges, as resource development often takes place in countries with a weak regulatory environment and companies are dependent on local governments that might not be accountable or transparent.

The Extractive Industry Transparency Initiative (EITI) places responsibility equally on companies and local governments, but recent anti-corruption developments are focused on the role of companies.

There are several ways to address or encourage transparency in extractive companies such as legislation, increased enforcement of existing regulations, voluntary compliance, and through the financial sector. One suggestion was made that initiatives should focus on junior mining companies, because their small size and lack of sophistication in anti-corruption policies create compliance challenges.

Canada was described as lagging behind our peers on corruption legislation. Disclosure legislation, such as the new proposed private member's bill of The Honourable John McKay, would require companies to disclose the amount, purpose, and recipients of all payments made to government organizations. The disclosure requirements could supplement anti-bribery legislation, and could also provide companies an easy answer when they are asked for bribes. In developing new disclosure legislation, consideration should be given to the costs of complying with the law, and its effect on a company's relationship with local governments. Legislation could also be tied to EITI as well as Canada's peer countries.

Enforcement of existing regulations should be significant enough for companies to take notice. For example, penalties for offending companies could include removing financing from the Canada Pension Plan, removing consular support, and delisting companies from the stock exchange.

When a company develops a compliance regime, they must clearly communicate expectations to all employees. Voluntary compliance and disclosure can be valuable, but not all companies will comply.

Disclosing government payments will give investors full information to invest responsibly. Financial disclosures and legal compliance could improve a junior company's chances to get financing or be bought.

There is considerable public support in Canada for imposing more stringent government regulations on mining companies, as was demonstrated by public engagement in the debate surrounding Bill C-300, a private member's bill that was defeated. In foreign countries there is also support to ensure transparency so that benefits from resource development are equitably distributed.

One participant suggested that while transparency is not the whole answer to corruption, it is 75 per cent of the solution. Corruption erodes public trust and a few unscrupulous companies have given the industry a bad reputation. Companies almost always want to do the right thing, but regardless of whether companies feel that compliance is the right thing, or they are just being pragmatic, it is in their interest to comply with anti-corruption norms and meet the terms of TRL disclosure initiatives.

12. The Effectiveness of Municipal Anti-Corruption Institutions

Moderator: Tom Marshall, Q.C., former General Counsel, Attorney General of Ontario.
Linda Gehrke, Lobbyist Registrar, City of Toronto
Andre Marin, Ombudsman of Ontario
David Nitkin, President, EthicScan Canada Ltd.
Rapporteur: Garrett MacSweeney, PhD Candidate, Dep.t of Philosophy, York University

While anti-corruption is not necessarily the intent or sole mandate of each public institution, each office deals with problems of corruption in some way, shape, or form. Whether it is a conflict of interest, facilitation fee, or bribe in dealing with the private sector or private citizens, a practice that undermines the integrity of the office, or maladministration in acting against the public interest, corruption enters the municipal level in many ways and our public dialogue on these issues is lacking.

From the public's perspective, there is an increasing dissatisfaction and lack of confidence with the process by which public servants and office holders go about discharging their public duties. Therefore, the roles of these institutions and offices are meant not only to investigate individual cases of public concern, but also to analyze greater systemic concerns of public administration.

In doing so, the intent is to create a more transparent public system through educating both the public at large and public administrators more specifically on the acceptable practices of governing, and what are acceptable relations with the private sector and individual citizens.

While transparency is expected, the interpretation of what constitutes transparent governing and decision-making varies widely between municipal jurisdictions and ministries within the province and between provinces. Thus, these institutions seek to set the tone for transparency by clarifying expectations both through rules guiding processes for public administration and precedent setting decisions in particular hard hitting or high profile cases.

In addition to these two functions, the institutions offer to the public an avenue by which to access investigative measures and voice particular concerns, which in turn opens a dialogue and gives power back to the public at large, hopefully improving the dissatisfaction and lack of confidence along the way.

How do we measure the success and effectiveness of such institutions? There are two ways in which this question can be answered: the first is empirically, and the second culturally.

While empirical results measure the amount of calls and complaints from the public compared with the results of actions taken, the addressing of concerns, or solutions to a particular problem, which makes up the usual subject matter of annual reports, the cultural equation is much harder to pin point. The cultural success can be measured by how many citizens are affected by an action or solution, and how the result has bettered the situation of a number of citizens. While a drop on the empirical side may point to an improvement on the cultural side of the ledger, the often intangible nature of cultural success, however, can be hard to identify, hard to implement, and even harder to convey to the public.

Unfortunately, all too often, the reaction is to pick from low hanging fruit as a quantitative measure of success, and this can hinder greater cultural and systemic change. The result is that it is a couple of bad apples, as opposed to various features and characteristics of the system that are the problem. Sometimes they are, but sometimes this practice hides more pressing concerns. While improving governance is hard to define, we need to see transparency, openness, and a realization of expectations, along with a lack of corruption, fraud, and faulty governing practices, if we are to succeed.

To complicate the problem further, the solution of one-size fits all is itself problematic, as it fails to address the nuances and situational factors on the ground. Current legislation and official mandates are often not clear, or limited in investigative scope or authority. At times the legislation lacks enforcement mechanisms or direction in the grey zone; and it can be difficult to decipher the difference between policy concerns and ethical concerns, as where the two come apart are at times not altogether clear. In addition to this, the relationship between the office holder and the governing body is, at its core, one of complexity, as legislators often have control over information and office budgets.

While it is the case that such accountability institutions are capable of questioning the system, they are not there to undermine the system. They ought to be viewed as measures of last resort, and so citizens, in almost all cases, are encouraged to return to the usual hierarchy within our system of public administration. Only after this process has been exhausted, or if the concern is of such a serious and pressing nature that it is warranted, are these particular institutions employed.

Yet, at the same time, there still needs to be greater integration of an overall accountability network; an integration that would allow for more substantial communication, cooperation, and a common effort between offices, as this would increase the overall ability to help fight corruption at the municipal level, provide education, and support and strengthen the effectiveness of the office holder in changing the culture of public administration across Canada. It is through these means and the courage and character of the office holder to realize their

mandate that we will be able to bring this dialogue forward for further public discussion and debate, offering to the public the benchmark of acceptable behavior, clarity, and expectations.