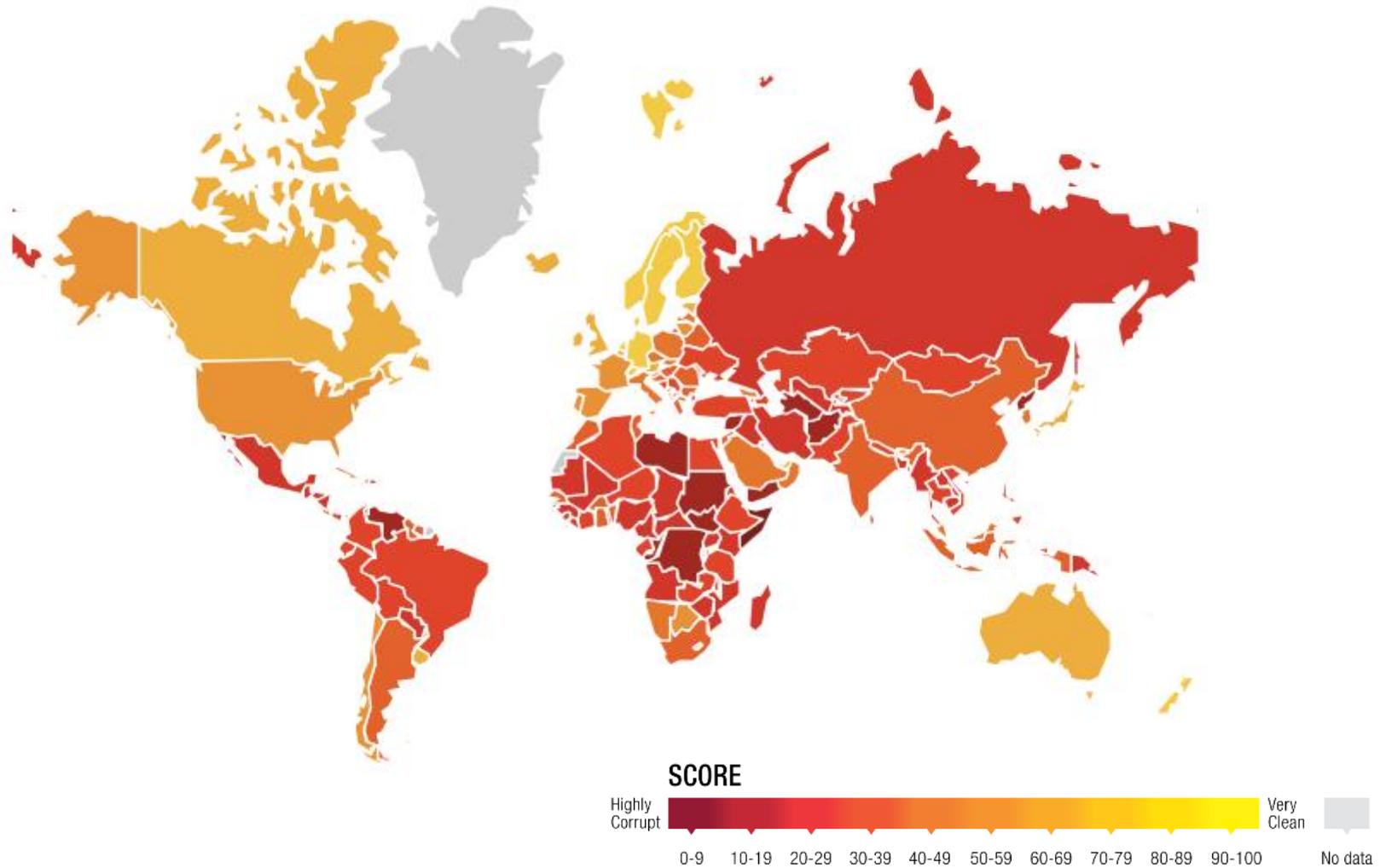


The Anti-Corruption Landscape for Mining Companies

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TI Corruption Perception Index Map 2018



Anti-bribery: An area of growing focus

Global scrutiny of corporate conduct

- The CFPOA is Canada's response to international bribery, very similar to the FCPA in the United States, and is part of an increasing effort to combat the practice.
- Internationally, we see:
 - International investigations becoming more common;
 - Increasing co-operation between law enforcement agencies; and
 - Sharing of investigative techniques, collaboration on evidence collection, parallel enforcement action in more than one jurisdiction.
- Enforcement trends increase need for global response including coordinated internal investigations.

Global Anti-Bribery Regimes

United Nations
Convention
Against Corruption
(UNCAC)
2003

Organization for
Economic
Cooperation and
Development
(OECD)
Anti-Bribery
Convention 1999

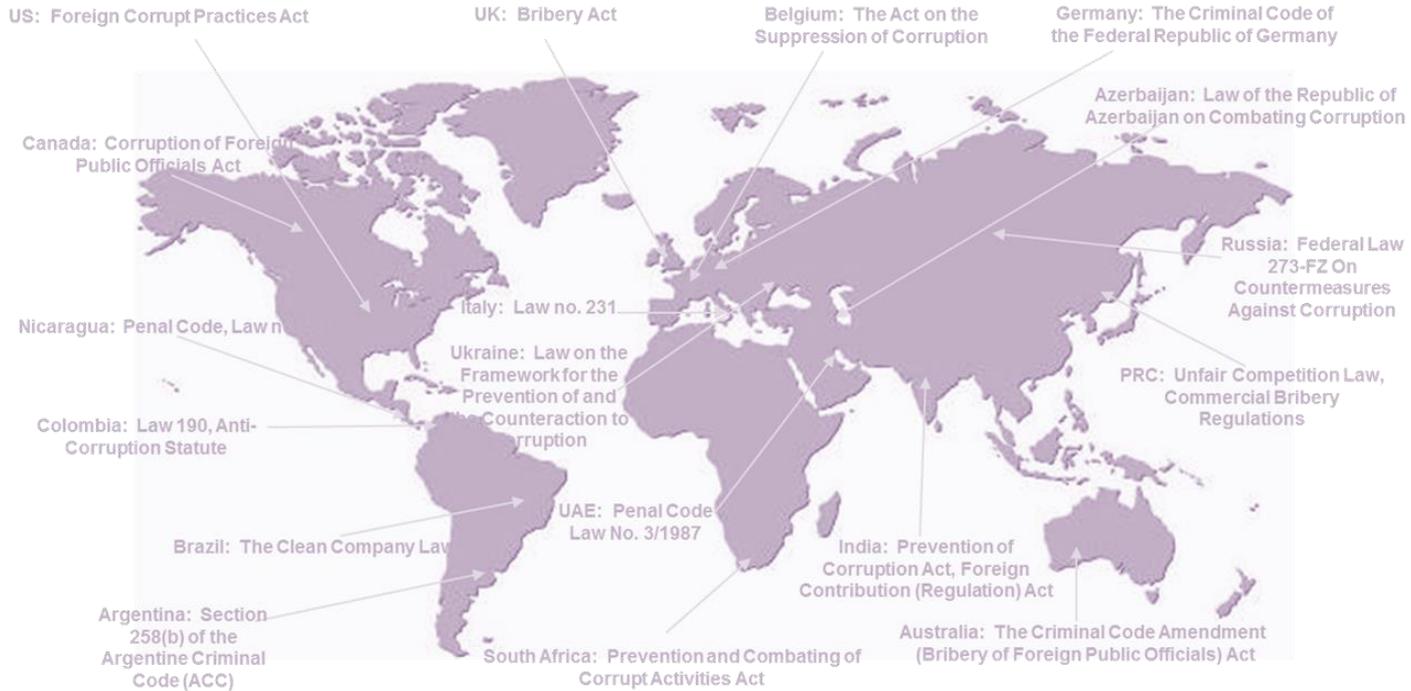
Canada
Corruption of
Foreign Public
Officials Act
(CFPOA)
1998

Similar anti-bribery
laws across the
globe, including
increasingly
aggressive local
laws:
<https://www.antibriberylaws.com>

United States
Foreign Corrupt
Practices Act
(FCPA)
1977

United Kingdom
Bribery Act
(UKBA)
2010

Bribery is prohibited around the globe



No country has legalized corruption, graft or bribery and most have explicit laws making the conduct criminal.

NOT Defenses to Bribery Charges

- It's a cost of doing business
- Everybody does it
- It's the culture here
- This is what we've always done
- My boss knew about it
- The guy before me did it
- But it was a small bribe
- No one will find out
- I'm using an agent, so it's not our problem if they are paying bribes

None of these matter...

Canada's CFPOA

Prohibits:

- **Giving, offering** some form of **benefit or reward** to a **foreign public official** in order to secure an advantage **in the course of business** (Section 3).
 - Does not need to be any money (or other benefit) actually changing hands, and merely an *agreement* with a third party to bribe an official is enough to trigger liability (*R. v. Karigar*)
 - Both direct and *indirect* bribes are prohibited (i.e. through a local agent or consultant)
- Manipulating, falsifying or destroying “books and records” to conceal or facilitate bribery (Section 4).
 - “Books and records” – records that company is “required to keep in accordance with applicable accounting and auditing standards”
 - Expressly prohibits creation or maintaining of “off book” records
- CFPOA offences also intersects with other Criminal and Regulatory offences e.g.:
 - Money Laundering – growing enforcement priority; can “piggy-back” off corruption/fraud cases;
 - Fraud;
 - Bid-Rigging and other anti-competitive behavior;
 - Tax evasion;
 - Secret commissions (kickbacks, private sector bribery); and
 - **Various *Criminal Code* bribery & influence peddling offences applicable to domestic officials.**

CFPOA: “Foreign Public Official”

Definition Captures

- (a) Anyone who holds a legislative, administrative or judicial position within a *foreign* (i.e. non-Canadian) state;
- (b) Anyone who performs public duties or functions *for* a foreign state, including a person employed by a government board, commission, corporation etc.; and
- (c) Any official or agent of a public international organization.

Examples:

- Officers or employees of a government owned or controlled entity or company (e.g. state-owned bank, national oil companies);
 - Police officers, customs officials, public licensing authorities;
 - Local municipal officials and councillors; and
 - Foreign Indigenous Community Leaders.
- ❖ **Note:** Domestic dealings with Canadian indigenous representatives captured under *Criminal Code offences* rather than CFPOA, but is also a potential FCPA exposure).

CFPOA: Advantages in the Course of Business

Examples include:

- Influence award of contract;
- Affect the nature of regulations or the application of regulatory provisions;
- Obtain confidential information about business opportunities, bids or the activities of competitors;
- Obtain a permit, license, certification;
- Influence the rate of taxes, license fees or duties (e.g. make a tax assessment “go away”); and
- Obtain relief or exemption from enforcement action, controls, inspections or regulations.

CFPOA: Exceptions

- **Reasonable and legitimate promotional expenses** – payment for **reasonable** expenses of the official **directly** related to: (1) **promotion, demonstration or explanation of products** or services; **or** (2) **execution or performance of a contract**.
 - Test is strict, and great caution should be exercised;
 - Legitimate business purpose should be clear, and no “side-trips” or similar personal benefits should be conferred; and
 - Accurate recording/supporting documentation (including regarding purpose) is critical.
- Some FCPA enforcement actions have involved cases where liability was not based on a finding that the expense was necessarily improper, but accounting for it was clearly inaccurate.

CFPOA - Penalties

- **Substantial jail terms for individuals - up to 14 years imprisonment.**

“Any person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary”

Justice Hackland, R v. Karigar

- **Unlimited Fines for Companies.**
- Corporations are encouraged by RCMP/Prosecutors to voluntarily self-disclose wrongdoing for leniency.
 - Criminal charges may be deferred under a Remediation Agreement

Anti-Corruption - The Foreign Corrupt Practices Act

Governs:

- Any **Publicly Traded Company** Registered in the **United States** or its agents
- Any **US Person**, including citizens, residents, or “**domestic concerns**”
- Any “foreign national or business” **acting or causing actions within the United States**



The **SEC** investigates compliance with the FCPA, provides civil enforcement lead by an FCPA unit headquartered in Washington and expanding across the nation



The **DOJ** prosecutes criminal violations of the FCPA through its Fraud Section, 93 US Attorney's Offices, and 8 international attachés, with thousands of investigative agents at its disposal

Prohibits:

- Payment of “**anything of value**” (directly or through a third party)
- To a “**foreign official**”, foreign political party, or candidate for office, including officials of state-owned businesses
- With a “**corrupt intent**” to influence a government decision, obtain business, or obtain an improper advantage

Books and Records:

- **Publicly Traded Companies** must maintain **books that accurately reflect** all transactions
- **Publicly Traded Companies** must have **internal accounting controls** to ensure all payments to foreign officials are recorded
- It is a **crime to circumvent** such controls

Penalty: 5 years in Prison, up to \$2M fine for **EACH VIOLATION**

Securities Regulatory Action

- US SEC enforcement has been aggressive for some time.
 - Reporting issuers are subject to US FCPA “Books and Records” and “Internal Control provisions”
 - Recent trend of enforcement focused on unaddressed risk that company previously identified
 - Enforcement against non-US companies is common, including Canadian companies
 - FCPA enforcement action against Canadian Mining company by US SEC (settled under Administrative Order)
 - Recent FCPA enforcement action against Westport Fuels (Vancouver company, NASDAQ-listed) and CEO (September 2019)
- Some sign of Canadian Securities Regulators addressing compliance failures, e.g.
 - OSC Enforcement Action against Katanga Mining in respect of inadequate and misleading disclosure regarding its operations in DRC
 - Action was **against company and several directors and officers**
 - One of three violations relied on was inadequate disclosures around the risks of corruption in DRC, and in particular regarding its use/reliance on and payments to a particular individual, or entities associated with him, who was known to have strong connections to senior government officials
 - Katanga paid **\$28,500,000** as part of a Settlement with OSC, and the individual officers and directors also paid significant fines (several hundred thousand dollars each)

Remediation Agreements – General Principles

- Remediation agreements are a tool available to the Public Prosecution Service of Canada (“**PPSC**”) under the Criminal Code.
- Remediation agreements are similar to deferred prosecution agreements in other jurisdictions – allowing the PPSC to defer CFPOA charges.
- Available to organizations when the PPSC prosecutor concludes:
 - There is a reasonable prospect of conviction;
 - The act did not cause serious harm or death, injury to national defence or security, and was not committed in association with a terrorist or criminal organization;
 - Negotiating the agreement is in the public interest; and
 - The Attorney General has consented.

Remediation Agreements - Factors

- The PPSC must rely upon the following (non-exhaustive) factors to conclude a remediation agreement is appropriate:
 - How the impugned conduct was brought to the attention of authorities;
 - Any efforts by the organization to remediate the wrongdoing and address deficiencies in its compliance program;
 - Whether the organization has taken disciplinary action against employees involved in the impugned conduct, and whether it is willing to identify individual wrongdoers to the authorities;
 - The gravity of the conduct, as well as any history of offending by the organization; and
 - "Any other factor the prosecution considers relevant," thereby giving the prosecutor considerable latitude to take account of specific circumstances.
- The PPSC is not allowed to consider the national economic interest, the foreign relations consequences, or the identity of those involved.

Compliance Tips

- Policies and other written procedures are only a small part of what is required: existence of Policies is not a defence to bribery charges.
- Resources should be applied to the areas of greatest risk – not a “one size fits all approach”.
 - Requires a substantive and effective risk assessment up front, reviewed on an ongoing basis, with compliance program enhancement when/where appropriate
 - Counterparty/intermediary risk is always a potential area of vulnerability
 - International enforcement agencies expect to see appropriate allocation of financial and human resources to compliance function
- Organizational “Culture of Compliance” is a valuable and cost-effective tool.
 - Must be demonstrated by internal messaging from management (written and verbal), and by appropriate/proportionate responses to compliance incidents or risks
 - Employee training should be properly tailored to organization’s risks, and to way in which it conducts business (including use of third parties)
- Do not ignore local laws: local enforcement is growing (encouraged by e.g. US), and local law may be relevant to a prosecution under CFPOA/FCPA.

Key Concepts for Policy on Corruption

Key Prohibitions

- Do not bribe or tolerate bribery of government officials or in private business relationships.
- Do not engage in other forms of corruption:
 - Kickbacks or taking bribes;
 - Conflicts against Company's interest;
 - Creating false records;
 - Unapproved charitable or political contributions; or
 - Inappropriate hospitality, expenses or gifts.
- Do not make facilitation payments.

What Constitutes a Facilitation Payment?

- Facilitation payments are small payments made to a non-domestic Government Official for the purpose of facilitating or expediting routine, lawful services or non-discretionary administrative actions or services.
 - **Such payments are unlawful under the laws of many countries**
- For example, a small fee to a government employee to move your permit request to the top of the pile.

Acceptable Interactions with Government Officials

- Bona fide and reasonable business expenses.
 - For example, expenses for promotion, demonstration or explanation of products or services
- Can host government officials for legitimate business purposes if the costs are reasonable.
- Charitable and – in certain jurisdictions – political donations *may* be permissible.

BUT each of the above are higher risk activities, and controls should be put in place to ensure:

- a.) risks are flagged and fully addressed in accordance with all applicable laws before offers or commitments are made;**
- b.) company has a consistent approach; and**
- c.) Appropriate records are maintained.**

Third Party Risk Management

Law Enforcement Expectations

- Leading law enforcement agencies/regulators have provided official guidance on their expectations around managing risks.
- In a broad sense, these expectations can be broken down into three aspects, each of which should be addressed as part of company's compliance infrastructure.

1. Initial due diligence

2. Terms and scope of engagement and remuneration

3. Ongoing monitoring and controls

Third Party Risk – *Due Diligence*

What's the goal?

- To understand who the agent is and what their function is.
 - Are they who we thought they were?
 - What is their reputation?
 - Does their skill and experience justify the proposed remuneration?
- Identify corruption risk, if any, in doing business with a particular third party.
 - Address and mitigate any warning signs
 - Decline to proceed if outside of tolerance (taking account of possible mitigation or counter-measures)
- Create a clear written record of steps taken.
 - Meet law enforcement expectations and lower the risk of enforcement actions

Third Party Risk – *Terms of engagement*

- The Agreement with a given Third Party is a key defense mechanism, and should clearly define:
 - Scope/nature of responsibilities;
 - Expectations around anti-corruption;
 - Terms of **remuneration** for agents, including rights to withhold payments if concerns arise; and
 - Additional rights to cement framework for ongoing monitoring and risk-mitigation (e.g. anti-corruption certifications, audit rights, termination etc.).

Third Party Risk – *Ongoing Monitoring*

- Risk profile of agent or distributor may change over time.
 - Must be alive to changes or red flags
 - React to mitigate new circumstances (e.g. change in ownership, scope of services, remuneration amount/structure)
 - Informed by ongoing due diligence and employee vigilance
- Company should exercise contractual rights where necessary/appropriate – audit rights are not “window-dressing” and can be valuable.

Accurate Books and Records

- The Company maintains internal accounting controls based on sound accounting principles.
- All payments, accounts, invoices and other documents and records relating to dealings with third parties must be prepared and clearly and accurately maintained.
- Employees must ensure that all expense reports relating to hospitality, entertainment, gifts or expenses incurred to third parties are submitted in accordance with the Company's Travel and Expense Policy.
- No accounts or transactions may be kept "off book" or in a manner designed to conceal improper payments.

Thank you

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Biography



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Stephen L. Hill, Jr., a former United States Attorney for the Western District of Missouri, is a member of Dentons' [Litigation and Dispute Resolution](#) practice, and serves as Chair of the US [White Collar and Government Investigations](#) practice group. In his role, Steve regularly counsels boards and business leadership on investigations related to allegations of federal law violations.

Appointed by President Bill Clinton, Steve served as United States Attorney for the Western District of Missouri from 1993 to 2001. His office obtained numerous convictions involving corruption at City Hall in Kansas City, MO, local county courthouses and the Missouri General Assembly. Steve advised US Attorney General Janet Reno and the Justice Department on corporate prosecution and health care-related policies as part of his tenure on the Attorney General's Advisory Committee. In addition, he co-developed Project Cease Fire, a nationally recognized program targeting prosecution and conviction of felons illegally possessing firearms in Kansas City and western Missouri.

During his tenure, Steve successfully argued the constitutionality of the Freedom of Access to Clinic Entrances Act of 1994 in *United States v. Dinwiddie* when the Eighth Circuit Court of Appeals upheld a federal district court decision finding that Dinwiddie had violated the law. The *Dinwiddie* decision was one of the first cases in the nation to consider the then-new law's constitutionality.

Biography



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Anthony's practice focuses on anti-corruption, anti-money laundering and civil fraud. He is the National Co-lead of Dentons' Fraud and Asset Recovery group.

In the area of anti-corruption, Anthony has represented clients in the context of criminal investigations, prosecutions, civil recovery measures and forfeiture proceedings. He has also represented clients in international arbitration proceedings relating to corruption matters. In addition, Anthony has substantial experience in conducting complex cross-border internal investigations, including within North America, Europe, Asia-Pacific, Africa, Latin America, and the Caribbean.

Anthony also conducts and oversees compliance reviews and regularly advises on the development of business integrity policies and procedures, and the delivery of anti-corruption training programs. Anthony is also a Certified Anti-Money Laundering Specialist (CAMS), and advises clients on a broader range of compliance and governance issues, including economic sanctions and compliance with Canada's Extractive Sector Transparency Measures Act.

Anthony has also acted on numerous complex and high-value civil fraud claims, including matters with a substantial cross-border element. He has experience obtaining and executing emergency interim relief such as Mareva injunctions, Norwich Pharmacal orders and Anton Piller orders.

Anthony also handles broader commercial litigation matters, including securities litigation ranging from oppression cases to prospectus misrepresentation claims.

Biography



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Murray A. Rodych is Counsel in the Firm's Litigation and Dispute Resolution group. In his practice, Murray focuses primarily on the areas of anti-bribery, anti-money laundering, fraud and capital market offenses.

In a career spanning more than three decades, Murray developed deep experience as senior counsel with the Public Prosecution Service of Canada (PPSC). In his role with the PPSC, Murray advised the Royal Canadian Mounted Police (RCMP) on the enforcement of the *Corruption of Foreign Public Officials Act* (CFPOA), and he acted as co-counsel on the successful prosecution of CFPOA charges in *R. v. Griffiths Energy International Inc.* Also in his role with the PPSC, Murray was regularly and actively involved in national and global CFPOA investigations, including assisting and providing liaison to foreign investigative agencies (in respect of civil recovery/forfeiture measures).

In addition to his work on anti-corruption, Murray was actively engaged in advising the RCMP on fraud, insider trading and money laundering investigations, as well as on the criminal enforcement of capital market offenses.

During his distinguished career, Murray also advised on the implementation and negotiation of international treaties, and represented the Government of Canada on matters involving terrorism, espionage and foreign interference in Canadian affairs. He also litigated a wide variety of national and international cases ranging from war crimes to national security issues on behalf of the Canadian Security Intelligence Service.