Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response

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Corruption in Canada:
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to Improve Our Response*

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1. Introduction

The impact of corruption and the associated costs to society are better understood today than they were even two decades ago. It's been said that we are now in a "new world of international anti-corruption standards and enforcement".[1] The last twenty years have seen a fundamental global shift in attitudes about corruption.[2] This is reflected in the increased efforts at the international and national levels to reduce and fight corruption. Some countries have introduced broad jurisdictional reach in their criminalization of transnational bribery of foreign officials and others have expanded and updated their domestic bribery laws, pursuant to treaties or simply due to an enhanced focus on combating corruption.[3]

Canada, like many other States, is confronted with the challenge of determining how best to respond and effectively combat corruption. There are no reliable statistics on the actual rate, or even the reported rate, of corruption offences either domestically or by Canadian companies doing business abroad (i.e. foreign corruption). Canada, like all other countries, has to rely on surveys of the perceptions of persons who are in the best position to estimate the extent of actual corruption. The general perception of Canada as an honest corrupt-free society is slipping somewhat. Canada's ranking on the Transparency International (TI) Corruption Perceptions Index (CPI) has gone from 6th place out of 178 countries in 2010[4] to 9th place in 2016.[5] Further, from another TI survey, we see Canada going from being tied for first place in 2008 for honesty abroad to being tied for sixth place in 2011.[6] Another survey by TI shows that Canadians think corruption is on the rise and that the government is not doing enough to stop it.[7]

The perception that corruption is on the rise is consistent with the increased media coverage over the past 20 years of large-scale corruption both in Canada and by Canadian companies working abroad. These instances of corruption, many of which are discussed in section 2 of this paper,

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[1] International Bar Association (IBA) *"Report of the Task Force on Extra-Territorial Jurisdiction"* (2009), retrieved from http://tinyurl.com/taskforce-etj-pdf, p. 216.

[2] Omphemetse Sibanda "The South African Corruption Law and Bribery of Foreign Public Officials in International Business Transactions: A Comparative Analysis" (2005) 18 South African Journal of Criminal Justice 1.

[3] IBA Task Force report, *supra* note 1, pp. 207-224.

[4] Transparency International "*Corruption Perception Index*" (2010), retrieved from http://www.transparency.org/cpi2010/in_detail, pp. 2-5. According to TI, the CPI 2010 "shows that nearly three quarters of the 178 countries in the index score below five, on a scale from 10 (very clean) to 0 (highly corrupt). These results indicate a serious corruption problem."

[5] Transparency International "*Corruption Perception Index*" (2016), retrieved from http://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2016, pp. 3-5. According to TI, the "findings are less than encouraging. Not a single country comes close to top marks, while over 120 countries score below 50 on the scale of 0 (highly corrupt) to 100 (very clean). This means less than a third of countries are even above the midpoint."

[6] Transparency International "*Bribe Payers Index*" (2011), retrieved from http://bpi.transparency.org/. The TI Bribe Payers Index (BPI) is a self-reporting poll of 3000 business executives from 30 countries around the world who were asked to talk confidentially about bribes paid to foreign governments or companies. Julian Sher, *"Canada loses ground in bribery ranking"* (The Globe and Mail, November 1, 2011), retrieved from http://www.theglobeandmail.com/news/national/canada-loses-ground-on-bribery-ranking/article4248748/.

[7] *"Canadians think corruption is on the rise: survey"* (Macleans, December 9, 2010), retrieved from http://www.macleans.ca/general/canadians-think-corruption-is-on-the-rise-survey/, citing TI's 2010 Global Corruption Barometer.

raise the question whether Canada's current legal framework and policies are sufficient to combat corruption.[8] In particular, how does the Canadian legal framework and its enforcement fare in comparison with laws, policies and enforcement elsewhere? What can we learn from other countries to improve our own legal response? ICCLR has commissioned this paper to assist in answering these questions and to generate ideas for improving the detection, investigation, prosecution and sanctioning of domestic and transnational corruption. A selected number of issues are covered:

(a) whether a federal Anti-Corruption Agency would be desirable;
(b) whether Canada, like the UK, should adopt a new offence of corporate failure to prevent bribery as well as affirmative defence of following an adequate anti-corruption compliance programme in its transactions;
(c) whether Canada needs to expand its current common law test in *Libman*[9] for territorial jurisdiction, at least in respect to foreign bribery;
(d) whether Canada should eliminate or at least alter its existing exemption of facilitation payments from the application of bribery under s. 3 of the *CFPOA*;
(e) whether Canada needs to increase its voluntary and mandatory corruption disclosure laws and policies;
(f) whether Canada should create a deferred prosecution agreement scheme, perhaps like the one in England; and
(g) whether Canada, like England, needs to create a system of mandatory disclosure of beneficial ownership in transactions involving shell companies and trusts.

Part I: Canada and Corruption

2. Scope and Extent of Corruption in Canada

As noted, there is no exact answer to the question of how widespread corruption is in Canada or the extent of corruption committed by Canadian companies that operate abroad. Like many other economic crimes, there is no data on the actual number of corruption offences since these offences are usually committed in secrecy. At best, we can only record the number of *reported* crimes of corruption. But data on *reported* crimes of corruption are also misleading, because the number of actual offences of corruption that are detected and reported will depend very much on the level of police and other resources that are devoted to investigating possible corruption. The fewer the resources, the lower will be the number of detected or reported crimes of corruption. In addition, measuring the scope and extent of corruption can be difficult because some acts of corruption are subsumed under other offences such as fraud, embezzlement or extortion.[10] Thus, as noted, the next best approach is to measure "perceptions" of corruption. Transparency International's estimates of the perceptions of corruption in each country are drawn from a number of sources, including private, non-governmental organizations (NGOs) and international

[8] The resourcing and implementation of prevention, prosecution and other enforcement issues are very important, but not the primary focus of this paper.
[9] *Libman v. The Queen*, [1985] 2 S.C.R. 178 [*Libman*].
[10] Indira Carr "*Fighting Corruption through Regional and International Conventions: A Satisfactory Solution?*" (2007) European Journal of Crime, Criminal Law and Criminal Justice 121, p. 125.

institutions. These perceptions also take into account reported criminal cases as well as anecdotal evidence from media and NGO reports.

In Canada, there is no national mechanism to monitor and assess the effectiveness of anti-corruption legislation and policies. In 2011, Quebec became the first, and so far the only, province to create an Anti-Corruption Enforcement Agency (UPAC) and to systematically collect and publish statistics on reported corruption offences in Quebec.[11] While there is no national anti-corruption assessment agency in Canada, as a party to the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), Canada is subject to the Convention's peer-review monitoring system. That system assesses Canada's legislation and policies relating to transnational bribery. Furthermore, with Canada's adoption of the United Nations Convention against Corruption (UNCAC) in 2005, Canada is also subject to the UNCAC peer review system in respect to compliance with the UNCAC for both domestic and foreign corruption in Canada. Peer reviews of Canada's compliance under the OECD Convention[12] and the UNCAC[13] have been conducted and have led to administrative and legal changes to Canada's corruption laws, especially the amendments in 2013 to the *Corruption of Foreign Public Officials Act* (CFPOA).[14]

According to the 2013 Global Corruption Barometer,[15] only 2 per cent of Canadians polled thought that corruption had decreased a lot over the past two years and 8 per cent said it had decreased a little. On the other hand, 38 per cent thought that it had stayed the same, while 29 per cent thought that it had increased a little and 24 per cent said that it had increased a lot. At the same time, only 14 per cent of those polled thought that the government's actions in the fight against corruption were effective or very effective, and 30 per cent said that they were neither effective nor ineffective. On the other hand, 41 per cent thought that they were ineffective and 14 per cent said that they were very ineffective. Similarly, a 2010 Angus Reid poll showed that a majority of Quebecers, British Columbians and Ontarians were concerned about corruption and the ethical standards of their politicians.[16] That concern is not surprising in light of a number of

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[11] UPAC was created in 2011 and is briefly discussed in Gerry Ferguson "*Global Corruption: Law, Theory and Practice*", 2nd ed (ICCLR, 2017), retrieved from http://icclr.law.ubc.ca/global-corruption-law-theory-and-practice, pp. 6.26-6.27.

[12] OECD, "*Canada: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*" (March 2011), retrieved from https://www.oecd.org/canada/Canadaphase3reportEN.pdf.

[13] United Nations Office on Drugs and Crime "*Review by Iraq and Switzerland of the implementation by Canada of articles 15 – 42 of Chapter III. 'Criminalization and law enforcement' and articles 44 – 50 of Chapter IV. 'International cooperation' of the United Nations Convention against Corruption for the review cycle 2010 - 2015*" (2015), retrieved from https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2015_08_07_Canada_Final_Country_Report.pdf.

[14] *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34 (*CFPOA*), as amended by the *Fighting Foreign Corruption Act*, S.C. 2013, c. 26.

[15] Transparency International "*Global Corruption Barometer*" (2013), retrieved from http://www.transparency.org/gcb2013/country/?country=canada.

[16] The Angus Reid poll showed Quebecers concerned (68%); BC (61%); Ontario (56%). See Aaron Wherry *"Poll: 62 per cent of Quebecers see broad, systemic corruption"* (Macleans: October 1, 2010), retrieved from http://www.macleans.ca/news/canada/poll-quebecers-are-the-most-concerned-about-corruption/.

instances of corruption that have been uncovered in recent years.

In September 2010, a controversial article in *Maclean's* magazine pronounced Quebec as the most corrupt province in Canada.[17] This was before the publication of the corruption scandal in Quebec involving construction companies, organized crime and numerous municipal officials, provincial politicians and Canada Revenue Agency (CRA) officers. As a result of these corruption allegations, a public inquiry (the Charbonneau Commission) was established in October 2011 and, four years later, it released a 1,741-page report containing detailed evidence of widespread corruption and 60 recommendations to the Quebec government to prevent such corruption.[18]The corruption investigation resulted in Montreal mayor Michael Applebaum being arrested by Quebec's anti-corruption unit in June 2013,[19] found guilty in January 2017 of eight criminal charges including breach of trust and fraud against the government[20] and subsequently sentenced to one year of imprisonment and two years of probation.[21] In December 2016, former Laval mayor Gilles Vaillancourt plead guilty to a conspiracy to commit fraud, fraud and breach of trust as part of a system of corruption and collusion in which he collected a percentage of the construction and engineering contracts awarded by the city between 1996 and 2010. He was sentenced to six years of imprisonment.[22] Moreover, 15 people, including eight former CRA auditors, were charged as a result of the Project Coche probe, an investigation pursued by the Royal Canadian Mounted Police (RCMP) between 2008 and 2014 into false billing practices used by companies associated with construction magnate Antonio Accurso.[23] Allegations of

[17] Martin Patriquin "*Quebec: The most corrupt province*" (Macleans: September 24, 2010), retrieved from http://www.macleans.ca/news/canada/the-most-corrupt-province/; Tasha Kheiriddin *"Tasha Kheiriddin: Still doubt there's corruption in Quebec?"* (National Post: October 26, 2011), retrieved from http://news.nationalpost.com/full-comment/tasha-kheiriddin-still-doubt-theres-corruption-in-quebec.

[18] "*Charbonneau commission finds corruption widespread in Quebec's construction sector*" (CBC News: November 24, 2015), retrieved from http://www.cbc.ca/news/canada/montreal/charbonneau-corruption-inquiry-findings-released-1.3331577; Martin Patriquin "*No one can deny it now: Quebec is facing a corruption crisis.*" (Macleans: November 24, 2015), retrieved from http://www.macleans.ca/news/canada/quebecs-now-undeniable-corruption-crisis/. Full text of the report (in French) is available at https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Integral_c.pdf. The Commission's recommendations in English can be found at the ICCLR's website: http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/9503929_001_EN_Rapport_final_CEIC_Tome3.pdf.

[19] Allan Woods & Julian Sher "*Montreal Mayor Michael Applebaum charged with 14 offences*" (Toronto Star: June 17, 2013), retrieved from https://www.thestar.com/news/canada/2013/06/17/montreal_mayor_michael_applebaum_has_been_arrested.html.

[20] Ingrid Peritz "*Ex-Montreal mayor Michael Applebaum found guilty of corruption, fraud*" (The Globe and Mail: January 26, 2017), retrieved from http://www.theglobeandmail.com/news/national/ex-montreal-mayor-michael-applebaum-found-guilty-on-eight-charges/article33784866/.

[21] Sidhartha Banerjee "*Former Montreal mayor Michael Applebaum sentenced to one year in prison for corruption*" (National Post: March 30, 2017), retrieved from http://news.nationalpost.com/news/world/former-montreal-mayor-michael-applebaum-sentenced-to-one-year-in-prison-for-corruption.

[22] Paul Cherry "*Former Laval mayor Gilles Vaillancourt gets six-year sentence"* (Montreal Gazette: December 15, 2016), retrieved from http://montrealgazette.com/news/local-news/former-laval-mayor-gilles-vaillancourt-gets-six-year-sentence.

[23] Daniel Leblanc "*RCMP lays charges in alleged Canada Revenue Agency fraud scheme*" (The Globe and Mail: February 10, 2014), retrieved from http://www.theglobeandmail.com/news/politics/rcmp-lays-charges-in-alleged-canada-revenue-agency-fraud-scheme/article16793066/. Former CRA auditor Francesco Fazio was convicted on three charges of bribery in June 2015, and sentenced to 20 months of imprisonment in January 2016. In October 2016, another former CRA audit, Luigi Falcone, was acquitted on four charges related to extortion, soliciting a bribe and breach of trust. See Paul Cherry "*Canada Revenue auditor convicted of soliciting a bribe*" (Montreal Gazette:

corruption and organized crime in the construction industry were also reported in regard to renovations to Parliament Hill.[24] As a result, Hubert Pichet, a former staffer to a Conservative senator, was charged with fraud and breach of trust in March 2014.[25]

Canada has seen its share of public inquiries into corruption in politics. Recent examples include the Oliphant Inquiry which looked into the actions of former PM Mulroney,[26] the Gomery Inquiry which looked into the Liberal sponsorship scandal,[27] and the Mississauga Judicial Inquiry which looked into allegations of conflict of interest against Mississauga Mayor Hazel McCallion and the role her son Peter McCallion and his company World Class Developments (WCD) played in a failed bid to purchase a parcel of land in Mississauga.[28]

The handling of corruption cases by the police, prosecutors and courts has also been criticized in the press. A case in point is the political corruption case coming out of British Columbia relating to the sale of BC Rail. Media reports note that the case dragged on for years and cost millions of dollars before a negotiated plea concluded the case. Media and NGOs were critical of the

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June 12, 2015), retrieved from http://montrealgazette.com/news/local-news/canada-revenue-auditor-convicted-of-soliciting-a-bribe; Paul Cherry "*Former Canada Revenue Agency auditor acquitted in corruption case*" (Montreal Gazette: October 31, 2016), retrieved from http://montrealgazette.com/news/local-news/former-canada-revenue-agency-auditor-acquitted-in-corruption-case. Apparently, charges against other six former CRA auditors are still pending.

[24] *"Public Works officials were warned about Parliament contractor"* (Macleans: February 18, 2011), retrieved from http://www.macleans.ca/general/public-works-officials-were-warned-about-parliament-contractor/.

[25] Stephen Maher "*Tory Senator's ex-staffer charged with fraud in multi-million-dollar Parliament Hill renovation*" (National Post: March 17, 2014), retrieved from http://news.nationalpost.com/news/canada/canadian-politics/tory-senators-ex-staffer-charged-with-fraud-in-multi-million-dollar-parliament-hill-renovation. The latest news we could on Mr. Pichet was the beginning of his preliminary hearing on October 17, 2016. See "*Preliminary hearing begins for Conservative staff member accused of fraud*" (CTV Montreal: October 17, 2016), retrieved from http://montreal.ctvnews.ca/preliminary-hearing-begins-for-conservative-staff-member-accused-of-fraud-1.3118513.

[26] Mary Vallis "*The Schreiber-Mulroney affair: Key quotes from Justice Jeffrey Oliphant*" (National Post: May 31, 2010), retrieved from http://news.nationalpost.com/news/the-schreiber-mulroney-affair-key-quotes-from-justice-jeffrey-oliphant; Les Whittington & Richard Brennan "*Brian Mulroney acted inappropriately in accepting cash, inquiry finds*" (Toronto Star: May 31, 2010), retrieved from https://www.thestar.com/news/canada/2010/05/31/brian_mulroney_acted_inappropriately_in_accepting_cash_inquiry_finds.html.

Pursuant to the terms of reference, Judge Oliphant could not make findings of civil or criminal liability, but did recommend that the failure of former public office holders to meet the disclosure obligations under the Conflict of Interest Act should constitute an offence. Oliphant concluded that the business dealings were "inappropriate" and that Mulroney failed to live up to the ethics code he himself introduced in 1985 for holders of public office. Oliphant also concluded that "in my view, an error in judgment cannot excuse conduct that can reasonably be described as questionable if that conduct, as is the case here, occurred on three distinction occasions…. I therefore conclude that the reason Mr Schreiber made the payments in cash and Mr Mulroney accepted them in cash was that they both wanted to conceal the fact that the transactions had occurred between them."

[27] This inquiry was investigating a federal government program under which Ottawa paid out $250 million between 1996 and 2002 to sponsor sporting and cultural events. Much of the money was funneled through Liberal friendly advertising firms. Full text of the report is available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/default.htm (Phase 1) and http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase2report/default.htm (Phase 2).

[28] "*Mississauga mayor found in conflict of interest*" (CBC News: October 3, 2011), retrieved from http://www.cbc.ca/news/canada/toronto/mississauga-mayor-found-in-conflict-of-interest-1.1073000. Full text of the See City of Mississauga Judicial Inquiry report is available at https://www.mississaugainquiry.ca/report/index_pdf.html.

sentences of house arrest and a fine equal to the bribes and benefits the accused received, as well as the fact that the BC government paid the offenders' legal bills of $6 million.[29] In 2015 and 2016, the media raised serious allegations of the laundering of proceeds of corruption in Vancouver's real estate market by offshore buyers,[30] but there has been no announcement of any police investigations into those allegations.

Turning to transnational corruption, Canada has experienced years of criticism by TI and OECD on its lackluster performance in fighting this form of corruption.[31] In 2011, TI singled Canada out as the only G7 country that had been stuck at the bottom of its bribery enforcement ranking since the agency began issuing its reports back in 2005.[32] In 2015, TI ranked Canada's enforcement of the OECD Convention as "Moderate", one level below the "Active Enforcement" level, which is considered an appropriate level.[33] If enforcement is measured by the number of *CFPOA* charges or convictions, the ranking of "Moderate" is rather generous.

In the eighteen years that *CFPOA* has been in force, only three corporations have been convicted and sentenced for *CFPOA* offences following plea agreements and one natural person was convicted at trial and sentenced.[34] Official data on the number of investigations into possible *CFPOA* offences is far from clear. In 2011, TI-Canada indicated that RCMP had 23 *CFPOA* investigations underway.[35] In May 2013, in the Canadian government report "*Canada: Follow-Up to the [OECD's Working Group on Bribery] Phase 3 Report & Recommendations*", the

[29] Brian Hutchinson "*Brian Hutchinson: Too quick, too easy end to B.C. Rail trial*" (National Post: October 18, 2010), retrieved from http://news.nationalpost.com/full-comment/too-quick-too-easy-end-to-bc-rail-trial; Gary Mason "*BC Rail trial ends after deal reached*" (The Globe and Mail: October 18, 2010), retrieved from http://www.theglobeandmail.com/news/british-columbia/bc-rail-trial-ends-after-deal-reached/article4266328/; Mark Hume "*Inside the corrupt world of Basi and Virk*" (The Globe and Mail: February 17, 2011), retrieved from http://www.theglobeandmail.com/news/british-columbia/inside-the-corrupt-world-of-basi-and-virk/article567373/.

[30] FATF "*Anti-money laundering and counter-terrorist financing measures, Canada*" (Paris: FATF, September 2016), retrieved from http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf, p. 16, note 10; TI-Canada "*No reason to hide: Unmasking the anonymous owners of Canadian companies and trusts*" (Toronto: TI Canada, 2016), retrieved from http://www.transparencycanada.ca/wp-content/uploads/2016/08/TIC-BeneficialOwnershipReport-Interactive.pdf, pp. 31-33. See Sam Cooper "*Chinese bank claims fugitive who owes $10M bought four homes in B.C. worth $7.2M*" (National Post: June 28, 2016), retrieved from http://news.nationalpost.com/news/canada/chinese-bank-claims-fugitive-who-owes-10m-bought-four-homes-in-b-c-worth-7-2m; Amy Judd "*Vancouver's real estate is 'fuelled by a money laundering bubble': Market analyst*" (Global News: July 5, 2016), retrieved from http://globalnews.ca/news/2804304/vancouvers-real-estate-is-fueled-by-a-money-laundering-bubble-market-analyst/; Jesse Ferreras "*Canada's doors are 'wide open' for criminals to launder money in real estate: report*" (Global News: April 1, 2017), retrieved from http://globalnews.ca/news/3350193/canada-launder-money-real-estate-report/.

[31] Fritz Heimann, Gillian Dell & Kelly McCarthy, *"Transparency International Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention"* (Transparency International, 2011), retrieved from http://www.transparency.org/whatwedo/publication/progress_report_2011_enforcement_of_the_oecd_anti_bribery_convention; Fritz Heimann & Gillian Dell, "*Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2015*" (Transparency International, 2015), retrieved from http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd; and *"Canada not doing enough to fight corruption: OECD"* (Macleans: March 28, 2011), retrieved from http://www.macleans.ca/general/canada-not-doing-enough-to-fight-corruption-oecd/.

[32] TI Progress Report 2011, *supra* note 31, pp. 6, 24-26.

[33] TI Progress Report 2015, *supra* note 31, p. 7.

[34] For more details about Canadian cases on corruption and bribery of foreign public officials see Gerry Ferguson, *supra* note 11, at pp. 7.48-7.45, and UNCAC Implementation Report (2015), *supra* note 13, pp. 33-35.

[35] TI Progress Report 2011, *supra* note 31, p. 6.

government reported that there were "35 investigations currently underway".[36] In its October 2016 annual *CFPOA* Report to Parliament,[37] the government (i.e. Global Affair Canada) reported that there are "currently 10 active investigations" and "four cases in which charges have been laid but are not yet concluded under the *CFPOA*."[38] As noted below, as of May 2017, charges in one of those four cases (Padma Multipurpose Bridge Project case) resulted in an acquittal for those charged, and charges have been laid in one new case.[39]

The 2016 *CFPOA* Annual Report to Parliament indicates that the RCMP have 19 international anti-corruption investigators in Ottawa and 2 in Calgary with a pool of other investigators that can be drawn upon if necessary. Based on the size and complexity of most anti-corruption investigations, one might question whether 20 investigators for 14 ongoing cases is adequate to robustly enforce the *CFPOA*.

In respect to the four convictions, the first conviction arose in 2005 when Hydro Kleen plead guilty to bribing a US immigration inspector.[40] It was the only *CFPOA* prosecution in the first 12 years of the legislation. In June 2011, Niko Resources plead guilty to bribing a Bangladeshi energy minister with a luxury SUV and foreign trips. Under the plea agreement, Niko agreed to pay a fine of $8,260,000 and a 15% victim surcharge fine, resulting in a total penalty of $9,499,000, and to be put on probation for three years.[41] In January 2013, Griffiths Energy

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[36] "*Canada: Follow-Up to the Phase 3 Report & Recommendations*" (May 2013), retrieved from https://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf, p. 5.

[37] Global Affairs Canada, "*Canada's Fight against Foreign Bribery: Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Enforcement of the Corruption of Foreign Public Officials Act* (September 2015 – August 2016)", Seventeenth Annual Report to Parliament (October 7, 2016), retrieved from http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-17.aspx?lang=eng.

[38] *Ibid*. Ongoing matters included (1) charges of bribery and fraud against SNC-Lavalin Group Inc. in relation to major construction projects in Libya; (2) charges against two former SNC Lavalin executives, Sami Bebawi and Stéphane Roy, with respect to allegations of bribery of Libyan public officials, and Sami Bebawi's lawyer Constantine Kyres, for obstruction of justice and extortion; (3) charges against Robert Barra, Dario Berini and Shailesh Govindia for agreeing to pay bribes to Indian officials; (4) charges against Kevin Wallace, Zulfiquar Ali Bhuiyan and Abul Hasan Chowdhury in relation to the Padma Multiporpose Bridge Project in Bangladesh; and (5) charges against Ramesh Shah and Mohammad Ismail, also in relation to the Padma Multiporpose Bridge Project.

[39] On November 24, 2016, the RCMP charged Larry Kushniruk, president of Calgary-based Canadian General Aircraft, with conspiracy to bribe foreign public officials in relation to a sale of a commercial passenger jet from Thailand's national airline, Thai Airways. The investigation, which did not reveal evidence that any Thai public officials were actually bribed or were parties to the conspiracy, started in 2013 when the RCMP received a tip from the FBI. Larry Kushniruk was set to appear in provincial court in Calgary on December 12, 2016. See "*Canadian General Aircraft president charged with conspiring to bribe Thai officials in plane deal*" (CBC News: November 24, 2016), retrieved from http://www.cbc.ca/news/canada/calgary/rcmp-bribery-larry-kushniruk-canadian-general-aircraft-thai-airways-1.3866073; "*Calgary man charged over allegedly trying to bribe foreign officials in jet sale*" (Toronto Star: November 24, 2016), retrieved from https://www.thestar.com/news/canada/2016/11/24/calgary-man-charged-over-allegedly-trying-to-bribe-foreign-officials-in-jet-sale.html.

[40] *R. v. Watts*, [2005] A.J. No. 568. According to the media reports, almost all of the evidence was collected by a private investigator who had been hired by one of Hydro Kleen's competitors: Greg McArthur *"Niko Resources: Ottawa's corruption test case"* (The Globe and Mail: August 25, 2011), retrieved from http://www.theglobeandmail.com/report-on-business/rob-magazine/niko-resources-ottawas-corruption-test-case/article2140358/.

[41] *R v Niko Resources Ltd*, 101 WCB (2d) 118, 2011 CLB 37508 (Alta. Q.B.). See Samuel Rubenfeld *"Niko Resources is First to Get RCMP Anti-Bribery Plea Deal"* (The Wall Street Journal, June 24, 2011), retrieved from https://blogs.wsj.com/corruption-currents/2011/06/24/niko-resources-is-first-to-get-rcmp-anti-bribery-plea-deal/.

International pleaded guilty to paying a bribe of over $2,000,000 to the wife of Chad's ambassador to Canada in order to persuade the ambassador to use his influence and help the Canadian company to secure an oil production sharing contract in Chad.[42] Griffith agreed to pay a $9,000,000 fine and a 15% victim surcharge, for a total sum of $10,350,000, the largest penalty to be imposed under the *CFPOA* until now. *R. v. Karigar*[43] marked the first time that a natural person was convicted under the *CFPOA*, following a conviction by trial rather than by guilty plea. In this case, which involved a corruption scheme to win a multi-million dollar contract to sell facial recognition software to Air India, Mr. Nazir Karigar received a sentence of three years imprisonment. RCMP have also laid corruption and fraud charges against SNC-Lavalin in relation to the company's activities in Libya between 2001 and 2011, but a preliminary hearing in this case is not expected to begin until September 2018.[44]

One case which raises concerns about whether there are adequate resources and experience in regard to *CFPOA* investigations and prosecutions is the sudden acquittal on February 10, 2017 of two former SNC-Lavalin senior executives and a Bangladeshi-Canadian businessman in regard to the Padma Bridge case. The case involved an alleged agreement by the SNC-Lavalin executives to pay $5,000,000 in bribes to senior Bangladeshi officials to obtain an engineering contract for the proposed Padma Bridge.[45] On January 6, 2017 the trial judge, Nordheimer J., threw out all the wiretap evidence in the case on the basis, amongst others, that the information provided in the Information to Obtain (ITO) was nothing more than "speculation, gossip and rumour".[46] If that was true, what does that say about the experience and competence of the senior RCMP officers who sought the wiretap, and of any prosecutor who may have assisted in obtaining it. If the trial judge's overall characterization of the ITO was incorrect, why didn't the Public Prosecution Service of Canada (PPSC) appeal that decision. Barely one month later, on February 10, 2017, the Crown elected to call no witnesses at the trial on the grounds that "we had no reasonable prospect of conviction based on the evidence".[47] If the wiretap evidence was as legally suspect as Nordheimer J. found, why didn't the PPSC pursue the other available evidence before the trial began that would have supported the continuation of the prosecution, including the possibility of a plea agreement or a non-prosecution agreement with one of the original

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[42] *R. v. Griffiths Energy International*, [2013] A.J. No. 412 (Alta. Q.B.).
[43] *R. v. Karigar*, 2014 ONSC 3093.
[44] Bertrand Marotte "*SNC's fraud, corruption hearing set for 2018*" (The Globe and Mail: February 26, 2017), retrieved from http://www.theglobeandmail.com/report-on-business/sncs-fraud-corruption-hearing-set-for-2018/article28929552/.
[45] For more details concerning allegations of SNC-Lavalin's involvement in corruption of Bangladeshi public officials, World Bank's investigation and subsequent withdrawal from funding the project, and RCMP investigation into this matter, see World Bank "*World Bank Statement on Padma Bridge*" (June 29, 2012), retrieved from http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge, and *World Bank Group v. Wallace*, [2016] 1 S.C.R. 207, 2016 SCC 15.
[46] "The fact that a particular investigation may be difficult, does not lower the standard that must be met in order to obtain a Part VI authorization. Reduced to its essentials, the information provided in the ITO was nothing more than speculation, gossip, and rumour. Nothing that could fairly be referred to as direct factual evidence, to support the rumour and speculation, was provided or investigated. The information provided by the tipsters was hearsay (or worse) added to other hearsay." (*R. v. Wallace*, 2017 ONSC 132, para. 71).
[47] Jacques Gallant "*Judge acquits SNC-Lavalin execs, says RCMP relied on 'gossip'*" (Toronto Star: February 10, 2017), retrieved from https://www.thestar.com/news/gta/2017/02/10/judge-acquits-snc-lavalin-execs-says-rcmp-relied-on-gossip.html, and Janet McFarland "*Former SNC executives, businessman acquitted in corruption case*" (The Globe and Mail: February 10, 2017), retrieved from http://www.theglobeandmail.com/report-on-business/former-snc-lavalin-executives-businessman-acquitted-in-corruption-case/article33979762/.

conspirators in exchange for their cooperation and testimony? Some inquiry and public explanation of why this important *CFPOA* case fell apart would be helpful and reduce the damage to Canada's reputation as a serious enforcer of our foreign corruption laws.

As part of an integrated and advanced anti-corruption enforcement program, Canada should consider creation of a national anti-corruption agency to examine and recommend new anti-corruption policies, to collect information on corruption charges, prosecutions and sentences and to assess the effectiveness of existing anti-corruption legislation, policies and practices. This could be accomplished with minimum new money by amalgamating into one unit or agency existing government personnel dealing with these aspects of international corruption.

3. Gaps in the Legal and Policy Framework

A review of the OECD Working Group reports, academic articles and NGO reports reveals a number of criticisms of Canada's legal and policy framework for addressing corruption. Some concerns are specifically related to the *CFPOA* legal framework whereas other concerns could be construed broader, relating to both foreign and domestic corruption. This paper explores in more detail some of the promising practices being introduced in other jurisdictions that might assist Canada to enhance its response to corruption. When first published in 2012, this paper identified the following gaps relating specifically to the *CFPOA* framework:[48]

- Limited jurisdictional basis: the *CFPOA* did not provide for nationality jurisdiction; Canada was the only OECD member that did not have nationality jurisdiction for the offence of foreign bribery, which the OECD Working Group identified as a serious obstacle to Canada's enforcement regime.
- The apparent exclusion of charities from *CFPOA*; the definition of "business" in relation to the offence of foreign bribery had a "for profit" requirement, thereby excluding not-for-profit organizations. The "for profit" requirement had been criticised as vague and confusing. Canada was the only Party to the OECD Convention to include such a requirement.
- Allowing for facilitation payments.
- *CFPOA* only dealt with criminal enforcement. TI noted that the absence of civil and/or administrative provisions undermines the effectiveness of the legal framework. Another criticism was that the sanctions had not been "effective, proportionate and dissuasive".
- There was limited use of suspending / debarring companies upon *CFPOA* charges /

[48] These gaps come from a review of a number of reports and articles, specifically: OECD Phase 3 Report (2011), *supra* note 12, and TI Progress Report 2011, *supra* note 31. Other issues raised by the OECD Convention itself include the concern that the Convention does not prohibit private sector corruption. In the ten year review of the OECD Convention the authors recognise that "permissiveness toward private sector bribery could result in a business climate conducive toward foreign bribery, especially where privatization has occurred in high risk areas, energy, telecommunications and transport." Trading in influence is only covered in a limited way. Address the bribery of foreign political parties and party officials raise challenges such as drawing the distinction between improper influence and lobbying and defining foreign political parties and party officials. For further discussion see the OECD Working Group on Bribery in International Business Transactions "Consultation Paper: Review of the OECD Instruments Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption" (OECD, January 2008), retrieved from http://www.oecd.org/dataoecd/18/25/39882963.pdf.

convictions.

The broader gaps included:

- No legal framework to implement programmes such as the Extractive Industries Transparency Initiative (EITI), or corporate social responsibility (for example, mandatory obligations on companies to publicly report the amount of money given to foreign governments where they are operating).
- Lack of effective provisions requiring the maintenance of accurate books and records.
- Deficient legal provisions to encourage companies to introduce and follow compliance programmes (i.e., lacking an offence of failing to prevent corruption, no provision for an affirmative defence of compliance).[49]
- No formal policy to encourage self-reporting or voluntary disclosure.

Many of these gaps have been addressed by Parliament. In particular, Canada's anti-corruption framework has been strengthened with the adoption of two legislative acts. In 2013, the *Fighting Foreign Corruption Act*[50] introduced a number of amendments to the *CFPOA* to (a) create a new books and records offence relating to the bribing of a foreign public official or the hiding of that bribery; (b) establish nationality jurisdiction for foreign bribery offences; (c) eliminate the facilitation payments defence; and (d) increase the maximum penalty applicable to foreign bribery offences. Also, the *Extractive Sector Transparency Measures Act* (ESTMA) came into force on June 1, 2015, requiring specified companies involved in the extractive sector to report payments made to domestic and foreign governments.[51] While these Acts address some of the gaps identified above, there are still concerns that *CFPOA* is limited to criminal enforcement, the amendment prohibiting facilitation payments has not been proclaimed yet, and legal provisions encouraging companies to introduce compliance programs, self-reporting and voluntary disclosure remain deficient.

Part II: Learning from Abroad to Improve Canada's Response to Corruption – Selected Issues

This part of the paper will examine and compare the way that other countries have dealt with some of the issues or gaps that did, or still do, exist in Canada's legal and policy framework for the prevention and prosecution of foreign corruption.

[49] The changes in 2004 in the Canadian *Criminal Code* to expand the liability of corporations and other organizations provide a limited version of the failing to prevent corruption offence in jurisdictions like the UK. Under s. 22.2 of the Canadian *Criminal Code* a corporation can be held liable for the crimes (including corruption) committed by its employees or agents if a senior office (widely defined in s. 2 of the *Code*), with intent at least in part to benefit the corporation or organization, "does not take all reasonable measures to stop [employees, agents, etc.] of the corporation from being a party to the offence, e.g. corruption]." However, corporations are seldom charged with crimes and therefore this aspect of s. 22.2 has gone largely unnoticed.

[50] *Fighting Foreign Corruption Act*, S.C. 2013, c. 26.

[51] *Extractive Sector Transparency Measures Act*, S.C. 2014, c. 39, s. 376 [*ESTMA*].

4. The Legal Framework

4.1. *A New Offence: Failure to Prevent Bribery*

One of the more innovative provisions in recent anti-bribery laws is the establishment in s. 7 of the UK *Bribery Act 2010*[52] of a new strict liability offence of failure of commercial organizations to prevent bribery. Under s. 7, a corporation can be guilty of an offence if a person associated with the corporation bribes another person intending to obtain or retain business or a business advantage for the firm in circumstances where the firm has failed to implement an adequate anti-bribery compliance programme. One of the principal policy objectives behind the offence of failing to prevent bribery is "to influence corporate behaviour and encourage bribery prevention as part of corporate good governance".[53] This offence expands criminal liability for transnational corruption in the United Kingdom well beyond those in other jurisdictions and has strikingly extended potential criminal liability for multinational corporations doing business in England.[54]

In respect of the new offence of failure to prevent bribery, the *Bribery Act 2010* establishes an affirmative defence for corporations which have followed an adequate internal compliance regime.[55] In other words, the corporation can rely on a statutory defence if it shows on the balance of probabilities that it has instituted effective internal controls to prevent persons associated with it from committing bribery. After a consultation phase, the UK Secretary of State issued public Guidance about procedures that firms can put in place to take advantage of this defence.[56] Some have said that the Guidance is somewhat vague.[57] Another commentator raises questions as to whether departmental Guidance bulletins are an appropriate method to assist in statutory interpretation which is the function of the courts. One commentator even suggests that "it runs the risk of leading to lazy drafting and can create as much uncertainty as it is intended to remove".[58]

While no legal obligation is found in international law to establish the offence of failing to prevent corruption, this is clearly one approach to promoting corporate anti-corruption compliance. It is too soon to tell how effective this approach will be. Certain statements from the British government suggested that they would be taking a reasonably soft line on meeting the

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[52] *Bribery Act 2010*, c. 23 (UK), s. 7(1).
[53] Rob Warren, Alice Large & Mark Tweddle "*Insight into awareness and impact of the Bribery Act 2010: Among small and medium sized enterprises (SMEs)*" (Ministry of Justice, 2015), retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf, p. 3. A more detailed description of the characteristics of an effective-anti-corruption compliance programme is provided in section 6 below.
[54] Jacqueline L. Bonneau "Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement" (2011) 49 Columbia Journal of Transnational Law 365, p. 390.
[55] *Bribery Act 2010*, s. 7(2).
[56] Section 9 of the *Bribery Act 2010* mandates the Secretary of State to publish guidance on what are adequate procedures. The Guidance was published in March 2011, see Ministry of Justice "*The Bribery Act 2010: Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing*", retrieved from http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
[57] Jacqueline L. Bonneau, *supra* note 54, p. 403, states that "the language of the guidance seems to suggest that the government was attempting to assuage the fears of British corporations".
[58] David Kirk "Opinion: A Guiding Light on Bribery" (2011) 75 The Journal of Criminal Law 157.

defence of an adequate internal compliance system.[59] As one commentator noted, "such a permissive attitude toward enforcement could undermine the progress that the UK has made in encouraging self-reporting and could weaken the UK's ability to uphold anti-bribery norms under the *Bribery Act 2010*."[60] The first conviction under section 7 of the *Bribery Act 2010* came in 2016 when Sweett Group PLC pleaded guilty and was ordered to pay a fine of £1.4 million, a confiscation order of £851,152 and £95,031 in costs following a Serious Fraud Office investigation into its subsidiary's activities in the United Arab Emirates.[61]

The new corporate offence of failure to prevent corruption and the defence of an adequate anti-corruption compliance policy are a promising approach to reducing bribery of foreign officials which have been both praised and criticized.[62] They should be carefully examined by Canada in respect to their pros and cons before accepting or rejecting them as a helpful amendment to the *CFPOA*.

4.2. *Other Features of Offences in the UK Bribery Act 2010*

Interestingly, the UK *Bribery Act 2010* also extends the general bribery offences, both those of bribing and being bribed, into the private sector.[63] While no mandatory obligation to criminalize private corruption is imposed by any of the international instruments,[64] the authors of the ten year review of the OECD Convention are concerned that "permissiveness toward private sector bribery could result in a business climate conducive to bribery of foreign public officials, particularly given that the private sector in many countries is larger than the public sector, thus providing more opportunities for corrupt dealings".[65]

Another notable aspect of the criminalization of passive corruption in the UK law, as one commentator comments, "is that the Act does not specify that the recipient must have a corrupt intent".[66] These provisions mark a significant and deliberate departure from the ordinary requirement of subjective fault under the pre-existing UK criminal law. The express intention of the Joint Committee on the Draft bribery Bill was to "change the culture in which taking a bribe is viewed as acceptable" and to "encourage anyone who is expected to act in good faith,

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[59] The Guidance, *supra* note 56, para. 11, states that "the objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organizations that experience an isolated incident of bribery on their behalf" and acknowledges that "no bribery prevention regime will be capable of preventing bribery at all times".

[60] Jacqueline L. Bonneau, *supra* note 54, p. 403.

[61] Serious Fraud Office "Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction" (Feb 19, 2016), retrieved from https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/.

[62] See, e.g., Gerry Ferguson, *supra* note 11, Chapter 3.

[63] *Bribery Act 2010*, ss. 1 and 2.

[64] The UNCAC calls on States to *consider* criminalizing private sector corruption. See UNCAC, Articles 21 and 22.

[65] OECD Working Group on Bribery in International Business Transactions "*Consultation Paper: Review of the OECD Instruments Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption*" (OECD: Jan 2008), retrieved from http://www.oecd.org/dataoecd/18/25/39882963.pdf, para. 22.

[66] F. Joseph Warin, Charles Falconer & Michael S. Diamant "The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption" (2010) 46 Texas International Law Journal 1, retrieved from http://www.tilj.org/content/journal/46/num1/WarinFalconerDiamant.pdf, p. 24.

impartially or under a position of trust to think twice before accepting an advantage for their personal gain".[67]

Regarding the structure of the offence of bribing a foreign public official, the UK *Bribery Act 2010* uses the "improper performance" test, defined as a performance or non-performance that breaches a relevant expectation. This means that evidence of intent to induce improper performance of a foreign official's duties is not required. One commentator writes that "the existence in local custom of different 'relevant expectations' about the impartiality or good faith inherent in a particular function or activity does not curtail the *Bribery Act 2010*'s sweep. On the contrary, the law forestalls the development of any such loophole".[68] However another commentator notes that the Guidance issued by the government which states that "it is not the government's intention to criminalize behaviour where no such mischief occurs" seems to suggest an additional intent requirement might be read into the foreign bribery offence.[69]

4.3. *"Books and Records" Provision*

An effective anti-corruption strategy is to have companies establish and maintain a system of internal controls that reasonably assures that corporate assets are used only for authorized corporate purposes and that requires companies to keep and maintain accurate books. Article 12 of UNCAC and Article 8 of the OECD Convention require member states to establish laws and procedures for maintaining accurate books and records. States implement this strategy differently. In the US, the *Foreign Corrupt Practices Act* (FCPA) places a positive obligation on corporations to keep adequate books and records by imposing criminal and civil consequences on a company if it violates these accounting provisions.[70] A company paying a bribe to a foreign public official is unlikely to accurately record such a payment as a bribe in its books, and thus the company violates a "books and records" provision by describing such a payment as something other than a bribe. The vast majority of US enforcement actions under the FCPA are from the "books and records" provisions rather than the anti-bribery provisions. In contrast, the UK *Bribery Act 2010* does not create an offence for failing to maintain accurate books and records, but, as mentioned, it creates an offence of failure to prevent bribery which applies unless the company establishes it has effective internal controls designed to prevent corruption. Those internal controls would include maintaining an accurate system of books and records.

In 2010 Peter Dent raised a concern that it was "hard to point to any piece of Canadian legislation that even defines what constitutes adequate books and records".[71] Since then, record-

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[67] Joint Committee on the Draft Bribery Bill, retrieved from www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11506.htm, paras. 45-46.
[68] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66, p. 27.
[69] Jacqueline L. Bonneau, *supra* note 54, p. 403.
[70] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66, p. 28. See Gerry Ferguson, *supra* note 11, pp. 2.67-2.70, for a more detailed description of the US books and records provisions.
[71] Peter Dent "*Canada: Too Soft on Bribery*" (Financial Post: October 22, 2010), retrieved from http://business.financialpost.com/fp-comment/canada-too-soft-on-bribery. For instance, s. 20(2) of the *Canada Business Corporations Act*, R.S.B.C. 1985, c. C-44, requires corporations to keep "adequate accounting records", but does not specify what such records must contain to be considered "adequate". While "adequate" records may not have been defined, *Criminal Code* offences specified practices that were not acceptable, such as making false pretence or statement (s.s. 361 and 362), forgery and the use or possession of forged documents (ss. 366 and 368), fraud affecting public markets (s. 380(2)), falsification of books and documents (s. 397), and issuing a false

keeping requirements for Canadian companies have been expanded (for instance, the Ontario *Securities Act* was amended in 2015[72]). In 2013, due in part to prompting by the OECD Working Group, the *CFPOA* was amended to create a new offence relating to books and records. Now, pursuant to s. 4 of the *CFPOA*, a person commits an indictable offence punishable by imprisonment for a term of up to 14 years if, "for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery", a person:

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

It should be noted that the books and records offence is punishable by the same maximum penalty (14 years) as the *CFPOA* bribery offence. This is significant since it may be easier to obtain evidence of the books and records offence than the bribery offence. While the United States appears to have taken the position that a books and records offence makes it unnecessary to also enact a UK-style "failure to prevent corruption" offence, we do not agree. The failure to prevent corruption by implementation of an adequate anti-bribery compliance program is much more than simply an adequate accounting system. Thus Canada should still consider implementation of a UK-style failure to prevent corruption offence.

4.4. *Definition of the Offence of Bribing a Foreign Public Official in the CFPOA*

One weakness in the Canadian legal framework noted by the OECD Working Group was the inclusion of a "for profit" requirement in the definition of the offence of bribing a foreign public official.[73] The "for profit" requirement was criticised as excluding charities or not-for-profit organizations from its coverage and for being vague and confusing, thereby creating an obstacle

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prospectus (s. 400).

[72] Section 19(1) of the *Securities Act*, R.S.O. 1990, c. S. 5, now requires every market participant to keep the following records:

1. Such books, records and other documents as are necessary for the proper recording of its business transactions and financial affairs and the transactions that it executes on behalf of others.
2. Such books, records and other documents as may otherwise be required under Ontario securities law.
3. Such books, records and other documents as may reasonably be required to demonstrate compliance with Ontario securities law.

[73] See OECD Phase 3 Report (2011), *supra* note 12, paras. 15-24. Section 3(1) of the *CFPOA* only applies for the purpose of obtaining or retaining an advantage in the course of business, which was prior to the 2013 amendments was defined in s. 2 of the Act as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere *for profit*" (emphasis added).

to effective enforcement.[74] Canada was the only Party to the OECD Convention to include such a requirement.[75] For a while, Canada argued that the OECD Convention did not require inclusion of not-for-profit organizations under the *CFPOA*.[76]

In 2009, Bill C-31 was introduced but not passed into law before Parliament was dissolved.[77] This Bill proposed an amendment that made both "for-profit" and "not-for-profit" entities subject to prosecution for foreign bribery. The Bill specifically listed that the Act applies to "a public body, corporation, society, firm or partnership that is incorporated, formed or otherwise organised under the laws of Canada or a province".[78] This would clarify that for-profit and not-for-profit entities, governmental or quasi-governmental agencies, as well as professional partnerships, such as legal and accounting firms, are subject to prosecution. Finally, in the 2013 amendments to the *CFPOA*, the definition of "business" in s. 2 of the *CFPOA* was amended to exclude the "for profit" requirement. This definition, which is broad enough to cover the provision of international aid by NGOs, is also supported by the UNCAC Legislative Guide.[79] The broad definition of "business" acknowledges the shift away from treating government aid or education as a public good outside the scope of "business".[80] For example, universities are increasingly viewed as business institutions with export potential and subject to market forces. This increases the opportunities for corruption and raises the question of whether such corruption would be caught by the previous *CFPOA* definition of business. Removing the "for profit" element now makes it clear that the *CFPOA* does apply.

5. Jurisdiction

5.1. *Overview*

The definition and scope of a country's claims of jurisdiction over the prosecution of persons engaged in bribery of foreign officials is a critical element of that country's commitment and

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[74] *Ibid*.
[75] *Ibid*, para. 15.
[76] The Working Group stated that the OECD Convention does not differentiate between business for profit and not for profit. Canada argued that the title of the Convention referring to "international business transactions" implies transactions that are carried out to generate some form of profit. The Working Group replied that the Convention is not limited to such a "transaction approach" and specifically includes benefits to the briber other than pecuniary gain. Canada also argued that the "for profit" requirement is met when the entity is set up for the purposes of making a profit, whether or not a specific transaction makes a profit. The Working Group replied that the Convention is not limited to the "organizational approach" and would leave out numerous organizations that, while not set up to make a profit for themselves, might still bribe in order to secure business, including state owned and controlled enterprises. These arguments and responses are summarized from the OECD Phase 3 Report, *supra* note 12, at paras. 15-24.
[77] Bill C-31, *An Act to amend the Criminal Code, the Corruption of Foreign Public Officials and the Identification of Criminals Act and to make a consequential amendment to another Act*. The Bill went through the second reading but died on the order paper in December 2009. See http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=c31&source=library_prb&Parl=40&Ses=2.
[78] Bill C-31, clause 38.
[79] UNODC "Legislative Guide for the Implementation of the United Nations Convention against Corruption" (2006) retrieved from http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf, para. 208.
[80] Indira Carr and Opi Outhwaite "The OECD Anti-Bribery Convention Ten Years On" (2008) 5:1 Manchester Journal of International Economic Law 3.

ability to combat foreign corruption. Jurisdiction over crimes is normally based on the principle of territoriality, which in turn is based on the international principle of state sovereignty. In other words, if a crime is committed within the geographic boundaries of a state, that state has jurisdiction to prosecute that crime. But some crimes are transnational in the sense that part of a crime is committed in one state and the remainder of the crime is committed in another state. In such cases both states may have jurisdiction, depending on how the state defines how much of an offence has to be committed within its geographic borders before it will assume jurisdiction. Section 6(2) of the Canadian *Criminal Code* states that no person shall be convicted of an offence "committed outside Canada." As will be discussed shortly, Canada has taken a narrow approach to asserting jurisdiction when some portions of an offence have occurred in Canada and other portions have occurred outside Canada.

A second basis for asserting jurisdiction over an offence is nationality; in other words, a state will claim jurisdiction to prosecute its own "nationals" even if the offence is committed entirely outside the territory of that state. Prior to the 2013 amendments to the *CFPOA*, Canada did not recognize nationality as a basis for jurisdiction over Canadians who committed bribery of foreign officials in a foreign country.

Neither UNCAC nor the OECD Convention lay down definitive jurisdictional obligations. In respect to territorial jurisdiction, neither Convention specifies how territorial jurisdiction should be defined. Neither Convention specifies how much of a crime needs to be committed or to have occurred in a state before the state should claim territorial jurisdiction to prosecute. Nor do the UNCAC and the OECD Convention require that a state must adopt nationality jurisdiction for bribery and corruption, unless according to the OECD Convention that state recognizes nationality jurisdiction for other crimes.[81]

5.2. *United States*

The United States is an example of a country that claims jurisdiction on the basis of a very broad notion of territoriality, as well as nationality. The US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) claim jurisdiction to prosecute foreign bribery if any aspect of the foreign bribery occurred in the United States or affected a United States' interest. Thus the FCPA applies where actions of foreign persons or organizations have had some "effect" on the US, regardless of whether the foreign entity or its agents were physically present in US territory while acting in furtherance of corruption. The FCPA anti-bribery provisions apply to citizens and residents of the US regardless of where the corrupt conduct occurred, and specifically extend to foreign and domestic companies that conduct business in the US, as well as their subsidiaries, whose shares are traded on any US stock exchange or that are registered with

[81] International conventions also address jurisdiction differently. Article 4(2) of the OECD Convention requires nationality jurisdiction to the extent the State concerned has jurisdiction to prosecute its nationals for offences committed abroad. The Inter-American Convention against Corruption (Article V(2)) and the UNCAC (Article 42(2)) permit, but do not mandate, nationality jurisdiction. The latest international anti-corruption instrument, the African Union Convention on Preventing and Combating Corruption, does require the establishment of jurisdiction over offences committed by their nationals (Article 13(1)(b)). This Convention also asserts jurisdiction over matters which produce a deleterious effect on the "state" irrespective of where those acts take place or by whom they are committed. It is also the only treaty that provides for this broad protective jurisdiction (Article 13(1)(d)), although it may be argued that the other conventions do not preclude it.

the SEC. These provisions also cover foreign persons, including corporations, who perform any act within the territory of the US in furtherance of an offer, promise to pay, or payment to a foreign government official. The FCPA "books and records" provisions and internal controls apply to "issuers" which means (1) entities with "a class of securities" registered pursuant to the securities laws or (2) entities otherwise required to file reports pursuant to the securities laws.[82]

US prosecutors and regulators have demonstrated their willingness to take action against businesses which fall within this "wider" jurisdiction,[83] including the following situations: (1) the proceeds for the unlawful payments passed through the US financial system; (2) the company has US listed securities even if that company is not in fact based in the US; (3) the subsidiary's employees in the US participated in the bribery scheme; or (4) the intended "effect" of the unlawful activity was to be felt in the US. If further framed according to an agency principle, foreign subsidiaries may be considered agents of an issuer or domestic concern parent, thereby subjecting the subsidiaries to liability. Their overseas actions also may form the basis of liability for the parent issuer if the parent knew of or consciously disregarded a risk of the subsidiary's illicit payments. Further, a foreign subsidiary can cause its US parent to violate the FCPA's accounting provisions due to its activities outside of the US.[84]

5.3. *United Kingdom*

The United Kingdom recognizes both territorial and nationality jurisdiction in its *Bribery Act 2010*. The "close connection" test, as enacted in the UK *Bribery Act 2010*, expands the jurisdictional reach to any person or entity that has a close connection to the United Kingdom, including a citizen or various other categories of passport holder; a resident; and an entity incorporated under the law of any part of the UK.[85] The close connection test is similar to the premise of jurisdiction based on agency, with liability imposed on the foreign agents of the country's principles or while in the territory of that country.[86] One commentator notes that on its face, this "close connection" test appears narrower than the wide jurisdictional impact of the United States laws against issuers.[87] However, coupled with the UK offence of failing to prevent bribery, such jurisdictional requirements for a business could have a significant impact on multinational corporations.

It is still early days in appreciating how broad the "close connection test" will be for companies. The Guidance note issued by the British Ministry of Justice advocates for a common sense approach to determining whether foreign companies are "conducting business" in the UK within

[82] Summarized from the US law description in F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66, pp. 9-10.
[83] *Ibid*; Mike Koehler "*The Foreign Corrupt Practices Act in a New Era*" (Edward Elgar Publishing, 2014).
[84] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66, pp. 32-35.
[85] In the UK situation, this could include any company with British offices or owning a UK subsidiary or to UK-based companies whose overseas agents, suppliers or joint venture partners are involved in the corruption.
[86] The practice in the US (revealed from review of plea bargained cases as opposed to case law) uses an interpretation of agency that "reads a powerful form of extraterritorial jurisdiction": Evan Lestelle "The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery and Extraterritorial Jurisdiction" (2008) 83 Tulane Law Review 527, p. 536.
[87] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66, p. 16.

the meaning of the Act.[88] The Guidance goes on to suggest that merely being listed to trade on the London Stock Exchange would not be sufficient to trigger the jurisdictional application of the Act. Furthermore, the Guidance suggests that parent and subsidiary companies situated in the UK may not be held liable for paying bribes through a second non-UK subsidiary if they do not directly benefit from the bribes ("associated persons"). The guidance also suggests that the relevant inquiry should be based on the "level of control" over the associated person. One commentator is concerned that by issuing the Guidance note, the Ministry of Justice has created loopholes that simply did not exist in the Act.[89]

Extending jurisdiction to prosecute bribery committed wholly or largely in another country implicates the issue of national sovereignty. As one commentator notes, "Delicate questions arise regarding the proper role of countries in the prosecution of their corruption cases. On one hand, it may be uncomfortable for one country to monitor and prosecute another's corporations, but on the other, business environments have become international, making the consequences of local corruption more widely felt".[90]

5.4. *Situation in Canada before and after the 2013 CFPOA Amendments*

Until 2013, Canada was the only signatory to the OECD Convention that had not adopted the "nationality" principle in its enabling legislation to assert jurisdiction over citizens and permanent residents who commit bribery offences abroad.[91] Canada argued that there is no explicit treaty obligation to establish nationality jurisdiction over the offence of bribing a foreign public official.[92] Extraterritorial jurisdiction in Canada for offences under the *CFPOA* required a "real and substantial" link to the territory of Canada which is a much more restrictive definition of territorial jurisdiction than in the US or the UK. Canada's position was that in cases where there is no explicit treaty obligation to establish nationality jurisdiction, Canada reviews whether applying extraterritorial jurisdiction to its nationals is appropriate on a crime by crime basis taking into account factors such as the nature of the crime, as it did, for example, when it applied extra-territorial jurisdiction based on citizenship or permanent residency in the case of child sex tourism. Canada's territorial jurisdiction, unless otherwise specified, is still the "real and substantial link" test set out by the Supreme Court in *R. v. Libman*,[93] where the Court held that for an offence to be subject to the jurisdiction of Canadian courts, *a significant portion of the activities* constituting the offence *must take place in Canada and have a real impact on Canadians*. There must be a "real and substantial link" between the offence and Canada before criminal liability will be imposed in Canada. The courts must apply a two-stage test. The court

[88] Bribery Act 2010 Guidance, *supra* note 56, para. 35.
[89] Jacqueline L. Bonneau, *supra* note 54, p. 403.
[90] Margaret Ryznar and Samer Korkor "Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing" (2011) 76 Missouri Law Review 415.
[91] Tyler Hodgson "*Global Jurisdiction for a Global Crime: The Long Reach of Anti-Bribery Laws in G7 Nations*", ABA Criminal Justice Section Global Anti-Corruption Task Force, Insight from the Trenches (September 2011). 28 signatories adopted nationality principle.
[92] OECD Phase 3 Report, *supra* note 12, para. 115. Indeed, the general jurisdictional basis of anti-corruption measures in international treaties continues to be predominately that of territoriality. See Evan Lestelle, *supra* note 86. Most of the treaties require establishing jurisdiction over bribery offences where the offence is committed "in whole or in part" in its territory. However, 2 of the treaties – OAS and UN – omit the "or in part" language, requiring that jurisdiction be established when the offence is committed in the territory of the State Party.
[93] *Libman v. The Queen*, [1985] 2 S.C.R. 178.

must first take into account all the relevant factors that happened in Canada and that would legitimately give Canada an interest in prosecuting the offence. The court must next consider whether there is anything in those facts that offends international comity (i.e. respect for the laws of other countries). In *Chowdhury v. H.M.Q.*,[94] the Court held that Canada did not have jurisdiction over Chowdhury, who was not a Canadian citizen, whose acts of bribery occurred entirely in Bangladesh, even though bribery was for the benefit of the Canadian company SNC-Lavalin. Although Chowdhury was aiding and abetting bribery and the benefit of the bribery was for a Canadian company that was not sufficient in the Court's view to give jurisdiction to prosecute Chowdhury. The Court emphasized that the rationale for the principle of territorial jurisdiction is respect to the international principle of sovereignty.

The OECD Working Group criticised Canada's limited jurisdiction as a serious obstacle to enforcement.[95] It urged Canada to establish nationality jurisdiction over the offence of bribing a foreign public official as a matter of urgency. The Working Group argued that by its very nature, the offence of bribing a foreign public official occurs abroad and therefore Canada could consider such corruption an appropriate matter for extending jurisdiction. In 2009, Bill C-31 proposed amending the *CFPOA* to introduce nationality jurisdiction,[96] but the Bill died on the Order Paper when an election was called.

In 2013, the *CFPOA* was amended to provide for nationality jurisdiction over all foreign corruption offences. Now, under s. 5 of the *CFPOA*, Canadian law enforcement has jurisdiction to prosecute offences of foreign bribery committed outside Canada by (a) Canadian citizens; (b) permanent residents of Canada who, after the commission of an offence, are present in Canada; and (c) Canadian public bodies, corporations, societies, firms and partnerships, without having to provide evidence of a link between Canada and the offence.[97] The new provisions also provide safeguards, subject to certain exceptions, for a person who has already been tried and dealt with outside Canada for an act or omission that is deemed to have been committed inside Canada under this *Act*. This addresses the concern that someone could be tried twice for the same offence, once by a court exercising jurisdiction on the basis of territory and once by a court exercising jurisdiction on the basis of nationality.

5.5. *Issues and Concerns in Respect to Expanding Territorial and Nationality Jurisdiction*

5.5.1 *Territorial Jurisdiction*

The goal of the international community is to effectively combat global corruption. Given that transnational corruption offences are typically complex with multiple elements, it is argued that a narrow understanding of territorial jurisdiction is ill-suited for prosecuting transnational bribery.[98] A broader understanding of territorial jurisdiction[99] enhances the prosecution of offences involving transnational bribery and makes it possible to establish jurisdiction in all

[94] *Chowdhury v. H.M.Q.*, 2014 ONSC 2635.
[95] OECD Phase 3 Report, *supra* note 12, at para. 119.
[96] Bill C-31, clause 38.
[97] Clause 38, Bill C-31.
[98] Evan Lestelle, *supra* note 86, at p. 557.
[99] Abiola Makinwa "The Rules Regulating Transnational Bribery Achieving a Common Standard" (2007) International Business Law Journal 17.

cases of corruption with a real link to Canada whatever the ability, resources and rules of the State where the corrupt act took place.[100]

A number of commentators point to discussions at the international level as well as the emergence of aggressive enforcement regimes to support their call for broad jurisdiction over transnational corruption.[101] The OECD, in its Commentary to the Convention and Ten Year Review, notes that territorial jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.[102] Further they remind States that they are expected to review their jurisdictional rules to assess whether they are *effective* against this bribery.[103] The UNCAC Technical Guide recognises the need to deal with contemporary corruption and clearly states that the effective prosecution of this offence will likely only be possible if broad extraterritorial and nationality jurisdiction can be applied to it.[104]

In light of the OECD requirement to review our jurisdictional rules, and the growing concern to curb foreign corruption which is "public enemy number one" in the developing world,[105] perhaps it is time for Canada to consider revising its strict definition in *Libman* of territorial jurisdiction at least for foreign bribery offences. Perhaps it is also more appropriate for Parliament to decide on the proper scope of territorial jurisdiction for foreign bribery than leaving it to the Supreme Court of Canada to alter its *Libman* test. The US Department of Justice/SEC claim of territorial jurisdiction is too broad but the UK test for territorial jurisdiction is perhaps more appropriate for Canada. While considering an expansion of *Libman* test, Canada should also consider whether including the so-called "protective" principle is appropriate. There have been calls to amend UNCAC to include the "protective" principle which would provide for jurisdiction if the effect or possible effect of the offence occurs in the forum state as well as for offences that threaten the "specific national interests" of the forum state.[106]

The 2009 OECD Recommendations call on States to strengthen the OECD framework by adopting best practices for making companies liable for foreign bribery so that they cannot be misused as vehicles for bribing foreign public officials and they cannot avoid detection, investigation and prosecution for such bribery by using agents and intermediaries, including foreign subsidiaries, to bribe for them.[107] Broad notions of territorial and nationality jurisdiction are essential to accomplishing those OECD recommendations.

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[100] *Ibid*.
[101] See Evan Lestelle, *supra* note 86, pp. 554-558.
[102] Article 4 section 25 of the Commentary to the OECD Convention and OECD 10 Year Review, *supra* note 48.
[103] Article 4(4) OECD Convention.
[104] In order to achieve and safeguard a law-biding attitude of their citizens and to promote comparable standards of behaviour at home and abroad, States may wish to implement nationality jurisdiction: UNODC "*Technical Guide to the United Nations Convention Against Corruption*" (UN: 2009), retrieved from http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.
[105] World Bank, "*Corruption is "Public Enemy Number One" in Developing Countries, says World Bank Group President Kim*" (December 19, 2013), retrieved from http://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim.
[106] Evan Lestelle, *supra* note 86, p. 541.
[107] OECD Working Group on Bribery in International Business Transactions "*Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*" (November 26, 2009), retrieved from https://www.oecd.org/daf/anti-bribery/44176910.pdf.

The broadening of jurisdiction beyond the principle of territoriality will in theory result in higher incidences of concurrent jurisdiction. Theoretically, this could give rise to conflicting assertions of civil or criminal jurisdiction, conflicts of laws and concerns of dual criminality and double jeopardy. Companies have raised concerns as to how they are to do business and respond to investigations and prosecutions in multiple jurisdictions that have different substantive laws, enforcement procedures, penalties and available resources.[108] Companies have also expressed concern regarding the "legalization of compliance codes" and the multiplicity of possible compliance codes found in different States.[109] Some commentators counter these concerns by pointing out that the reality is that there is an appalling lack of enforcement, and therefore there is no practical reason to waste time worrying about multiple jurisdictional issues.[110] However, the IBA Legal Practice Division Task Force on Extraterritorial Jurisdiction is studying this issue and calls for harmonizing guidelines to alleviate this potential challenge.[111] The Task Force also calls for States to consider adopting a "soft" form of double jeopardy or *ne bis in idem* that takes into account not just criminal liability, but "functional equivalent" civil liability for corporations and individuals.[112] The lack of harmonization of corruption statutes in terms of corporate and individual liability, penalties, major elements of offences and defences, needs to be considered in devising any double jeopardy rule.

5.5.2 *Nationality Jurisdiction*

Whether a corporation may be regarded as national differs amongst States. Some States regard a corporation as national if it has been founded according to the national law or if the corporation resides in the territory. Other States relate the question of jurisdiction to the nationality of the natural person acting on behalf of the corporation, not to the nationality of the legal person. These States require that the person who has acted corruptly within the structure or in favour of the legal person is one of its citizens. However, this may cause "serious legal loopholes since in complex cases of corporate conduct, investigative agencies may not be able to identify the individual instigator or perpetrator".[113] Moreover, states "may consider that the principle of liability of legal persons links legal consequences to the legal entity itself, hence abstracting from individual persons and their nationality".[114] The application of nationality jurisdiction to legal persons remains largely untested by courts. On the other hand, whether the authorities in a parent company's country can take action against the parent company where one of its foreign subsidiaries bribes a foreign public official is a priority issue for OECD.[115]

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[108] Working Group on Bribery Consultation with the Private Sector and Civil Society (OECD, October 2011), retrieved from http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/49040760.pdf.
[109] *Ibid.*
[110] IBA Task Force report, *supra* note 1, p. 202.
[111] The Task Force recommends consideration of the development of a protocol to the OECD Convention that would spell out the relevant factors that countries should take into account in their consultations regarding the most efficient jurisdiction as well as putting forth the possibility of developing a concept of single jurisdiction: Report on the Task Force on Extra-territorial Jurisdiction. Others call for harmonization, such as Thomas Snider and Won Kidane "Combating Corruption through International Law in Africa: A Comparative Analysis" (2007) 40 Cornell International Law Journal 714.
[112] IBA Task Force report, *supra* note 1, p. 202.
[113] UNCAC Technical Guide, *supra* note 104.
[114] *Ibid.*
[115] OECD 10 Year Review, *supra* note 48.

6. An Affirmative Compliance Defence

6.1. *Overview*

While there are a number of affirmative defences for individuals and corporations charged with transnational corruption, this section will focus on the compliance defence.[116] A compliance defence provides that corporations will not be held liable for foreign corruption committed by its employees or agents if the company established and followed procedures reasonably designed to prevent and detect such violations by employees and agents. Generally this refers to corrupt conduct of employees and not officers or directors. If faced with possible criminal charges by reason of the employees or agents conduct, the corporation has a defence if it can show "good faith efforts" to achieve compliance with the laws, usually demonstrated by corporate compliance programmes.[117] This defence recognises that corporations should not be held criminally liable for criminal offences committed by employees or agents who committed such offences while carrying out their corporate functions in circumstances where the corporation has used due diligence to prevent such offences.

6.2. *What a Compliance Programme Could Look Like*

Several international organizations, including Transparency International,[118] have published guidelines on corporate anti-corruption compliance programmes. TI-Canada outlines the following six essential steps for a business to establish an effective compliance programme: (1) *commit* to the programme from the top, (2) *assess* the current status and risk environment, (3) *plan* the anti-corruption programme, (4) *act* on the plan, (5) *monitor* controls and progress, and (6) *report* internally and externally on the programme.[119]

Businesses may also obtain certification of compliance of their anti-bribery management systems (ABMS) with ISO 37001 standard,[120] which is quickly becoming the new internationally recognized gold standard. To help an organization prevent, detect and deal with bribery, ISO 37001 requires:[121]

1. Implementing the anti-bribery policy and supporting anti-bribery procedures (ABMS);

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[116] Other defences include: (1) payments that are permitted or required under the laws of the foreign state; (2) reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to the promotion, demonstration or explanation of the person's products and services, or that are directly related to the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions; and (3) facilitation payments.

[117] Ellen Podger "A New Corporate World Mandates a 'Good Faith' Affirmative Defense" (2007) 44 American Criminal Law Review 1537.

[118] Transparency International "*Business Principles for Countering Bribery*", 3d ed (October 2013), retrieved from http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery; Transparency International-Canada "*Anti-Corruption Compliance Checklist*", 3rd ed (2014), retrieved from http://www.transparencycanada.ca/wp-content/uploads/2014/09/2014-TI-Canada_Anti-Corruption_Compliance_Checklist-Third_Edition-20140506.pdf.

[119] TI-Canada Checklist (2014), *supra* note 118, p. 6.

[120] Global Infrastructure Anti-Corruption Centre "*International Standard ISO 37001 Anti-bribery Management Systems Standard*", retrieved from http://www.giaccentre.org/ISO37001.php.

[121] *Ibid.*

2. Ensuring that the organization's top management has overall responsibility for the implementation and effectiveness of the anti-bribery policy and ABMS, and provides the appropriate commitment and leadership in this regard;
3. Ensuring that responsibilities for ensuring compliance with the anti-bribery policy and ABMS are effectively allocated and communicated throughout the organization;
4. Appointing a person(s) with responsibility for overseeing anti-bribery compliance by the organization (compliance function);
5. Ensuring that controls are in place over the making of decisions in relation to more than low bribery risk transactions;
6. Ensuring that resources (personnel, equipment and financial) are made available as necessary for the effective implementation of the ABMS;
7. Implementing appropriate vetting and controls over the organization's personnel designed to ensure that they are competent, and will comply with the anti-bribery policy and ABMS, and can be disciplined if they do not comply;
8. Providing appropriate anti-bribery training and/or guidance to personnel on the anti-bribery policy and ABMS;
9. Producing and retain appropriate documentation in relation to the design and implementation of the anti-bribery policy and ABMS;
10. Undertaking periodic bribery risk assessments and appropriate due diligence on transactions and business associates;
11. Implementing appropriate financial controls to reduce bribery risk (e.g. two signatures on payments, restricting use of cash, etc.);
12. Implementing appropriate procurement, commercial and other non-financial controls to reduce bribery risk (e.g. separation of functions, two signatures on work approvals, etc.);
13. Ensuring that all other organizations over which it has control implement anti-bribery measures which are reasonable and proportionate to the nature and extent of bribery risks which the controlled organization faces;
14. Requiring, where it is practicable to do so, and would help mitigate the bribery risk, any business associate which poses more than a low bribery risk to the organization to implement antibribery controls which manage the relevant bribery risk;
15. Ensuring, where practicable, that appropriate anti-bribery commitments are obtained from business associates which pose more than a low bribery risk to the organization;
16. Implementing controls over gifts, hospitality, donations and similar benefits to prevent them from being used for bribery purposes;
17. Ensuring that the organization does not participate in, or withdraws from, any transaction where it cannot appropriately manage the bribery risk;
18. Implementing reporting (whistle-blowing) procedures which encourage and enable persons to report suspected bribery, or any violation of or weakness in the ABMS, to the compliance function or to appropriate personnel;
19. Implementing procedures to investigate and deal appropriately with any suspected or actual bribery or violation of the ABMS;
20. Monitoring, measuring and evaluating the effectiveness of the ABMS procedures;
21. Undertaking internal audits at planned intervals which assess whether the ABMS

conforms to the requirements of ISO 37001 and is being effectively implemented;

22. Undertaking periodic reviews of the effectiveness of the ABMS by the compliance function and top management;
23. Rectifying any identified problem with the ABMS, and improving the ABMS as necessary.

6.3. *Compliance Defence in Other States*

6.3.1 *Overview*

Twelve out of the thirty-eight OECD member countries have a compliance-like defence.[122] This is a significant number taking into account that some OECD Convention signatory countries do not have the concept of "legal person" criminal liability (as opposed to natural person criminal liability) and that, in those that do, such legal person liability can only result from the actions of high level executive personnel or other so called "controlling minds" of the legal person.

6.3.2 *The Codified Compliance Defence in the United Kingdom*

In general, a compliance defence would mean that a company's pre-existing compliance policies and procedures and its good faith efforts to comply with the law should be relevant as a matter of law when a non-executive employee or agent acts contrary to those policies and procedures and violates the law.[123] Such a defence would not eliminate corporate criminal liability when senior officers or executives violate the law. The UK *Bribery Act 2010* contains a compliance-like defence in section 7, the adequate procedure affirmative defence.[124] But that defence only applies to the new s. 7 offence of failure to prevent bribery. The Ministry of Justice has drafted guidance on "adequate procedures" that provided six general qualities of an effective anti-bribery compliance program.[125] In its current form, the guidance is not prescriptive and does not propose any particular procedures in themselves.[126] Some commentators view the new UK *Bribery Act 2010* as an international signal, "prodding states to ramp up their anti-corruption efforts".[127]

Arguments for introducing a formal compliance defence include the claim that such a defence properly provides incentives for corporate compliance. When companies can show pre-existing, published and trained compliance policies and procedures, this can reduce the company's risk of scrutiny, costly internal investigations, and the collateral consequences of transnational corruption inquiries when their employees engage in questionable conduct.[128] A formal defence

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[122] Examples of countries that do have compliance like defences include: Australia, Chile, Germany, Hungary, Italy, Japan, Korea, Poland, Portugal, Sweden and Switzerland. See Mike Koehler "Revisiting a Foreign Corruption Practices Act Compliance Defence" (2001) Wisconsin Law Review 1.

[123] *Ibid.*

[124] "A commercial organization will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing."

[125] Bribery Act 2010 Guidance, *supra* note 56.

[126] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66, at p. 64.

[127] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66, at p. 70.

[128] Mike Koehler "*No – The Consistent Answer in DoJ Responses to Senator Questions Regarding FCPA Reform*" (FCPA Professor Blog: April 14, 2011), retrieved from http://fcpaprofessor.com/no-the-consistent-answer-in-doj-responses-to-senator-questions-regarding-fcpa-reform/.http://www.fcpaprofessor.com/page/49

contributes to a more consistent, transparent and predictable application of the defence than leaving it up to the discretion of the prosecution. Furthermore, a formal defence can increase public confidence in enforcement actions as well as allow the enforcement authorities to better allocate its enforcement resources. One commentator advocates for the need of a specific and formal compliance defence in the field of transnational corruption. He cites the unique aspects and challenges of complying with anti- corruption measures in the global marketplace, which can include hiring local agents who are the product of different cultures and experiences, removed from company's headquarters and often speak a different language.[129]

A concern about the formal compliance defence, raised by the US Department of Justice, is that "the creation of such a defence would transform criminal FCPA trials into a battle of experts over whether the company had established a sufficient compliance mechanism".[130] "Against this backdrop, companies may feel the need to implement a purely paper compliance program that could be defended by an "expert", even if the measures are not effective in stopping bribery". They further state that "if the FCPA were amended to permit companies to hide behind such programs, it would erect an additional hurdle for prosecutors in what are already difficult and complex cases to prove".[131] These are legitimate concerns but not insurmountable obstacles for attentive prosecutors.

6.3.3 *No Compliance Defence in the United States' FCPA*

As noted, the US FCPA does not contain a codified compliance defense to corporate liability. Rather, US laws contain positive obligations to ensure compliance, such as the "books and records" provision and the "internal accounting controls" provision.[132] Interestingly, numerous FCPA reform bills in the 1980s included such a specific defence.[133] In recent hearings looking at proposed reforms to the FCPA, the Department of Justice stated that a potential FCPA compliance defence was "novel and risky" and that the "time is not right to consider it".[134] According to the Department of Justice, it "already considers a company's compliance efforts in making appropriate prosecutorial decisions, and the US Sentencing Guidelines also appropriately credits a company's compliance efforts in any sentencing determination".[135] Guidance to the prosecutor could address anti-corruption compliance in a general manner, without prescribing specific measures. A concern raised with this approach is that the prosecutors have no legal

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[129] Mike Koehler, *supra* note 122.
[130] Senate Committee on the Judiciary Subcommittee on Drugs and Crimes, Hearing on "Examining Enforcement on the Foreign Corrupt Practices" Questions for the record by Senator Christopher A. Coons, retrieved from http://www.scribd.com/doc/52975583/DOJ-Responses-Senate-Hearing-Examining-Enforcement-of-the-FCPA.
[131] *Ibid.*
[132] The "books and records" provision requires issuers "make and keep books, records and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets…". The "internal controls" provision requires that issuers "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: transactions are executed in accordance with management's general or specific authorization; transactions are recorded as necessary… etc." See F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66, p. 32.
[133] Mike Koehler, *supra* note 122. He notes that an FCPA reform bill containing such a defence did pass the US House but was not enacted into law.
[134] Questions for the record by Senator Christopher A. Coons, *supra* note 130.
[135] Found in the US Attorneys' Manual, as cited in Mike Koehler, *supra* note 122.

obligation to take these relevant factors into consideration and as such this practice might be applied inconsistently.

6.4. *Should Canada Create an Affirmative Compliance Defence?*

Like the US, Canada has no affirmative anti-corruption compliance defence. Based on the above opposite approaches in the UK and the United States, Canada should undertake a review of the issue of whether a compliance defence approach, perhaps like the UK *Bribery Act 2010*, would enhance Canada's efforts to combat corruption. An affirmative anti-corruption compliance defence would be essential if Canada enacted a new offence of failure to prevent bribery similar to s. 7 of the UK *Bribery Act 2010*. The defence would be of assistance in any corruption-type offences which are based on criminal negligence, penal negligence or strict liability. An adequate anti-corruption compliance defence could also be relevant to corporate criminal liability for a subjective *mens rea* offence like s. 3 of the *CFPOA*. However, to be relevant it would have to include specific directions on what a senior officer, who knows bribery is or is about to be committed by a company representative, must do to satisfy the requirement in s. 22.2(c) of the *Criminal Code* "to take all reasonable measures to stop [the company representative] from being a party to the offence" of bribery.

7. Facilitation Payments

Although the 2013 amendments provide for the elimination of the facilitation payments defence, this provision of the *Fighting Foreign Corruption Act* remains unproclaimed four years later. It is unclear whether or when the government will proclaim it. Thus the issue of whether facilitation payments should still be lawful under the *FCPOA* is a live issue. This section examines whether Canada's current position of still allowing for the defence of facilitation payments to allegations of foreign corruption should be changed by proclaiming the 2013 amendment, or alternatively by clarifying or eliminating the defence of facilitation payments in one way or another.

7.1. *What Are Facilitation Payments?*

It is generally accepted that a facilitation payment is a payment made with the purpose of expediting or facilitating the provision of services or routine government action which an official is normally obliged to perform. Some jurisdictions that allow for facilitation payments require that such payments be of "small" value,[136] or of a "minor nature"[137] made in relation to "a routine governmental action".[138] However, as noted by TRACE, the precise definition is "often unclear and stretched to breaking point".[139] In Canada, section 3(4) *CFPOA* provides that a

[136] New Zealand Crimes Act 1961, s 105C(3)(b) the value of the payment must be "small" and a "routine government action" is defined so as not to include any decision about whether to award new business.
[137] Australia Criminal Code Act 1995, s 70.4(1)(a) the payment must be of a "minor nature" and made in relation to "a routine governmental action".
[138] In the United States, facilitation payments are permitted to "expedite or to secure the performance of a routine governmental action".
[139] TRACE "*The High Cost of Small Bribes*" (2015), retrieved from https://www.traceinternational.org/Uploads/PublicationFiles/TheHighCostofSmallBribes2015.pdf, p. 3. See also A. Wrage "The Big Destructiveness of the Tiny Bribe" (Ethisphere: 2010), retrieved from

"loan, reward, advantage or benefit… made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions" does not constitute a violation of the act.[140]

In the US, the FCPA contains a narrow exemption in 15 U.S.C. § 78dd-1(b) for "facilitating or expediting payment[s]… made in furtherance of a 'routine governmental action' that involves non-discretionary acts. According to the *Resource Guide*,[141] such governmental actions could include processing visas, providing police protection and mail service and the supply of utilities. It would not include such actions as the decision to award or continue business with a party, or any act within the official's discretion that would constitute the misuse of the official's office. *The general focus is on the purpose of the payment rather than its value*. The *Resource Guide* recommends companies discourage facilitation payments despite their legality under the FCPA, since they may still violate local laws in the country where the company is operating, and other countries' foreign bribery laws (such as the UK) may not contain a similar exception. As a result, American individuals and companies may find they still face sanctions in other countries despite the FCPA's facilitation payment exception. Finally, facilitation payments must be properly recorded in the issuer's books and records.[142]

The UK *Bribery Act 2010*, unlike the American FCPA, does not provide an exemption for facilitation payments. However the *Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*[143] states that whether it is in the public interest to prosecute for bribery in the case of facilitation payments will depend on a number of factors set out in the *Joint Prosecution Guidance*.[144]

7.2. *Rethinking Whether Facilitation Payments Should Be Prohibited*

There appears to be an emerging international norm in favour of prohibiting facilitation payments. None of the major international instruments allows for the defence of facilitation payments, with the exception of Article 9 of the OECD Convention's reference to "small facilitation payments".[145] Even the Parties to the OECD Convention appear to be moving away

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http://www.forbes.com/2010/03/01/bribery-graft-law-leadership-managing-ethisphere.html. They are not tips, as tipping is voluntary and given after the service has been rendered, nor are they welfare for underpaid civil servants.

[140] Section s. 3(5) of the *CFPOA* clarifies that an "act of a routine nature" does not include a decision to award new business or to continue with a particular party.

[141] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Department of Justice and Securities Exchange Commission, 2012), retrieved from http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[142] Gerry Ferguson, *supra* note 11, p. 2.43.

[143] UK Serious Fraud Office, "*Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*", retrieved from https://www.sfo.gov.uk/?wpdmdl=1456https://www.compliance-instituut.nl/wp-content/uploads/SFO-UK-BRIBERY-ACT-2010-JOINT-PROSECUTION-GUIDANCE.pdf.

[144] Gerry Ferguson, *supra* note 11, p. 2.45.

[145] The Inter-American Convention does not create an exception for facilitating payments to government officials. Article VII criminalizes all payments made "in connection with any economic or commercial transaction, including facilitating payments". The UNCAC criminalizes the "direct or indirect promising, offering or giving, of an undue advantage to the official such that he will act or refrain from acting in the exercise of his official duties". A literal interpretation of this language would include the criminalization of facilitating payments to government

from that position. The 2009 Recommendations call upon all States Parties to "encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognizing that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records".[146] The recent Ten Year Review concludes that the OECD Working Group might decide to undertake a mid- to long-term analysis about whether the exception for "small facilitation payments" in Commentary 9 is too vague to implement in practice.[147] One commentator believes that the OECD Convention should be amended to eliminate the facilitation payments exception.[148]

A review of States' practices appears to show that the tolerance for small bribes or facilitation payments may well be fading.[149] Twenty years ago, when the OECD Convention was negotiated and countries passed relevant domestic legislation, such payments were common and even legal in many countries.[150] However, times have changed. There is no country anywhere with a written law permitting the bribery of its own officials.[151] The only OECD countries that permit facilitation payments to foreign public officials are the US, Canada, Australia, New Zealand and South Korea.[152] In 2011, the Australian government released a consultation paper seeking public comments on removing the facilitation payment defence.[153] Also, the Australian Attorney-General's Department guidance was amended to clarify that facilitation payments are restricted to payments of a minor value and the document now "recommends that individuals and companies make every effort to resist making facilitation payments".[154] For now, however, the facilitation payment defence remains available under the Australian Commonwealth Criminal Code.[155] In the United States, some practitioners increasingly believe that US authorities have simply read the exception for facilitation payments out of the statute.[156] Other commentators are calling for the US to repeal the exception.[157]

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officials. UNCAC Article 16: while creating the offence of passive bribery is not mandatory, there does not include a reference to defence of facilitation payments, rather there is a reference to the principle that the domestic law of a State party governs applicable defences for the offences covered by the Convention (art 30(9)).

[146] OECD Recommendations (2009), *supra* note 107, Recommendation VI(ii).

[147] OECD 10 Year Review, *supra* note 48.

[148] Jon Jordan "The OECD's Call for an End to 'Corrosive' Facilitation Payments and the International Focus on the Facilitation Payments Exception under the Foreign Corrupt Practices Act" (2011) 13 University of Pennsylvania Journal of Business Law 881.

[149] The old thinking was that such payments were excluded in recognition that such payments were common and even legal in many countries. While such payments may still be common, they are no longer legal in many countries.

[150] Rebecca Koch "*The Foreign Corrupt Practices Act*: It's Time to Cut Back the Grease and Add Some Guidance" 28 Boston College International & Comparative Law Review 389 (2005).

[151] A. Wrage "One Destination, Many Paths: The Anti-Bribery Thicket" (TRACE: November 2009).

[152] A. Wrage, *supra* note 139.

[153] Australian Government Public Consultation Paper "Assessing the "facilitation payments" defence to the Foreign Bribery offence and other measures" (November 15, 2011). See Australian Government – Attorney General's Department "*Possible changes to anti-foreign bribery laws to remove the facilitation payments defence and other technical measures - CRJD*", retrieved from https://www.ag.gov.au/Publications/Pages/Plannedregulatorychanges.aspx.

[154] OECD "Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia" (October 2012), retrieved from https://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf, paras. 10, 15.

[155] Criminal Code Act 1995, s. 70.4

[156] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66.

[157] See Rebecca Koch, *supra* note 150; Jon Jordan, *supra* note 148; and Alexandros Zervos "Amending the FCPA:

7.3. *Arguments to Support Eliminating the Defence of Facilitation Payments*

Every bribe of a government official, regardless of size, breaks the law of at least one country.[158] A lack of resources or political interest has meant violations are rarely prosecuted, but that may be changing. Permitting the citizens of one country to violate the laws of another corrodes international standards and marginalizes the global fight against corruption. It is also a double standard. The few countries that allow for facilitation payments to be made to foreign public officials prohibit their own officials from accepting them.[159]

Some companies are concerned that paying facilitation payments could lead to costly legal complications.[160] Some describe it as a very limited and complicated defence which is frequently misunderstood, thus exposing businesses operating offshore to criminal liability in circumstances where they might genuinely believe they are acting lawfully.[161] It can also make it difficult for companies to follow the laws in their domestic jurisdiction if they are required to record such payments that are illegal in the country where it is being made. Furthermore, with countries like the UK prohibiting facilitation payments, there is an increasing risk that a multinational company with foreign subsidiaries will violate the laws of the country where the subsidiary is based. Companies with offices in more than one country expressed concern that if they do not abolish the use of small bribes altogether, they must undertake different compliance programs based upon the location of each office and the citizenship of the people working there.[162] According to TRACE, many multinational companies are taking steps to eliminate "facilitation payments".[163] TRACE asks why governments are not following what is already the practice of many major companies.[164]

Prior to the passing of the *Bribery Act 2010*, the UK Law Commission Consultation Report listed a number of arguments against exempting facilitation payments:[165]

- Inherent difficulties in determining when a payment crosses the line (does "routine" mean "frequently" or "commonplace").[166]

Repealing the Exemption for 'Routine Government Action' Payments" (2007) 25 Penn State International Law Review 251.

[158] A. Wrage, *supra* note 139.

[159] Jon Jordan, *supra* note 148. According to TRACE, of the countries that permit these small bribes overseas, none permits them at home: A Wrage, *supra* note 151.

[160] TRACE 2015, p. 6. Representatives of the legal profession in Canada have expressed concern that this defence creates a large area of uncertainty, see OECD Phase 3 Report, *supra* note 12, para. 30.

[161] Mike Koehler, *supra* note 128.

[162] A 2008 survey by the law firm of Fulbright and Jaworski found 80% of companies in the US prohibited the use of FP. Majority of domestic companies felt that it was better to ban facilitation payments altogether than "explore a gray area inviting costly and embarrassing investigations for FCPA violations". KPMG survey came up with similar results. Jon Jordan, *supra* note 148.

[163] TRACE 2015, p. 16.

[164] A. Wrage, *supra* note 151.

[165] UK Law Commission Consultation Paper (2007) Appendix F from the UK Law Commission report: Facilitation Payments, Commission Payments and Corporate Hospitality, retrieved from http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp185_Reforming_Bribery_consultation.pdf.

[166] UK Law Commission Consultation Report notes the Association of Chartered Certified Accountants 2007 study which stated that only 46% of its respondents felt able to differentiate between a facilitation payment and a

- Blurs the distinction between legal and illegal payments and floodgates argument.[167]
- Weakens the corporation's ability to implement its anti-bribery programme.
- Sends confusing messages to employees.
- Creates a "pyramid scheme of bribery".[168]

Another argument supporting the prohibition of facilitation payments is the accounting dilemma. A business may be required to record a facilitation payment in its accounts by one jurisdiction, but this may then formalize an illegal act which, if concealed, may amount to tax evasion in another jurisdiction. It has been observed that often companies must opt between "falsifying their records in violation of their own laws or recording the payments accurately and documenting a violation of local law".[169]

Facilitation payments can have a negative impact on society.[170] Such payments can interfere with the proper administration of government, impede good governance and result in social unrest. This may even go as far as encouraging governments to fix their employees' salaries in expectation of these payments. Security concerns have also been raised. "If you pay government officials to manage differently, you shouldn't be surprised if criminals and terrorists are doing the same".[171] If visas can be bought, border security is threatened.[172]

7.4. *Arguments to Support Retaining the Defence of Facilitation Payments*

The most cited argument is that business will "lose out" to rival foreign companies that do not make facilitation payments.[173] They will experience competitive disadvantages because prohibiting facilitation payments will result in an uneven playing field. Such payments are seen as a necessary and acceptable part of business. Since other jurisdictions permit such payments, to exclude them would be detrimental to businesses that are from countries where they are prohibited. Another argument is that only payments that are minor in nature are permitted, so it is argued that they will have minimal detrimental consequences.

In response to the argument that business will "lose out" to rival foreign companies that do not make facilitation payments, the UK Trade and Investment Department argues that "UK companies may lose some business by taking this approach, but equally there will be those who choose to do business with UK companies precisely because we have a no-bribery reputation, and the costs and style of doing business are more transparent".[174] Research conducted by the

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bribe.

[167] Floodgate argument is further discussed in Rebecca Koch, *supra* note 150.

[168] Junior officials who look for small bribes rise to higher positions by paying off those above them. Corruption creates pyramids of illegal payments flowing upward. Legalizing the base of the pyramid gives it a strong and lasting foundation.

[169] TRACE 2015, p. 5.

[170] A. Wrage, *supra* note 139.

[171] *Ibid.*

[172] As TRACE noted, "the practice of bribing immigration officials can lead to serious entanglements with the enhanced security laws of the company's home country". See A. Wrage, *supra* note 151.

[173] Charles B. Weinograd "Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception" (2010) 50 Virginia Journal of International Law 509.

[174] UK Law Commission Consultation Report cites examples of BP and Shell, *supra* note 165, para. F.18.

World Bank demonstrated that in fact payment of bribes results in firms spending "more, not less, management time… negotiating regulations and facing higher, not lower, costs of capital".[175] Further it may be more difficult if payments are made once to resist subsequent demands for payment. A TRACE study revealed that none of the companies that approached the issue carefully and comprehensively reported significant or prolonged disruption in their business activities.

A concern has been raised that banning facilitation payments would prove to be impractical and ineffective. One commentator argues that in many cultures, payment for routine governmental action is a widespread practice, engrained within social norms and local mores.[176] Inadequate wages abroad and foreign customs make such payments necessary. As he notes "it would be far better to have a provision that is workable and can be enforced, rather than have one which looks good on the statute books but is totally unenforceable".[177]

7.5. *Should Canada Prohibit Facilitation Payments?*

As noted, although the *Fighting Foreign Corruption Act*[178] provided for the elimination of the facilitation payments defence by repealing s. 3(4) of the *CFPOA*, this provision remains unproclaimed and thus Canada remains one of the few countries to continue to permit these payments. If the defence of facilitation payments is eliminated, one helpful suggestion that has been made is to incorporate a scaled penalty system for acts of lower-level bribery.[179] Even without an express scaled-down penalty system, judges in Canada have a wide discretion to select a penalty for offences like bribery where no mandatory minimum penalty is specified. The general sentencing principles state that the penalty is to be "proportionate" to the nature and scope of the harm and to the culpability of the offender. These small facilitation payments would normally result in very small penalties if facilitation payments were criminalized.[180] However, the high maximum penalty of 14 years imprisonment does eliminate the use of some sentencing options such as absolute and conditional discharges and conditional sentences. This elimination of these sentencing options for minor incidents of otherwise serious offences such as bribery occurred under the Conservative government's so-called "law and order" policy. Hopefully those laws will soon be repealed. Enacting a scaled-down version (e.g. a summary conviction offence of bribery) would also necessitate a consideration of whether automatic mandatory debarment from federal procurement contracts is suitable for conviction of small scale bribery offences.

Another alternative that falls short of a total prohibition on all facilitation payments is to amend the *CFPOA* to provide a clear definition of facilitation payments with a monetary threshold. An American commentator has reviewed the possibilities of amending the FCPA to clarify the facilitation payment exception.[181] He argues for an amendment that refines the exception's current purpose-focused paradigm and adopts a complementary, regionally tailored monetary

[175] Daniel Kaufmann and Shang-Jin Wei "Does 'grease money' speed up the wheels of commerce?" (World Bank), retrieved from https://www.imf.org/external/pubs/ft/wp/2000/wp0064.pdf.
[176] Charles B. Weinograd, *supra* note 173.
[177] *ibid*.
[178] Fighting Foreign Corruption Act, S.C. 2013, c. 26, s. 3(2).
[179] Jacqueline L. Bonneau, *supra* note 54.
[180] See also s.718.21 of the *Criminal Code* for additional sentencing factors where the accused is an organization.
[181] Charles B. Weinograd, *supra* note 173.

cap. According to his proposal, facilitation payments that fall below this monetary threshold will enjoy a rebuttable presumption of legality, while those in excess will presumptively stand outside the exception's shelter.[182] This would allow corporations, prosecutors and courts a manageable and flexible standard to analyze these payments. US Congress has considered and rejected the imposition of a cap in the past. A concern raised regarding this proposal is that a cap would create an environment for abuse.[183]

7.6. *Ways to Discourage the Use of Facilitation Payments*

If the government does not see it as practical to eliminate facilitation payments at this time, they should at least follow the OECD Guidance to "encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' book and financial records".[184]

7.6.1 *A "Books and Records" Provisions in the CFPOA*

One way to address the concern of facilitation payments is through a "books and records" provision, an approach enacted into the *CFPOA* with the 2013 amendments. A company paying a bribe to a foreign public official must accurately record such a payment in its books, and if it does not, then the company violates a "books and records' provision. Representatives from Canadian business who were interviewed by the OECD Working Group noted that it is not uncommon for companies to make a payment to expedite or secure the performance of some act by a foreign public official and that "facilitation payments" are rarely recorded in corporate books and records.[185] Accountants believe these are often not recorded (despite the defence) because of concerns by a company of criminal liability. Auditors also state that they do not pay close attention to "facilitation payments" when auditing a corporation because those payments usually do not materially affect the corporation's financial statements.

With the adoption of a "books and records" offence, the Canadian law now poses the same challenges that commentators have been describing regarding the American system for years. That is, since almost every country outlaws facilitation payments under their respective domestic bribery laws, corporations are hesitant to properly record such payments as doing so essentially is tantamount to confessing to bribes in violation of a relevant foreign law.[186] But failing to make the proper recording also violates a books and records provision.

7.6.2 *"Publish What You Pay" Legislation*

"Publish what you pay" legislation requires companies to disclose any payments made to a

[182] Legislature should craft a two-pronged conjunctive test, which considers both the subjective purpose of the payment and an objective application of a threshold payment amount. *Ibid*.
[183] By using a cap to define bribery, Congress might create a floor price for doing business abroad. Corrupt officials would persistently demand the exact amount of the threshold, see Charles B. Weinograd, *supra* note 173.
[184] OECD Recommendations (2009), *supra* note 107.
[185] OECD Phase 3 Report, *supra* note 12.
[186] Jon Jordan, *supra* note 148.

foreign government, including legal payments such as taxes and facilitation payments. The NGO Publish What You Pay, which advocates for increasing transparency in the extractive sector, suggests that because "companies and developed countries profit hugely from the global extractive sector, they have a responsibility to diminish the opportunities for corruption or mismanagement".[187]

In the United States, such a requirement for the extractive industry was introduced as part of the *Dodd-Frank Act* following the 2008 global financial crisis.[188] In the UK, *Reports on Payments to Government Regulations 2014* came into force on December 1, 2014, and apply to any company or partnership that is either a large undertaking or a public interest entity (PIE), and is engaged in extractive industries (mining, oil and gas) or logging.[189] The ESTMA, which came into force in Canada on June 1, 2015, applies to a corporation or a partnership that is engaged in the commercial development of oil, gas or minerals, and (1) is listed on a stock exchange in Canada or (2) has a place of business in Canada, does business in Canada or has assets in Canada and, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (a) it has at least $20 million in assets, (b) it has generated at least $40 million in revenue, and (c) it employs an average of at least 250 employees.[190] The threshold for reporting single or multiple payments made by an entity to any government in Canada or in a foreign state is set at $100,000.[191]

7.6.3 *Promulgation of Guidelines Defining Permissible Facilitation Payments*

The following excerpt from the *FCPA Resource Guide*[192] explains the US DOJ's and SEC's view on what type of payments qualify for this exemption:

BEGINNING OF EXCERPT

What Are Facilitating or Expediting Payments?

The *FCPA*'s bribery prohibition contains a narrow exception for "facilitating or expediting payments" made in furtherance of routine governmental action. The facilitating payments exception applies only when a payment is made to further "routine governmental action" that involves non-discretionary acts.

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[187] Publish What You Pay "Mandatory Disclosures", retrieved from http://www.publishwhatyoupay.org/our-work/mandatory-disclosures/.

[188] Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 2010) requires issuers in the extractive industry reporting to the US Securities and Exchange Commission (SEC) to disclose any payments made to a foreign government or the US federal government for the purpose of commercial resource development. Legislation is found at http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf. The SEC first adopted the rules implementing this section in August 2012 and a revised version in June 2016. See Securities and Exchange Commission "*Disclosure of Payments by Resource Extraction Issuers*" 17 CFR Parts 240 and 249b, Release No 34-78167, File No S7-25-15, retrieved from https://www.sec.gov/rules/final/2016/34-78167.pdf and "*SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act*" (June 27, 2016), retrieved from https://www.sec.gov/news/pressrelease/2016-132.html

[189] *Reports on Payments to Government Regulations 2014*, 2014 No. 3209, s. 4.

[190] *ESTMA*, ss. 2 (entity), 8(1).

[191] *Ibid*, s. 2 (payment).

[192] Department of Justice and Security Exchange Commission "*A Resource Guide to the U.S. Foreign Corrupt Practices Act*" (2012), retrieved from http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

Examples of "routine governmental action" include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party. Nor does it include acts that are within an official's discretion or that would constitute misuse of an official's office. Thus, paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment.

Examples of "Routine Governmental Action"

An action which is ordinarily and commonly performed by a foreign official in—

- obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- processing governmental papers, such as visas and work orders;
- providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or actions of a similar nature.

Whether a payment falls within the exception is not dependent on the size of the payment, though size can be telling, as a large payment is more suggestive of corrupt intent to influence a non-routine governmental action. But, like the *FCPA*'s anti-bribery provisions more generally, the facilitating payments exception focuses on the *purpose* of the payment rather than its value. For instance, an Oklahoma- based corporation violated the *FCPA* when its subsidiary paid Argentine customs officials approximately $166,000 to secure customs clearance for equipment and materials that lacked required certifications or could not be imported under local law and to pay a lower-than-applicable duty rate. The company's Venezuelan subsidiary had also paid Venezuelan customs officials approximately $7,000 to permit the importation and exportation of equipment and materials not in compliance with local regulations and to avoid a full inspection of the imported goods. In another case, three subsidiaries of a global supplier of oil drilling products and services were criminally charged with authorizing an agent to make at least 378 corrupt payments (totaling approximately $2.1 million) to Nigerian Customs Service officials for preferential treatment during the customs process, including the reduction or elimination of customs duties.

Labeling a bribe as a "facilitating payment" in a company's books and records does not make it one. A Swiss offshore drilling company, for example, recorded payments to its customs agent in the subsidiary's "facilitating payment" account, even though company personnel believed the payments were, in fact, bribes. The company was charged with violating both the *FCPA*'s anti-bribery and accounting provisions. Although true facilitating payments are not illegal under the *FCPA*, they may still violate local law in the countries where the company is operating, and the OECD's Working Group on Bribery recommends that all countries encourage companies to prohibit or discourage facilitating payments, which the United States has done regularly. In addition, other countries' foreign bribery laws, such as the United Kingdom's, may not contain an exception for facilitating payments. Individuals and companies should

therefore be aware that although true facilitating payments are permissible under the *FCPA*, they may still subject a company or individual to sanctions. As with any expenditure, facilitating payments may still violate the *FCPA* if they are not properly recorded in an issuer's books and records.

Hypothetical: Facilitating Payments

Company A is a large multi-national mining company with operations in Foreign Country, where it recently identified a significant new ore deposit. It has ready buyers for the new ore but has limited capacity to get it to market. In order to increase the size and speed of its ore export, Company A will need to build a new road from its facility to the port that can accommodate larger trucks. Company A retains an agent in Foreign Country to assist it in obtaining the required permits, including an environmental permit, to build the road. The agent informs Company A's vice president for international operations that he plans to make a one-time small cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously, as the agent has experienced delays of three months when he has not made this "grease" payment. The clerk has no discretion about whether to file and stamp the permit applications once the requisite filing fee has been paid. The vice president authorizes the payment.

A few months later, the agent tells the vice president that he has run into a problem obtaining a necessary environmental permit. It turns out that the planned road construction would adversely impact an environmentally sensitive and protected local wetland. While the problem could be overcome by rerouting the road, such rerouting would cost Company A $1 million more and would slow down construction by six months. It would also increase the transit time for the ore and reduce the number of monthly shipments. The agent tells the vice president that he is good friends with the director of Foreign Country's Department of Natural Resources and that it would only take a modest cash payment to the director and the "problem would go away." The vice president authorizes the payment, and the agent makes it. After receiving the payment, the director issues the permit, and Company A constructs its new road through the wetlands.

Was the payment to the clerk a violation of the *FCPA*?

No. Under these circumstances, the payment to the clerk would qualify as a facilitating payment, since it is a one-time, small payment to obtain a routine, non-discretionary governmental service that Company A is entitled to receive (i.e., the stamping and filing of the permit application). However, while the payment may qualify as an exception to the *FCPA*'s anti-bribery provisions, it may violate other laws, both in Foreign Country and elsewhere. In addition, if the payment is not accurately recorded, it could violate the *FCPA*'s books and records provision.

Was the payment to the director a violation of the *FCPA*?

Yes. The payment to the director of the Department of Natural Resources was in clear violation of the *FCPA*, since it was designed to corruptly influence a foreign official into improperly approving a permit. The issuance of the environmental permit was a discretionary act, and indeed, Company A should not have received it Company A, its vice president, and the local agent may all be prosecuted for authorizing and paying the bribe. [endnotes omitted]

END OF EXCERPT

The UK Ministry of Justice has addressed the facilitation payments issue as follows:[193]

> Small bribes paid to facilitate routine Government action – otherwise called 'facilitation payments' – could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offence and therefore potential liability under section 7.
>
> As was the case under the old law, the *Bribery Act* does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.
>
> The Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play and the guidance below offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.
>
> Issues relating to the prosecution of facilitation payments in England and Wales are referred to in the guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.

The OECD Working Group recommended that Canada "consider issuing some form of guidance in the interpretation" of the defence as there is lack of clarity as to the threshold for facilitation payments and other bribes.[194] However, Canada has noted its long standing practice not to issue guidelines on the interpretation of criminal law provisions. Courts are responsible for interpreting the application of the law in individual cases. But that principle does not preclude Parliament from amending the definition of facilitation by giving it a more precise definition or authorizing an agency to issue regulations in respect to the meaning or scope of facilitation payments.

7.6.4 *Raise Awareness for Corporate Activism and Institutional Reform*

Representatives from the business sector indicated that the government of Canada has not encouraged them to prohibit or discourage the use of facilitation payments.[195] More and more

[193] UK Minister of Justice "*The Bribery Act 2010: Guidance*", retrieved from https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
[194] OECD Phase 3 Report, *supra* note 12.
[195] OECD Phase 3 Report, *supra* note 12.

companies are, however, introducing institutional reform. According to TRACE, increasingly companies are adopting a zero-tolerance approach to facilitation payments. For example, the Royal Bank of Canada has banned facilitation payments.[196] Some companies conclude that it is sufficient to stay on the right side of the enforcement agencies in the country in which they are headquartered. Others conclude that the US authorities are the most active internationally, so they work to comply with the US legal framework. Still others try to comply with the laws of all countries in which they operate.[197]

8. Enhancing Detection through a Voluntary Disclosure Regime

Investigating and prosecuting corruption can be highly complicated. Cases involving transnational bribery are costly and difficult, as evidence to build a case must be gathered abroad, often in unfriendly environments. Canada is not the only system that experiences this.[198] A number of years ago, the British Attorney General hired former Manhattan Assistant DA De Gracia to conduct a review of how the Serious Fraud Office handles its investigations and prosecutions.[199] Her report issued in 2008 stated that "the SFO uses significantly more resources per case than their US office and achieves significantly less for its efforts".[200] The SFO has been significantly reorganized since that time,[201] but the point remains that foreign bribery investigations can be very complex and expensive.

This section examines some of the more interesting State self-reporting practices that can be introduced to enhance the detection, investigation and prosecution of corruption cases. In particular, this section contains a review of voluntary corporate disclosure or self-reporting, being used in the UK and US, as well as mandatory obligations of reporting and maintaining accounting records being introduced in Europe and elsewhere.

8.1. *Schemes to Encourage Self-Reporting of Bribery or Corruption Offences*

"Self-reporting" means that a business informs the authorities when it discovers wrongdoing in its organization. "Self-reporting" to the criminal justice or regulatory authorities is generally distinct from cooperating with authorities once an investigation has been commenced.[202] Self-

[196] *"RBC bans facilitation payments"* (The Blog of Canadian Lawyers and Law Times: November 2011), retrieved from http://www.canadianlawyermag.com/legalfeeds/528/RBC-bans-facilitation-payments.html. This news article notes that the RBC is opting to follow the UK Bribery Act and adapts to the highest standard.
[197] A. Wrage "One Destination, Many Paths: The Anti-Bribery Thicket" (Nov 2009).
[198] Transparency International noted that the Canadian legal system and courts do not handle complex white collar criminal cases well. TI Progress Report 2011, *supra* note 31.
[199] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66.
[200] Ms. De Gracia provided 34 recommendations, see De Gracia, Jessica "Review of the Serious Fraud Office: Final Report" (June 2008).
[201] Gerry Ferguson, *supra* note 11, pp. 6.33-6.35, 6.68-6.70. Prime Minister May has indicates, if she wins the June 2017 British election, she will move on her proposal to incorporate the SFO into the more recently established National Crime Agency (NCA). This proposal will significantly reduce the SFO's political independence. At the moment, SFO is "overseen" by the UK's Attorney General while the NCA is "directly answerable" to the Home Secretary who is a government minister. See Susan Hawley "*UK leader pledges to bring SFO under political control*" (FCPA Blog: May 22, 2017), retrieved from http://www.fcpablog.com/blog/2017/5/22/susan-hawley-uk-leader-pledges-to-bring-sfo-under-political.html.
[202] Ms Dyer notes that there is not a universally accepted definition of self-reporting regimes. The Serious Fraud

reporting schemes have been introduced in a number of jurisdictions.[203] These schemes encourage corporations to identify, investigate and monitor cases of actual or possible corruption. While mostly targeting businesses,[204] in some jurisdictions these schemes provide benefits to individuals who self-report or cooperate with the authorities and accept their guilt at the earliest opportunity. Canada does not have a self-reporting policy or scheme. This section of the paper analyzes whether Canada should have such a scheme in light of their existence in both the UK and the US.

8.1.1 *The Process*

Under self-reporting schemes, a business is expected to identify the nature and extent of its wrongdoing to the authorities, which may involve sharing with the authorities the results of internal investigations or investigations carried out by the business' solicitors or forensic accountants. In most self-reporting schemes the authorities will consider refraining from prosecuting the reporting business criminally and instead will reach a civil settlement with the business. Typically there are three stages after self-reporting:[205]

1. The company usually conducts an internal investigation into the corruption issue.
2. The company reports its findings to the enforcement authority and negotiates a resolution of the issues.
3. Often there is a requirement that the self-reporting company retain an independent compliance monitor for several years.

Examples of self-reporting schemes include England and Wales,[206] Scotland,[207] and Turkey.[208] In July 2009, the Serious Fraud Office (SFO) issued guidelines entitled "Approach of the Serious Fraud Office to dealing with Overseas Corruption" that encourages corporations to self-report overseas corruption and establishes procedures for voluntary disclosure, self-

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Office in England and Wales has accepted self-reports from businesses against which investigations have begun.

[203] This information is from a draft paper prepared by Catherine Dyer and presented at the conference "Globalization of Crime–Criminal Justice Responses" co-organised by the International Society for the Reform of Criminal Law and the International Centre for Criminal Law Reform and Criminal Justice Policy, held in Ottawa, Canada, August 7-11, 2011. For a discussion of voluntary disclosure in the UK and the US see Gerry Ferguson, *supra* note 11, pp. 6.42-6.43.

[204] The focus is on cooperation by businesses/corporate as by their nature bribery and corruption are often "corporate" crime.

[205] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66. See also Gerry Ferguson, *supra* note 11, Chapter 6, ss. 4.1 & 4.2.

[206] July 2009 the SFO introduced self-reporting scheme for corporations and in 2011, the SFO issued joint guidance with the DPP re *Bribery Act 2010*. This sets out the SFO's approach to prosecutorial decision-making on *Bribery Act 2010* cases and makes reference to the 2009 guidance.

[207] Lord Advocate in Scotland instructs introduction of self-reporting initiative for businesses to report instances of bribery that they uncover within their organisation directly to the SOCD (Serious and Organised Crime Division of Crown Office).

[208] Turkey has a voluntary disclosure programme which requires persons to self-report to the authorities prior to detection and investigation of the bribery. If a person in receipt of the bribe, or who agreed to be bribed, self-reports in these circumstances and hands back the bribe, no action will be taken against them. Similarly, if persons who bribed or offered to bribe come forward, no action will be taken. The bribe will be removed from the public official bribed.

investigation and post-settlement monitoring.[209] It states that "the benefit to the corporation will be the prospect of a civil rather than a criminal outcome as well as the opportunity to manage, with the SFO, the issues and any publicity proactively". It does not give an "unconditional guarantee that there will not be prosecution of the corporate [entity]".[210]

In the United States, self-disclosure is a very important factor in the prosecutor's decision whether or not to lay or proceed with criminal charges and whether or not to enter into a deferred prosecution agreement (DPA) or even a non-prosecution agreement (NPA). US prosecutors may decline to lay bribery charges due to lack of admissible evidence, or even if sufficient evidence exists, on the grounds that criminal prosecution is not in the public interest. In the latter circumstances, the prosecutor may nonetheless enter into a NPA. Ferguson describes NPAs and the US practice with NPAs as follows:

> An NPA is a private agreement between the DOJ and the alleged offender agreeing to a certain set of facts and legal conclusions. An NPA is not filed with a court. In essence, an NPA is a contract where both sides provide consideration: the DOJ agrees not to prosecute the alleged offender for its alleged offenses and allows the company to continue doing business in the international marketplace, while the alleged offender agrees to certain terms, including implementing compliance undertakings and paying the equivalent of criminal or civil fines and penalties.[211]
>
> …
>
> The DOJ has the power to prosecute and pursue criminal convictions. In determining whether to bring criminal charges in an FCPA case, DOJ prosecutors consider the factors outlined in *Principles of Federal* Prosecution[212] and *Principles of Federal Prosecution of Business Organizations*.[213] DOJ prosecutors are guided by the following general principle, pursuant to US Attorney's Manual s. 9-27.220:
>
> A. The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:
>
> 1. No substantial Federal interest would be served by prosecution;
> 2. The person is subject to effective prosecution in another jurisdiction; or
> 3. There exists an adequate non-criminal alternative to prosecution.

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[209] Serious Fraud Office "Approach of the Serious Fraud Office to Dealing with Overseas Corruption" (SFO: 2009) retrieved from https://www.skadden.com/eimages/Approach_of_the_Serious_Fraud_Office_to_Dealing_with_Overseas_Corruption.pdf.

[210] *Ibid*, para. 5. Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany* (Surrey, UK: Ashgate Publishing, 2014), p. 121, reports that the SFO's new director, David Green, removed this guidance in October 2012 after a review. However, Green maintains that self-reporting is encouraged.

[211] Gerry Ferguson, *supra* note 11, p. 6.63.

[212] [158] US Attorney's Manual s 9-27.000, online: <http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution>.

[213] [159] US Attorney's Manual s 9-28.000, online: <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecutionbusiness-organizations>.

> In the context of FCPA cases against corporations, DOJ prosecutors also consider "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents" pursuant to US Attorney's Manual s. 9-28.300. Cooperation is defined broadly as helping the DOJ ascertain the identity of corrupt actors and providing the DOJ with disclosure of relevant facts and evidence. However, according to Mike Koehler, the history of DOJ enforcement shows that even raising legal arguments and disputing the DOJ's enforcement theory is classified as "not cooperating" and can lead to the DOJ bringing criminal charges.[214]
>
> The *Principles of Federal Prosecution* cited above also govern the use of alternatives to criminal charges. The use of these alternatives is seen as a desirable middle ground between declining prosecution and pursuing criminal charges. Evaluating the factors described above, DOJ prosecutors may come to the conclusion that they have insufficient evidence to obtain a conviction or that the public interest would not be best served by prosecuting the alleged offender. In such cases, the DOJ prosecutor may choose to pursue an alternative to criminal charges [such as NPA] as opposed to declining prosecution altogether.[215]

8.1.2 *The Issue of Waiver of Attorney-Client Privilege*

Various issues arise when considering self-reporting schemes. One is the waiver of attorney-client privilege at the investigation stage. In the UK, the SFO has a strong preference that investigation work be carried out by corporate professional advisers, i.e. document recovery and analysis, electronic searches, etc.[216] The SFO expects to see the report of the internal investigation and "any notes of interviews during the course of the investigation" as well as regular updates.[217] This is qualified by noting that this likely will not include the SFO wanting to review "the advice that lawyers are giving to the corporation on the investigation, the types of remediation to be offered and any issues regarding the conduct of the negotiations".[218] This is in contrast to the US position. In a 2008 statement the US Department of Justice noted that "eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection".[219] Prosecutors should not ask for such waivers and are directed not to do so. The corporation may need to provide factual information, possibly including information obtained in an internal investigation, to obtain cooperation credit.

8.1.3 *Civil Settlement and Its Benefits*

Different approaches are also taken to non-criminal resolutions. In contrast with the US Department of Justice, the SFO used to have an expressed preference for civil settlement,[220] although in recent years the SFO has concentrated on prosecutions rather than seeking civil

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[214] [160] Mike Koehler, The Foreign Corrupt Practices Act in a New Era (Cheltenham, UK: Edward Elgar, 2014) at 56.
[215] Gerry Ferguson, *supra* note 11, p. 6.62.
[216] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66.
[217] SFO Guidance, *supra* note 209.
[218] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66.
[219] *Ibid.*
[220] Catherine Dyer paper, *supra* note 203. See OECD, "Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom" (March 2012), retrieved from https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf, paras. 102, 108.

settlements, with mixed results.[221] The SFO *Guidance on Corporate Prosecutions*[222]emphasizes the importance of self-reporting and putting an effective corporate compliance programme into place:

> ***Additional public interest factors in favour of prosecution:***
>
> (a) A history of similar conduct (including prior criminal, civil and regulatory enforcement actions against it); failing to prosecute in circumstances where there have been repeated and flagrant breaches of the law may not be a proportionate response and may not provide adequate deterrent effects;
>
> (b) The conduct alleged is part of the established business practices of the company;
>
> (c) The offence was committed at a time when the company had an ineffective corporate compliance programme;
>
> (d) The company had been previously subject to warning, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct, or had continued to engage in the conduct;
>
> (e) Failure to report wrongdoing within reasonable time of the offending coming to light; (the prosecutor will also need to consider whether it is appropriate to charge the company officers responsible for the failures/ breaches);
>
> (f) Failure to report properly and fully the true extent of the wrongdoing.
>
> ***Additional public interest factors against prosecution:***
>
> (a) A genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims:
>
> - In applying this factor the prosecutor needs to establish whether sufficient information about the operation of the company in its entirety has been supplied in order to assess whether the company has been proactively compliant. This will include making witnesses available and disclosure of the details of any internal investigation;
>
> (b) A lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the company:
>
> - contact should be made with the relevant regulatory departments to ascertain whether investigations are being conducted in relation to the due diligence of the company;
>
> (c) The existence of a genuinely proactive and effective corporate compliance

[221] OECD "Implementing the OECD Anti-Bribery Convention Phased 4 Report: United Kingdom" (OECD, March 2017), retrieved from http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf, para. 133.
[222] SFO "Guidance on Corporate Prosecutions", retrieved from http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/.

programme.

(d) The availability of civil or regulatory remedies that are likely to be effective and more proportionate:

- Appropriate alternatives to prosecution may include civil recovery orders combined with a range of agreed regulatory measures. However, the totality of the offending needs to have been identified. A fine after conviction may not be the most effective and just outcome if the company cannot pay. The prosecutor should refer to the Attorneys Guidance on Civil Recovery (see Proceeds of Crime Act 2002: Section 2A [Contribution to the reduction of crime] Joint Guidance given by the Secretary of State and Her Majestys Attorney General) and on the appropriate use of Serious Crime Prevention Orders.

(e) The offending represents isolated actions by individuals, for example by a rogue director.

(f) The offending is not recent in nature, and the company in its current form is effectively a different body to that which committed the offences. For example it has been taken over by another company, it no longer operates in the relevant industry or market, all of the culpable individuals have left or been dismissed, or corporate structures or processes have been changed in such a way as to make a repetition of the offending impossible.

(g) A conviction is likely to have adverse consequences for the company under European Law, always bearing in mind the seriousness of the offence and any other relevant public interest factors.

- Any candidate or tenderer (including company directors and any person having powers of representation, decision or control) who has been convicted of fraud relating to the protection of the financial interests of the European Communities, corruption, or a money laundering offence is excluded from participation in public contracts within the EU. (Article 45 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts). The Directive is intended to be draconian in its effect, and companies can be assumed to have been aware of the potential consequences at the time when they embarked on the offending. Prosecutors should bear in mind that a decision not to prosecute because the Directive is engaged will tend to undermine its deterrent effect.

(h) The company is in the process of being wound up.

The SFO states that there are no guarantees for criminal investigations of individuals employed by the self-reporting entity and that it will access the position of individual conduct on its merits. The US enforcement authorities have prosecuted individuals for FCPA violations at a relatively stable rate over the last ten years, although there have been one year spikes and declines over that

period.[223]

In the UK, there have only been a couple of civil settlement cases, so it is far too early to assess whether this policy is having the desired effect.[224] There are a number of benefits of self-reporting for law enforcement and prosecutors,[225] including:

- Potentially huge savings in time and resources.
- More likely cases that corruption will be uncovered and dealt with.
- Increase in public confidence that bribery will not be tolerated and is being taken seriously by authorities.
- By using civil recovery processes, the authorities can avoid challenges in establishing the criminal standard of proof, and tricky evidentiary issues, including electronic evidence.

For businesses, civil settlements can avoid the negative publicity of criminal prosecution or other forms of negative publicity since civil settlements often have a "no public disclosure" clause. They can also avoid the consequences of convictions such as debarment. The business demonstrates its commitment to uncovering bribery and corruption as soon as this is discovered within the organization and shows its commitment to establishing a good corporate culture thus enhancing its reputation in the long term.

8.1.4 *The Use of Deferred Prosecution Agreements to Encourage Voluntary Disclosure*

Apart from NPAs, the authorities in countries such as England and the US can reward voluntary disclosure and cooperation by entering into a deferred prosecution agreement (DPA). These are frequently used in the US and have been recently introduced in England. They are essentially probationary agreements between a prosecutor and a corporation which has been involved to some extent in criminal conduct.[226] Prosecutors agree to defer criminal prosecution of the corporation in exchange for a variety of corporate promises. The concessions can include fines, internal reforms, independent monitors and assistance in prosecuting corporate employees. The Department of Justice has established a FCPA "opinion procedure" (which operates on a "no name" basis) whereby a business can ask the Department to give an opinion as to the legality of proposed business conduct as a means of giving businesses comfort that subsequent action will not be taken in certain defined circumstances.[227]

Due to the difficulty of meeting the high threshold of initiating a charge and securing the successful prosecution of corporate offenders, the UK has also introduced deferred prosecution

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[223] Sherman & Sterling, "Cases and Review Release Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977" (FCPA Digest: January 2017), retrieved from http://www.shearman.com/~/media/Files/NewsInsights/Publications/2017/01/January-2017--FCPA-Digest-011117.pdf.

[224] For a critical assessment, see Corruption Watch "*Out of Court, Out of Mind – do Deferred Prosecution Agreements and Corporate Settlements deter overseas corruption?*" (March 2016), retrieved from http://www.cw-uk.org/wp-content/uploads/2016/03/Corruption-Watch-Out-of-Court-Out-of-Mind.pdf.

[225] Catherine Dyer paper, *supra* note 203.

[226] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66.

[227] Charles B. Weinograd, *supra* note 173.

agreements through the *Crime and Courts Act 2013* as an alternative to criminal prosecution. This occurred after the UK government published initial plans in May 2012 for the introduction of DPAs, receiving an overwhelmingly positive response with 86% of respondents supporting the proposal.[228] The very idea of DPAs is somewhat novel for UK prosecutors, given that prosecutorial plea bargaining is not as "powerful" a part of the criminal justice system as it is in the US.[229] In "Deferred Prosecution Agreements: A Practical Consideration",[230] Michale Bisgrove and Mark Weekes write that the "[i]ntroduction of the alternative is clearly not supposed to be a gold standard for prosecution but a compromise, allowing for effective punishment and regulation within a reasonable timeframe, where, in their absence, there might be none." As of November 2016, the UK has only concluded two DPAs.[231] An important prosecutorial control not present in the US deferred prosecution system is that a DPA in the UK must be approved by a court at a preliminary hearing.[232] The prosecutor will then indict the person, but suspend the indictment pending satisfactory performance of the terms set out in the DPA.[233] Once these terms are satisfied, the SFO will dismiss all charges.[234]

8.1.4.1 *Advantages*

Prosecution agreements can be flexible and normally emphasize anti-corruption compliance reform. In addition, any fine as part of a DPA can be mitigated by factors such as (1) whether the business self-reported, (2) dismissed the individuals involved in the corruption, and (3) carried out their own investigation including exploring whether any other corrupt activities have taken place, implementing an anti-corruption compliance programme within its organization and agreeing to submit to and pay for a period of external monitoring. These agreements allow prosecutors to punish corporations without risking total corporate collapse, an arrangement that appears to benefit both parties.[235] The agreements can focus on aspects of business reforms, such as requiring termination or disciplining of employees for either contributing to the underlying criminal conduct or for failure to cooperate with the investigation or hiring new senior management, new board members or new auditors.[236] The reforms can also cover operational

[228] UK Ministry of Justice "*Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations*", Response to Consultation CP(R) 18/2012 (October 23, 2012), para 18, retrieved from https://consult.justice.gov.uk/digital-communications/deferred-prosecutionagreements/results/deferred-prosecution-agreements-response.pdf.
[229] See UK Serious Fraud Office "*Operational Handbook*, "Guilty Pleas and Plea Bargaining" (2012), p. 3, retrieved from https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/. See *R. v. Innospec Limited*, [2010] EW Misc 7 (EWCC) (in which Thomas L.J. sternly warns that plea bargains are improper under UK law and that "no such arrangement should be made again"); *R. v. Dougall*, [2010] EWCA Crim 1048.
[230] Michale Bisgrove and Mark Weekes "Deferred Prosecution Agreements: A Practical Consideration" (2014) Criminal Law Review 416, p. 419.
[231] Ben Morgan "Deferred Prosecution Agreements (DPA): A Practical Guide by Defence and Prosecution" (Serious Fraud Office, 2016), retrieved from https://www.sfo.gov.uk/2016/10/17/deferred-prosecution-agreements-dpa-practical-guide-defenceprosecution/.
[232] *DPA Code of Practice*, 1.1, retrieved from https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf, 9.10.
[233] *Ibid*, 1.5.
[234] See Gerry Ferguson, *supra* note 11, pp. 6.71-6.72.
[235] Erik Paulsen "Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements" (2007) 82 New York University Law Review 1434; Koehler, *supra* note 214.
[236] Jacqueline Wolff and Pamela Sawhney "Voluntary Disclosure Under the FCPA" (2007) Business Crimes Bulletin (February 2007).

changes, such as enhanced compliance programs, amended financial controls, hotlines for whistleblowers, training programs to underscore legal behaviour, new personnel hiring policies and ethics officers.[237]

8.1.4.2 *Disadvantages*

Some commentators have argued that some limits should be imposed on prosecutorial discretion as these types of agreements can be abused.[238] They suggest that the actual practice of prosecution agreements reveals some concerns. By removing the threat of collateral consequences, individual prosecutors can take full advantage of the unique weaknesses of corporations in the criminal justice system. These weaknesses provide prosecutors with a dangerous amount of leverage over the corporations they target, creating a bargaining imbalance and a new threat of abuse.[239] Another concern is requesting cooperation from the company to further investigation and prosecution of the company's employees. The prosecutor may request that the company even refuse to pay attorney's fees for employees suspected of criminal conduct and further request that the company waive attorney-client privilege. Another concern commentators have raised about the US practice is that it is over-enforced and allegedly under-effective.[240] Serious enforcement actions are settled outside of court and there are few judicial decisions interpreting some of the vague provisions of the FCPA. The broad scope of "territorial jurisdiction" that DOJ and SEC claim without ever being decided by courts, is a prime example of this concern. NPA and DPA agreements allow prosecutors to impose substantial reforms on a company without having to internalize the considerable costs and risks of investigating and trying their case. Concerns about prosecutorial abuse are significantly reduced in England since DPAs must be submitted and accepted by a judge in England.

8.1.4.3 *Evaluating This Practice*

In the UK, SFO can engage in plea bargains which reduce charges. The "charge bargains" are completely under the control of the prosecutor. However, prosecutorial recommendations as to sentence reductions which form part of the plea agreement may be accepted or rejected by the court.[241] After reviewing the British case law on the plea bargains involving agreed sentencing submissions, commentators have noted some setbacks.[242] For example, in the Innospect prosecution the sentencing judge, while accepting the company's plea, explicitly noted that the SFO did not have power to enter into "sentence" agreements with cooperative entities.[243] In

[237] *Ibid.*
[238] Erik Paulsen, *supra* note 235.
[239] Bruce Hinchey "Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements" (2011) 40 Public Contract Law Journal 393; Koehler, *supra* note 214.
[240] Jacqueline L. Bonneau, *supra* note 54..
[241] In Canada, the prosecutor can not guarantee a specific sentence as part of a plea agreement, but the prosecutor and defence can agree to make a joint sentencing submission to the judge which, according to case law, the judge is expected to follow unless the judge is of the opinion that the jointly recommended sentence is demonstrably unfit. Before refusing to apply a joint sentencing submission, the judge is required to give Crown and defence a second opportunity to advise the judge as to why the sentence is fit (including the length of a complex trial, the uncertainty of the evidence, etc.).
[242] F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66.
[243] The Judge concluded that "I have concluded that the director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again", from the Innospect case cited in F. Joseph

another case, a judge rejected the mutual sentence agreement between the SFO and Dougall, the former vice president of Depuy International Ltd, and sentenced Dougall to 12 months in prison. Although an appeals court reversed this sentence, the court held that the sentencing decision was within the exclusive power of the court.[244]

In Canada, there are of course no DPAs for the prosecutor to offer to the cooperative self-reporting accused. And there are also real limitations on how much of a sentence reduction the prosecutor can facilitate. Where a prosecutor and defence counsel have agreed to a joint sentencing submission, the Supreme Court has indicated that the sentencing judge has the ultimate power to decide what the sentence should be but that judge should not depart from the joint sentencing recommendation unless the proposed sentence "would bring the administration of justice into disrepute or is otherwise contrary to the public interest."[245]

In the US, the enforcement authorities have greater power to enter into DPAs or NPAs. However, an American commentator who reviewed the FCPA sentences from 2004-2009, found that the benefits of self-reporting remain far from clear.[246] During the 5 year period, 16 voluntary disclosure cases (48%) were settled through DPAs or NPAs, while 11 non-disclosure cases (69%) were settled through DPAs or NPAs. Because information about no-action is not publicly available, it is difficult to assess the benefit of self- disclosure empirically and the actual benefits might be under-estimated. Added complexity is that both the Department of Justice and the SEC can make separate decisions. This commentator concluded that there does not appear to be a benefit to voluntary disclosure.[247] His data tends to show that companies seem to face a penalty one and a half times larger if they voluntarily disclose FCPA violations as compared to companies that do not. Another US commentator suggests that one way to improve the use of prosecutorial agreements and the use of discretion in voluntary disclosure situations would be to develop an internal guidance policy that voluntarily disclosed matters must normally be resolved by the DOJ within 90 days after completion of an internal investigation; that agencies should make public their calculation of credit for voluntary disclosure and coordination; and that the DOJ will publish a sanitized summary of its declinations.[248]

8.1.5 *A Proposal for Deferred Prosecution Agreements in Canada*

The following excerpt from Gerry Ferguson, *Global Corruption: Law, Theory and Practice*[249]

Warin, Charles Falconer & Michael S. Diamant, *supra* note 66.

[244] The Court of Appeal held that "Responsibility for the sentencing decision in cases of fraud or corruption is vested exclusively in the sentencing court…. There are no circumstances in which it may be replaced." Case cited in F. Joseph Warin, Charles Falconer & Michael S. Diamant, *supra* note 66.

[245] *R. v. Anthony-Cook*, 2016 SCC 43, para. 32. The SCC further described the test where the joint submission was "so markedly out of line with the xpectations of reasonable person aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system"; and where it would cause "an informed and reasonable public to lose confidence in the institution of the courts (at para. 33). The SCC intended to establish a high threshold in order to promote certainty in plea and sentence bargains. The SCC also provided six guidelines for applying the test.

[246] Bruce Hinchey, *supra* note 239.

[247] *Ibid.*

[248] Mike Koehler, "A Q&A with Homer Moyer" (FCPA Professor: May 24, 2011), retrieved from http://fcpaprofessor.com/a-qa-with-homer-moyer/.

[249] Gerry Ferguson, *supra* note 11, pp. 6.76-6.80.

summarizes Connor Bildfell's analysis of DPAs in the US and the UK and his recommendation to adopt a UK-style system of DPAs in Canada:

BEGINNING OF EXCERPT

In "Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases",[250] Connor Bildfell examines the use of DPAs in the US and the UK and the advantages and concerns surrounding their use before proposing that Canada adopt DPAs in limited and controlled circumstances.

(a) US DPAs

First, Bildfell traces the history of DPAs. DPAs were developed in the US in the 1930s in the context of juvenile offenders.[251] When a juvenile was charged with a crime, the prosecutor could extend to the juvenile an offer to defer the prosecution while the juvenile attended a rehabilitation program. If he or she successfully completed the program and promised not to commit any criminal acts in the coming year, the charge would be dropped.

In 1977, the DOJ introduced DPAs into federal criminal law with three principal objectives:

(1) to prevent future criminal activity among certain offenders by diverting them from the traditional prosecution system into community supervision and services;
(2) to save prosecutorial and judicial resources for concentration on major cases; and
(3) to provide, where appropriate, a vehicle for restitution to communities and victims of crime.[252]

By the early 1990s, DPAs found their way into white-collar crime prosecutions.[253] Here, DPAs were seen as a more proportionate response to corporate wrongdoing. A conviction or guilty plea might eradicate or seriously damage a good company that was engaged in socially and economically productive activities but happened to have a few "bad apples". DPAs were seen as offering a middle ground between letting the company off the hook entirely and bringing the full force of the law to bear on the company.

Bildfell observes how the use of DPAs in the US has surged in recent years. Between 2004 and 2014, federal prosecutors entered into 278 such agreements and extracted billions of dollars in penalties.[254] The use of DPAs and non-prosecution agreements

[250] [247] Connor Bildfell, "Justice Deferred: Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases" (2016) 20:2 Can Crim L Rev 161.
[251] [248] See Jed S Rakoff, "Justice Deferred Is Justice Denied", Book Review of *Too Big to Jail* by Brandon L Garrett, *The New York Review of Books* (19 February 2015), online: <http://www.nybooks.com/articles/archives/2015/feb/19/justice-deferred-justice-denied/>.
[252] [249] United States Department of Justice, *US Attorneys' Manual*, §9-22.010, online: <http://www.justice.gov/usam/usam-9-22000-pretrial-diversion-program>.
[253] [250] See Peter Spivack & Sujit Raman, "Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements" (2008) 45:2 Am Crim L Rev 159 at 161.
[254] [251] See James R Copland & Isaac Gorodetski, "The U.K.'s New (and Improved) Deferred-Prosecution Agreements", *Manhattan Institute for Policy Research* (3 March 2014), online: <http://www.manhattan-institute.org/html/uks-new-and-improved-deferred-prosecution-agreements-4746.html>.

(NPAs) in recent years has outstripped the use of plea agreements. Between 2010 and 2012 the Criminal Division of the DOJ entered into 46 DPAs or NPAs with corporations, compared to only 22 plea agreements.[255]

DPAs in the US typically contain three hallmark elements:[256]

(1) payment of a fine or penalty, which may include restitution to victims;
(2) the requirement that company employees undergo education and training on ethics, legal obligations, best practices, and/or other matters relevant to the misconduct at issue; and
(3) the implementation of new or improved compliance programs, sometimes including corporate governance reform measures or firings.

There may also be corporate monitorships, reporting requirements, limits on public statements, civil penalties, restrictions on ongoing business practices, or other measures deemed appropriate. In the regular course, there is no judicial involvement in the DPA process in the US.

(b) Benefits of DPAs in the US

Bildfell observes that DPA proponents have lauded DPAs as the preferred means of "righting the corporate ship". This sentiment is aptly summarized in a 2006 article written by Christopher J. Christie and Robert M. Hanna:[257]

> In contrast to the far more rigid criminal sentencing process, deferred prosecution agreements allow prosecutors and companies to work together in creative and flexible ways to remedy past problems and set the corporation on the road of good corporate citizenship. They also permit us to achieve more than we could through court-imposed fines or restitution alone. These agreements, with their broad range of reform tools, permit remedies beyond the scope of what a court could achieve after a criminal conviction.

DPAs are said to be effective in bringing about cultural reforms in corporations that have fallen astray, as well as ensuring a fair and efficient resolution of allegations of criminality. Thus, proponents point to DPAs as a sensible means of preserving prosecutorial and judicial resources while imposing appropriate sanctions on corporate criminality. Proponents of DPAs also suggest that such agreements mitigate the negative side effects felt by innocent parties – such as company employees, shareholders, consumers of the company's products or services – as a result of a corporate charge or conviction.

(c) Concerns with DPAs in the US

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[255] [252] See David M Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability" (2013) 72:4 Md L Rev 1295 at 1317.
[256] [253] See Jed S Rakoff, "Justice Deferred Is Justice Denied", Book Review of *Too Big to Jail* by Brandon L Garrett, *The New York Review of Books* (19 February 2015), online: <http://www.nybooks.com/articles/archives/2015/feb/19/justice-deferred-justice-denied/>.
[257] [254] Christopher J Christie & Robert M Hanna, "A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Meyers Squibb Co." (2006) 43:3 Am Crim L Rev 1043 at 1043.

Bildfell reiterates several points raised in the earlier discussion regarding concerns over DPAs in the US (see Section 6.1.2.4 above), including the concern that DPAs are a threat to the rule of law because they are private resolutions reached behind closed doors instead of in open courts, with parties bound to confidentiality and non-disclosure of details,[258] as well as the concern that the DPA process in the US today is opaque, *ad hoc*, and unpredictable.[259] Bildfell enumerates five additional concerns associated with DPAs:

(1) Under-prosecution: Detractors of DPAs argue that the company or individuals involved in the wrongdoing are not being punished or not being punished adequately. DPAs let companies and individuals "off the hook" and may be used improperly as a means of avoiding prosecutions where the corporation is "too big to prosecute".

(2) Over-prosecution: Other detractors argue that, rather than creating "sweetheart deals", DPAs can have Draconian effects on the corporation. DPAs afford comparatively little procedural protections, and prosecutors can use their leverage to push corporations into accepting unfair deals out of fear of receiving a "corporate death sentence" (i.e., the prosecution of criminal charges). Prosecutors' emphasis on co-operation and negotiation may mask disproportionate prosecutorial leverage. In addition, some corporations may enter into DPAs as a form of risk management, despite there being no demonstrable criminal conduct.

(3) Debarment and loss of privileges: Debarment (i.e. banning a corporation from obtaining government procurement contracts)[260] can be a potential consequence of a corporation's entering into a DPA. Debarment is seen by some as a disproportionate response to white-collar crime, as the effect may be to extinguish companies whose success depends on their ability to secure government contracts.

(4) Questionable incentives: Some have questioned the government's use of DPAs. Detractors suggest that DPAs may be used as an economical, but unfair, means of signalling a victory to the public without pursuing a full-blown prosecution. DPAs may be subject to abuse, as the prosecutor is left to be judge, jury, and executioner. By keeping cases out of the courts, moreover, prosecutors maintain a fog of uncertainty around the boundaries of corporate criminal liability, giving prosecutors enhanced bargaining power at the negotiating table.

(5) Expanding prosecutorial options: Some argue that the expansion of the prosecutorial toolkit should not be seen as a welcome development. Prosecutors should either (a) pursue a full prosecution if they have sufficient evidence or (b) investigate the case further or drop the case entirely if they have insufficient evidence. Some suggest that the "charge or walk away" dichotomy is more principled and fair: If the law and the facts justify prosecution, charges should be pursued; if not, further action should be declined. DPAs represent an uncomfortable "middle ground", as they lack the transparency of a full prosecution. The process by which the DPA is reached is shielded from public scrutiny, and the facts underlying the alleged wrongdoing are never determined in open court.

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[258] [255] See James R Copland & Isaac Gorodetski, "The U.K.'s New (and Improved) Deferred-Prosecution Agreements", *Manhattan Institute for Policy Research* (3 March 2014), online: <http://www.manhattan-institute.org/html/uks-new-and-improved-deferred-prosecution-agreements-4746.html>.

[259] [256] See Jed S Rakoff, "Justice Deferred Is Justice Denied", Book Review of *Too Big to Jail* by Brandon L Garrett, *The New York Review of Books* (19 February 2015), online: <http://www.nybooks.com/articles/archives/2015/feb/19/justice-deferred-justice-denied/>.

[260] [257] See Chapters 7 and 11 for further discussion of debarment.

(d) DPAs in the UK

Bildfell notes that DPAs in the UK, discussed in Section 6.2.3 above, are subject to a distinctly different process than the process applicable in the US. Perhaps most notably, the UK's DPA model requires significant involvement of the courts. Whereas US DPAs are largely shielded from judicial scrutiny, UK authorities have embraced the idea that the courts should play a meaningful role in approving and overseeing the creation and implementation of DPAs. One of the most noteworthy features distinguishing the UK's DPA process from that of the US is that the court will actually review the agreement and make a determination on whether the DPA is in the interests of justice and whether the terms of the agreement are fair, reasonable, and proportionate. More specifically, two hearings are contemplated:

(1) First, there is the preliminary hearing, which takes place privately in order to preserve confidentiality and allow for full and frank discussion of proposed terms without fear of jeopardizing future prosecution. An application with supporting documents including a statement of facts must be submitted to the court before this hearing, and the prosecutor must apply to the Crown Court for a declaration that (a) entering into a DPA with the company is "likely to be in the interests of justice" and (b) "the proposed terms of the DPA are fair, reasonable and proportionate".
(2) Second, at the subsequent final hearing, the prosecutor must apply to the Crown Court for a declaration that (a) "the DPA is in the interests of justice" and (b) "the terms of the DPA are fair, reasonable and proportionate". If the court approves the DPA and makes the requested declaration, it must give its reasons in open court.

The court's involvement – which, on its face, appears to involve something more meaningful than the mere application of a "rubber stamp" – represents a powerful safeguard against the risk of DPAs being used inappropriately or otherwise against the public interest. UK policy makers appear to have recognized that the flexibility and discretion inherent in DPAs, while beneficial in some circumstances, can pose risks and should be moderated, at least to some degree, by the court's involvement and oversight. We might understand the court's role in this respect as a form of "check" on prosecutorial discretion. Unlike the nearly unfettered discretion in the hands of US prosecutors to employ DPAs and shape their terms without judicial oversight, the UK process envisions a process by which prosecutors and the courts each play a meaningful role in shaping the appropriate response to alleged corporate criminality. For those who see the courts as the institution best placed to make an objective determination regarding whether a particular legal outcome would be in the public interest, the UK model represents a significant improvement upon the US model. Furthermore, the UK's DPA process is considerably more open and transparent. Unlike the prevailing state of affairs in the US, where DPAs are negotiated behind closed doors and there is no independent determination made in open court regarding the fairness of the process or the outcome, the UK model espouses a more transparent, open approach. This provides some assurance to the public that DPAs are being used appropriately.

Bildfell further observes that, at present, there is a policy in place in the UK that DPAs will be available only with respect to economic crimes, and only with respect to corporations, not individuals. It remains to be seen whether UK policy makers might remove this restriction and extend the use of DPAs to situations beyond economic crimes, and perhaps to employ DPAs vis-à-vis individuals.

(e) Proposed DPAs for Canada

Bildfell indicates that DPAs are not formally available in Canada at present, but some have called for their introduction. Perhaps most notably, SNC-Lavalin, after having been charged on February 19, 2015 with one count of corruption and one count of fraud in connection with alleged activities of former employees in Libya, issued a swift and defiant response that brought the potential availability of DPAs squarely into focus. Referencing DPAs, SNC-Lavalin issued a press release stating that "companies in other jurisdictions, such as the United States and United Kingdom, benefit from a different approach that has been effectively used in the public interest to resolve similar matters while balancing accountability and securing the employment, economic and other benefits of businesses."[261]

Having considered the competing arguments, Bildfell proposes that Canada adopt DPAs in limited and controlled circumstances. Bildfell argues that DPAs, when used appropriately, can contribute to criminal sentencing objectives and can offer a robust means of providing restitution to victims and implementing reforms within the company. DPAs can be used to impose sanctions that are better calibrated to the gravity of the wrongdoing and that protect other public policy values. Notably, DPAs can assist prosecutors in tailoring an appropriate response to corporate criminality while minimizing collateral damage and harm to innocent parties.

In terms of the specific model to be adopted, Bildfell suggests that the UK approach better upholds public confidence in the procedures leading up to and implementing DPAs as compared to the US model. Although requiring court approval of DPAs adds to the time and expense of prosecutions, these marginal costs are far outweighed by the benefits derived from the greater transparency, fairness, and predictability that court involvement injects into the DPA process. Bildfell further suggests that Canada enact clear and detailed legislation that provides guidance and transparency with respect to the negotiation, key considerations, and the procedural process of reaching DPAs.

END OF EXCERPT

8.1.6 *Private Sector Initiatives*

One commentator noted that in light of the criticisms around DPAs and voluntary disclosure in the US, private initiatives are another good enforcement strategy to increase compliance and voluntary disclosure.[262] His example is the Defense Industry Initiative (DII), which is an outgrowth of the President's Blue Ribbon Commission on Defense Management in 1986, which primarily focused on defense contractor fraud and waste. DII created a voluntary code of ethics and a program for self-disclosure. In the same year the DOJ instituted a voluntary disclosure program through which compliance with the clear standards encouraged by the DII significantly reduced the chance of suspension or debarment. Compliance later became mandatory in 2008.

[261] [258] SNC-Lavalin Group Inc, Press Release, "SNC-Lavalin Contests the Federal Charges by the Public Prosecution Service of Canada, and Will Enter a Non-Guilty Plea" (19 February 2015), online: <http://www.snclavalin.com/en/snc-lavalin-contests-the-federal-charges-february-19-2015>.
[262] Bruce Hinchey, *supra* note 239.

Thus private measures can effectively hasten refinement and help government establish specific standards. Also the DII model also shows that the DOJ can fairly and effectively grant credit to companies that voluntarily disclose under private guidelines. The corporate social responsibility movement is a current private initiative to promote ethical corporate behaviour that may generate reform similar to the DII. The International Chamber of Commerce, Transparency International, United Nations Global Compact (UNGC) and the World Economic Forum Partnering Against Corruption Initiative (PACI) jointly developed the Resisting Extortion and Solicitation in International Transactions (RESIST) Handbook[263] to help companies train employees to deal with clients that push for bribes.

8.1.6.1 *Mandatory Disclosure Rules*

As previously noted, some jurisdictions are introducing "publish what you pay" legislation, which is basically turning the voluntary Extractive Industry Transparency Initiative (EITI) into a mandatory requirement. Canada is an EITI "supporting country", and therefore calls for Canada to consider becoming an "implementing country" began in 2007.[264] The trend in a number of developed countries is towards imposing much stricter disclosure rules about what their companies, especially in the extractive industries, do in foreign markets. The US passed legislation which essentially converted the voluntary EITI into a mandatory requirement.[265] The G8 noted in 2008 that countries need to move beyond voluntary initiatives and force companies to publish details of their payments.[266]

Similarly, in 2013 the European Union imposed an obligation on listed and large non-listed companies with activities in the extractive industries and the logging of primary forests to report on payments they make to governments.[267] Such payments are to be broken down by country and

[263] "RESIST: Resisting Extortion and Solicitation in International Transactions. A company tool for employee training" (2011), retrieved from http://www.transparency.org/whatwedo/publication/resist_resisting_extortion_and_solicitation_in_international_transactions.

[264] Canada has participated in the EITI as a supporting country since February 2007 and was an EITI Board member for the 2013-2015 cycle. See Global Affairs Canada, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" (November 2014), retrieved from http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng.

[265] Section 1504 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Dodd-Frank") § 1504, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010) amended the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78a et seq., to add new a section 13(q). The amendment was co-sponsored by Senator Ben Cardin and Senator Richard G. Lugar and built upon language originally introduced in a bill entitled the Energy Security Through Transparency Act of 2009. S. 1700, 111th Cong. (2009) (the "ESTTA"). It imposes an obligation on the extractive industry to report what they pay in furtherance of commercial development of oil, gas or mineral developments to government. It requires issuers in the extractive industry reporting to the US Securities and Exchange Commission to disclose any payments made to a foreign government or the US federal government for the purpose of commercial resource development. This means all payments, including legal payments such as taxes and facilitation payments. See Securities and Exchange Commission "Facilitating Transparency of Resource Revenue Payments to Protect Investors", Public Statement by Commissioner Luis A. Aguilar (August 22, 2012), retrieved from https://www.sec.gov/news/public-statement/2012-08-22-open-meeting-laa.

[266] Global Witness, *"G8 endorses new transparency laws for oil, gas and mining companies"* (Global Witness: May 2011), retrieved from http://www.globalwitness.org/library/g8-endorses-new-transparency-laws-oil-gas-and-mining-companies.

[267] *Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive*

by project and include production entitlements; taxes levied on the income, production or profits of companies; royalties; dividends; signature, discovery and production bonuses; licence fees, rental fees, entry fees and other considerations for licences and/or concessions; and payments for infrastructure improvements. A company is considered to be "large" and thus falls within the ambit of the EU legislation if it satisfies two of the three following criteria: (1) turnover of €40 million; (2) total assets of €20 million; and (3) number of employees 250.

In Canada, in 2010, a private member's bill, "An Act respecting Corporate Accountability for Activities of Mining, Oil or Gas in Developing Countries", introduced to give government power to scrutinize the companies' behaviour and deny them federal funds if the committed abuse, was defeated in the House of Commons.[268] The Government of Canada then enacted in 2014 the *Extractive Sector Transparency Measures Act* ("*ESTMA*") as part of "Prime Minister Harper's commitment at the June 2013 G8 Leaders Summit to contribute to global efforts of deterring corruption and promoting transparency in the extractive sector."[269] Gerry Ferguson offers the following summary of the *ESTMA*:[270]

BEGINNING OF EXCERPT

In Canada, the *Extractive Sector Transparency Measures Act* (*ESTMA*),[271] which came into force on June 1, 2015, requires specified companies involved in the extractive sector to report payments made to domestic and foreign governments. The stated purpose of the *ESTMA* is:

> to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities. Those measures are designed to deter and detect corruption including any forms of corruption under any of sections 119 to 121 and 341 of the *Criminal Code* and sections 3 and 4 of the *Corruption of Foreign Public Officials Act*.[272]

The *ESTMA* applies to a corporation, trust, partnership or other unincorporated organization that is

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2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, OJ L 294, 6.11.2013, p. 13-27. See European Commission "*New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – frequently asked questions*" (June 12, 2013), retrieved from http://europa.eu/rapid/press-release_MEMO-13-541_en.htm.

[268] Mining Watch Canada "Bill C-300 – Private Member's Bill Promotes Industry and Government Accountability" (January 2010) and Bill C-300 "An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries". Bill C-300 was defeated on its third vote in the House of Commons on October 27, 2010.

[269] Government of Canada "*Extractive Sector Transparency Measures Act*", retrieved from http://news.gc.ca/web/article-en.do?nid=982329.

[270] Gerry Ferguson, *supra* note 11, pp. 8.55-8.57.

[271] [293] *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376, online: <http://laws-lois.justice.gc.ca/eng/acts/E-22.7/FullText.html>.

[272] [294] *Ibid*, s 6.

engaged in the commercial development of oil, gas or minerals, either directly or through a controlled organization, and (1) is listed on a stock exchange in Canada or (2) has a place of business in Canada, does business in Canada or has assets in Canada and, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (a) it has at least $20 million in assets, (b) it has generated at least $40 million in revenue, and (c) it employs an average of at least 250 employees.[273] Thus, an entity that has its shares listed on any stock exchange in Canada will be subject to the *ESTMA* reporting requirements even if it does not do business, does not have assets in Canada or does not meet the size-related criteria.

An entity must report every payment, whether monetary or in kind, that is made to a single payee in relation to the commercial development of oil, gas or minerals and that totals, as a single or multiple payments, CA$100,000 or more within one of the following categories:

(1) Taxes (other than consumption taxes and personal income taxes);
(2) Royalties;
(3) Fees (including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licences, permits or concessions);
(4) Production entitlements;
(5) Bonuses (including signature, discovery and production bonuses);
(6) Dividends (other than dividends paid to payees as ordinary shareholders); and
(7) Infrastructure improvement payments.[274]

The term "payee" in the *ESTMA* includes:

(a) any government in Canada or in a foreign state;
(b) a body that is established by two or more governments; or
(c) any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph (a) or a body referred to in paragraph (b).[275]

Reports are due within 150 days after the end of the financial year and must include an attestation made by a director or officer of the entity, or an independent auditor or accountant, that the information in the report is true, accurate and complete.[276] An entity must keep records of its payments for a seven-year period from the day on which it provides the report.[277]

Non-compliance with the *ESTMA* and its reporting and record-keeping obligations is punishable on summary conviction by a fine of up to $ 250,000 CAD.[278] Because each day of non-compliance forms a new offence, an unreported payment could result in a multimillion-dollar liability. However, s. 26(b) of the *ESTMA* creates a defence to liability if the person or entity "establish that they exercised due diligence" to prevent the commission of the offence.

In 2016, the Ministry of Natural Resources released a *Guidance*[279] and *Technical Reporting*

[273] [295] *Ibid*, ss 2 (entity), 8(1).
[274] [296] *Ibid*, ss 2 (payment), 9(2).
[275] [297] *Ibid*, s 2 (payee).
[276] [298] *Ibid*, ss 9(1), (4).
[277] [299] *Ibid*, s 13.
[278] [300] *Ibid*, s 24.
[279] [301] Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Guidance* (2016), online: <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Guidance_e.pdf>.

Specifications[280] to the *ESTMA*. Since the *ESTMA* came into force in 2015 and it does not require the companies to provide reports with respect to the financial year in progress on that day or any previous financial year,[281] the companies are expected to submit their first *ESTMA* reports not later than 2017. The provisions of the *ESTMA* also do not apply to the payments made to Aboriginal governments in Canada before June 1, 2017.[282]

While the *ESTMA* has a similar purpose to that of the EITI, it is unlikely that the reporting requirements in the *ESTMA* would meet the more stringent requirements of the EITI. As mentioned earlier, however, Canada has never pledged to adhere to EITI.

END OF EXCERPT

This trend toward mandatory disclosure laws contributes to transparency in financial transactions between governments and companies, greater accountability of these governments to their citizens, and to diminished corruption and bribery. Such provisions shine a light on how resource benefits are shared in resource countries, by making the payments made to the governments of these countries more visible. This enhanced visibility creates the possibility of greater accountability of these governments to their citizens, and, in turn, the possibilities for corruption and bribery may be diminished.

One commentator cautions about this approach, noting that while corruption is bad, not every attempt to curtail corruption is good.[283] He believes that s. 1504 of the *Dodd-Frank Act* will substantially increase compliance costs and headaches for numerous companies that already have extensive FCPA compliance policies and procedures by further requiring disclosure of perfectly legal and legitimate payments to foreign governments.[284]

The mining and extraction sector in Canada is a very important industry.[285] Canadian companies account for 43% of global expenditures in this sector, and Canadian financial markets in Toronto and Vancouver are seen as the world's largest source of equity capital for mining companies undertaking exploration and development. In 2008, over 75% of the world's exploration and mining companies were headquartered in Canada. This sector is considered a high risk sector for engagement in corrupt practices. For instance, in 2014-2015 the US DOJ and SEC issued subpoenas to Kinross Gold Corp., a Toronto-based gold mining company, seeking information about alleged "improper payments made to government officials", and two independent organizations, MiningWatch Canada and the French Sherpa, announced in December 2015 that they had asked the RCMP to investigate Kinross's operations in Mauritania and Ghana.[286]

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[280] [302] Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Technical Reporting Specifications* (2016), online <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Technical_e.pdf>.
[281] [303] *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 30.
[282] [304] *Ibid*, s 29.
[283] Mike Koehler "*Financial Reform Bill Contains Major Compliance Headache*" (FCPA Professor: July 16, 2010), retrieved from http://fcpaprofessor.com/financial-reform-bill-contains-major-compliance-headache/.
[284] *Ibid*.
[285] This information is taken from the OECD Phase 3 Report, *supra* note 12.
[286] Geoffrey York "*Mauritanian firm target of Kinross probe, documents say* " (The Globe and Mail: March 13, 2016), retrieved from https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-

9. Sanctions and Consequences of Corruption

Article 12 of UNCAC and Article 3 of the OECD Convention require Canada, and all other ratifying States, to ensure that their legal frameworks provide for "effective, proportionate and dissuasive sanctions" for convictions of corruption.[287] These sanctions or measures should ensure that the perpetrator does not benefit from corrupt practices and they need to be incorporated into all relevant fields of law.[288] Such measures could, for example, include the rescission of contracts or the withdrawal of concessions founded on corrupt practices.[289]

9.1. *Comparable Sanctions for Domestic and Foreign Corruption Offences*

Article 6.3 of the OECD Convention provides that penalties for corruption of foreign officials "shall be … comparable to the penalties for corruption of domestic officials." Until 2013, Canada was in violation of that OECD Convention requirement in respect to the maximum sentence of imprisonment for bribery. Section 120 of the *Criminal Code* provides that the maximum sentence for bribery of a domestic official is 14 years imprisonment, whereas s. 3 of the *CFPOA* provided a maximum sentence of 5 years imprisonment for bribery of a foreign official. However, the 2013 amendments to the *CFPOA* have increased the maximum penalty to 14 years imprisonment. In other respects, the sentencing provisions for domestic and foreign bribery are the same. Section 34(2) of the federal *Interpretation Act*[290] provides that all the provisions of the *Criminal Code* that relate to indictable offences apply to all other indictable offences unless otherwise stated. Thus the *Criminal Code* provisions on sentencing also apply to *CFPOA* offences.

9.2. *Criminal Code Debarment from Public Contracts as a Collateral Consequence*

In Canada, debarment from bidding on or being awarded a government procurement contract is not characterized by the government as a criminal penalty although, similar to driver's licences, a criminal conviction for certain offences will result in automatic mandatory suspension of the licence. To the convicted person this civil consequence of debarment may seem to be a very significant part of the criminal penalty. The *Criminal Code* does contain one debarment "disability" provision in respect to some domestic corruption offences. Section 750(3) provides that a person has no capacity to contract with or receive any benefit from a contract with Her Majesty if that person is convicted of s. 120 (bribery of a domestic official), s. 124 (selling or purchasing an office) or fraud on the government (under ss. 380 and 418). The automatic debarment is in effect until a criminal record suspension[291] is granted or the Governor in Council

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resources/mauritanian-firm-target-of-kinross-probe-documents-say/article29203061/.

[287] OECD Convention, also see UNCAC Art 34 which imposes a mandatory obligation on States to take measures to address consequences of corruption.

[288] As articulated in the UNCAC Technical Guide related to article 34 when addressing consequences of corruption, the relevant fields of law include: private law, tax law, competition law, administrative law, law of contracts, law of torts and law of dispute resolution, see *supra* note 104.

[289] While the first part of article 34 is mandatory, the examples are up to the State Party.

[290] *Interpretation Act*, R.S.C. 1985, c. I-21.

[291] Pursuant to s. 3 of the *Criminal Records Act*, R.S.C., 1985, c. C-47, a person who has been convicted of an offence under an Act of Parliament may apply to the Parole Board of Canada for a record suspension in respect of

restores the offender's capacity to contract with the government. The words "Her Majesty" are not defined in the *Criminal Code* but it is likely that in the context of s. 750 those words would be interpreted as "Her Majesty in right of Canada" and therefore only include federal government contracts and not provincial government contracts. The extension of the provision to provincial government contracts would likely be *ultra vires*. It appears that at least until recently s. 750 was not well known to either business or government officials.

Since s. 750(3) refers specifically to only a few offences, the debarment provision does not apply to other offences such as foreign corruption offences under *CFPOA*. If automatic debarment from federal procurement under s. 750(3) of the *Criminal Code* is considered a "sanction" under Article 3 of the OECD Convention, then s. 750(3) should be amended to include bribery under s. 3 of the *CFPOA*, and arguably books and records offences under s. 4 of the *CFPOA*. When the issue was raised in the OECD Working Group's Canada Phase 3 Evaluation Report, the Canadian government's position was that debarment is not a criminal penalty or sanction.[292] Perhaps that response should be reconsidered by either abolishing the automatic suspension in s. 750(3) or including the *CFPOA* offences in s. 750(3). The Working Group recommended that Canada "take appropriate actions to automatically apply on conviction for a *CFPOA* violation the same measures that apply for the bribery of a domestic public official – i.e. removal of the capacity to contract … or receive any benefit under a contract with Her Majesty".[293]

In our view, s. 750(3) is too strict and rigid and therefore repealing it and leaving debarment to the Integrity Framework under PWGSC, discussed in the next section, is the better option. In its follow-up to Phase 3 Report, Canada reiterated that it considers debarment and other disabilities in respect to the power to contract with the government as "legal disabilities", rather than "criminal penalties" within the meaning of Article 3(1) of the OECD Convention, and therefore is not required to include the offence of foreign bribery in s. 750(3) of the *Criminal Code*. Nonetheless, the Canadian response informed the OECD Working Group of the following actions taken to implement the Working Group's recommendation:

> In July 2012, the Minister of Public Works and Government Services Canada (PWGSC) added convictions for the foreign bribery under section 3 of the *CFPOA* to the list of offences that would automatically result in permanent debarment from contracting with PWGSC, pursuant to PWGSC's departmental policy. In addition, prior to PWGSC

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that offence. In light of s. 35(1) of the federal *Interpretation Act*, which provides that "person, or any word or expression descriptive of a person, includes a corporation", this means that a corporation may apply for a record suspension, and the eligibility criteria for corporations are the same as those for an individual.

[292] See OECD Phase 3 Report, *supra* note 12, para 65:

> The Canadian authorities explain that the disability in subsection 750(3) is not a "criminal penalty" which would be imposed by a court. Instead, the disability is triggered by operation of law upon conviction for the specified offence. They state that the logic of removing the capacity to contract with the government where convicted of the bribery of a domestic public official is designed to be protective and not punitive, because the Canadian government has been directly affected by the crime. The same consideration may not apply in foreign bribery cases where the contract is not with the Canadian government. They have therefore left it up to the relevant government bodies to set the policy in regard to debarment in the case of a *CFPOA* conviction. That said, Canada has indicated that it is willing to consider providing for automatic debarment in the case of foreign bribery.

[293] OECD Phase 3 Report, *supra* note 12, p. 25.

> awarding a contract, companies and individuals must now provide consent stating that neither they, nor those on the Board of Governors for their company, nor any of their affiliates have ever committed certain acts or offences. This list of acts / offences includes bribery of a foreign public official. The list of offences applies to PWGSC's real property transactions, such as leasing agreements, letting of space, and the acquisition and disposal of Crown-owned properties. PWGSC will also be able to terminate contracts with companies that are convicted before the end of their contract or lease.[294]

The *CFPOA* does not independently provide for civil or administrative consequences upon conviction, in respect to public procurement contracts, contracts funded by official development assistance and officially supported export credits. Whether a *CFPOA* conviction results in such consequences depends on whether a *CFPOA* offence is included as a triggering device in each of those government programmes. The current approach is for the relevant government agencies, such as Canadian International Development Agency (CIDA), to set the policy in regard to debarment in the case of corruption. The OECD Working Group recommended that Canada bar those convicted of bribery offences from doing business with the government. They suggested that the CIDA procedures could be strengthened.[295]

9.3. *Debarment as a Civil Consequence*

Debarment is widely regarded as a powerful sanction and a potentially effective deterrent to the commission of corruption and fraud on the government. SNC-Lavalin has made it quite clear that they would be happy to resolve the Libyan-related bribery charges that they are facing if that could be done in a way to avoid criminal conviction and debarment from federal procurement which automatically follows such a conviction.[296] In this section, there is a discussion of the key elements of an effective debarment policy and its advantages and disadvantages.

One commentator notes that debarment "is seen as a potentially useful deterrent as it deprives a corporation of the power to undertake business and thus forces it to take its anti-corruption responsibilities seriously".[297] Other commentators note that debarment from future government contracts, even temporarily, "offers a far more potent deterrent than fines and penalties, as multinational contractors that conduct business [with governments] are much less likely to view the sanction as merely a cost of doing business".[298]

9.3.1 *Model for an Effective Debarment System*

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[294] Canada Follow-Up Report, *supra* note 36, pp. 6-7.

[295] OECD Phase 3 Report, *supra* note 12. They suggest that CIDA could undertake due diligence concerning applicants' declaration about corruption- related convictions.

[296] Giuseppe Valiente "*SNC-Lavalin Welcomes Ottawa's Integrity Framework*" (Times Colonist: May 8, 2015); Nicolas Van Praet "*SNC-Lavalin wants to avoid protracted court battle on corruption charges*" (The Globe and Mail: May 7, 2015), retrieved from https://www.theglobeandmail.com/report-on-business/snc-lavalin-profit-beats-estimates-on-oil-contracts-cost-cuts/article24302270/; Bertrand Marotte "*SNC's fraud, corruption hearing set for 2018*" (The Globe and Mail: Feb 26, 2016), retrieved from https://www.theglobeandmail.com/report-on-business/sncs-fraud-corruption-hearing-set-for-2018/article28929552/.

[297] John Hatchard, Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa (Edward Elgar Publishing, 2014).

[298] Drury D. Stevenson and Nicholas J. Wagoner "FCPA Sanctions: Too Big to Debar?" 80 Fordham Law Review 775, p. 820.

Criteria for an effective debarment system include:[299]

- *Fair and transparent*. Corporations and individuals should know what conduct will lead to debarment and have access to a process that affords them a chance to make adequate representations.
- *Outcome should be made public*. Government agencies and others should have access to information from debarment lists so that they can carry out due diligence on potential contractors. Information could include: company's or individual's name; the grounds for investigation, the name of the project, the country of origin of sanctioned firms or individuals; and the rules governing the debarment process. The discussion regarding the level of detail of the information necessary should consider scenarios where owners of debarred companies can simply start up a new company operating under a new name.
- *The penalty should be proportionate to the wrongdoing*. A debarment system could allow for a sliding scale of penalties. This could provide an incentive to report. The threat of debarment can be useful to encourage corporations to implement effective anti-corruption strategies and cooperate with authorities in investigations and prosecutions of corruption.
- *Should clearly set out entry and exit rules*. For example, if the corporation has shown that, after the offence, it has implemented substantial changes like enforcing codes of conduct, there should be a possibility to lift the debarment.

9.3.2 *Benefits of Mandatory Debarment*

Having a provision in the law requiring debarment would ensure that the corporations and the public know what conduct will lead to debarment. An automatic debarment would ensure that this process is uniformly applied. Debarment is also seen as an incentive for companies to implement effective anti-corruption strategies so that they can avoid being convicted and debarred.[300] Debarment would also be an incentive to self report if voluntary disclosure can avoid a conviction. As noted previously, investigating foreign corruption can be time consuming and expensive. With limited resources, investigators and prosecutors can encourage companies to disclose cases and benefit from not being debarred. This allows investigators and prosecutors to devote more time to those companies that are not cooperating. As noted by the UK Anti-Corruption Forum: "If a company knows that it will receive the same debarment penalty whether or not it itself uncovers and reports the offence, it will have no incentive to undertake internal audit and cooperate with the authorities. On the contrary, it may be encouraged to conceal the offence, as it will be aware that reporting will alert the authorities and result in no benefit. As a result, corruption will be driven underground, when preventing corruption is best achieved by bringing it out into the open".[301]

There have been a number of high profile cases of bribing foreign public officials where a large fine was imposed after a deferred prosecution agreement was entered into and the corporation

[299] John Hatchard, *supra* note 297.
[300] The heightened degree of severity associated with the risk of debarment, even when the risk of detection is minimal, will increase compliance.
[301] UK Anti-Corruption Forum, Fair and Efficient Debarment Procedures at 2-4 (May 5, 2007), available at http://www.giaccentre.org/documents/FORUM.DEBARMENT.DISCUSSIONPAPER.pdf.

subsequently was awarded millions of dollars of US government contracts.[302] Without debarment, fines may still be treated by offending companies as a cost of doing business.

9.3.3 *Concerns of Mandatory Debarment*

Concerns have also been raised about debarment. The US Department of Justice sees *mandatory* debarment as being counterproductive and having a negative impact on government's ability to effectively investigate and prosecute transnational corruption.[303] They suggest *mandatory* debarment would reduce the voluntary disclosure, limit corporate remediation and the implementation of enhanced compliance programs and impinge negatively on prosecutorial discretion. The Department of Justice has stated that "linking mandatory debarment to a criminal resolution would fundamentally alter incentives of a contractor company to reach an FCPA resolution because such a resolution would likely lead to the cessation of revenues for a government contractor – a virtual death knell for the contractor company".[304] One commentator disagrees and asserts that "egregious instances of corporate bribery that legitimately satisfy the elements of an FCPA anti-bribery violation involving high level executives and/or board participation should be followed with debarment proceedings against the offender".[305]

A number of commentators also focus on how easily these regimes are being ignored. Given that prosecutors exercise a significant degree of charging discretion, they have the power to determine whether the debarment regime will be triggered. In the US, the trigger for debarment consideration is a conviction of the anti-bribery provisions and not the accounting provisions of the FCPA. And while the US law does not require mandatory debarment, many multinational companies are concerned that a conviction will trigger automatic disbarment pursuant to the EU Procurement Directives.[306] Therefore, as one commentator notes, there is an increasing practice of prosecutors and corporations entering into non- or deferred-prosecution agreements to avoid the possibility of debarment.[307] He notes that in nearly every FCPA enforcement action since the prevalence of NPAs and DPAs, debarment has not been used. Other commentators have noted that because of the facade of FCPA enforcement, the Act represents impotent legislation. In response to this concern, the US House of Representatives passed the *Overseas Contractor Reform Act* bill on September 15, 2009. The bill provided that a corporation "found to be in violation of the FCPA's anti-bribery provisions shall be proposed for debarment from any contract or grant awarded by the Federal Government within 30 days after a final judgment of such violation".[308] This bill, however, was not adopted as a law.[309]

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[302] Hinchey reviews the ratio and the consequences of DPA. He notes an interesting discussion regarding Siemens and Kellogg cases where the fines were very large but the ratio was still less than voluntarily disclosing cases. These violators were seen to have been some of the most egregious in the history of FCPA, and yet, the corporations immediately got US government business, including from the same government agency that prosecuted it for violating the FCPA. See Bruce Hinchey, *supra* note 239.

[303] Department of Justice statements from the November 30, 2010, Senate Subcommittee on Crimes and Drugs hearing entitled "Examining Enforcement of the FCPA".

[304] *Ibid.*

[305] Mike Koehler, *supra* note 128.

[306] See the EU Procurement Directives: The Council Directive 2004/17/EC, 2004 O.J. (L 134).

[307] Bruce Hinchey, *supra* note 239.

[308] *Overseas Contractor Reform Act*, H.R.5366, retrieved from https://www.congress.gov/bill/111th-congress/house-bill/5366/text.

[309] The last action on this bill was "Received in the Senate and Read twice and referred to the Committee on

A review of the American practice also highlights a question as to whether certain private contractors are too big to debar. In the US, certain federal agencies have become highly dependent on a handful of private firms responsible for providing services by way of government contracts. As one commentator notes, "because of the potential 'collateral consequences' that may result from the collapse of a debarred contractor, these firms have enjoyed bailouts from agency officials who refuse to sanction corrupt practices through suspension or debarment."[310] The BAE Systems case is illustrative of this. On March 1, 2010, BAE Systems paid approximately $400 million in fines for its corrupt practices abroad. In the 365 days that followed, however, BAE was awarded US contracts in excess of $6 billion.[311] This case illustrates the legitimate concern that the US Department of Defence has already expressed over the concentration of economic power in the hands of just a few major suppliers.[312]

9.3.4 *The Issue of Mandatory versus Discretionary Debarment*

Is the objective of ensuring that the perpetrator does not benefit from corrupt practices best achieved through an automatic debarment or through discretionary power in the hands of enforcement officials or courts to tailor an appropriate resolution given the facts and circumstances of each individual case? Discretion gives prosecutors flexibility and leverage. Discretion might also provide flexibility in terms of a time limit regarding debarment and whether the corporation could reverse this legal disability. For instance, if a corporation shows that, after the offence, it has implemented substantial changes (i.e., enforcing codes of conduct), the possibility of lifting the debarment could be included. Guidance on the use of debarment could also include consideration of whether debarment is a proportionate penalty in all foreign bribery cases. For example, if one of the subsidiaries of a Canadian-based multinational corporation paid a small bribe to a foreign public official, should the parent company face debarment?

One concern in providing no guidance to prosecutors is that they might enter into plea bargains with corporations that will avoid conviction of serious bribery offences that might attract debarment, even in cases where there is substantial likelihood of conviction. It has already been suggested that for certain instances of corporate bribery which legitimately satisfy the elements of the offence and involve high level executives and/or board participation, these instances

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Homeland Security and Governmental Affairs" on September 16, 2010. See https://www.congress.gov/bill/111th-congress/house-bill/5366/all-actions.

[310] Drury D. Stevenson and Nicholas J. Wagoner, *supra* note 298. The article continues: "Enforcement officials shy away from debarring entities that violate the FCPA due to the short-term inconvenience of an agency's inability to transact business with its favorite contractor, its inability to demand favorable bids from contractors when the field of potential bidders has thinned, the resulting job loss, and the risk of overdeterring companies that might otherwise pursue lucrative opportunities in emerging markets. This is the "too big to debar" problem—the federal government is too dependent on a particular set of large, private sector corporations for equipment and services."

[311] Drury Stevenson and Nicholas Wagoner, *Ibid*.

[312] "One can foresee a future in which the [D]epartment [of Defence] has at most two or three very large suppliers for all the major weapons systems that we acquire … The department would not consider this to be a positive development and the American public should not either", – stated Frank Kendall, Under Secretary of Defense for Acquisition, Technology and Logistics. See Julie Johnsson "*Pentagon Warns on Mergers After Lockheed-Sikorsky Deal*" (Bloomberg: September 30, 2015), retrieved from https://www.bloomberg.com/news/articles/2015-09-30/pentagon-warns-against-mergers-following-lockheed-sikorsky-deal.

should be followed with debarment proceedings against the offender.[313]

9.3.5 *Enhancing Government Agencies' Policies Regarding the Use of Debarment*

Some countries leave it to government contracting bodies to decide on the rules and policies for dealing with persons, companies and organizations convicted of corruption. Some States' policies provide for suspending a contract upon indictment and debarring upon conviction.[314] In Canada, the relevant government agencies, such as CIDA, set the policy in regard to debarment in the case of corruption. Should the debarment policy cover companies who have been convicted of corruption in other jurisdictions, such as US, UK or Lesotho? A case in point is Acres International. This Canadian company was convicted in Lesotho courts, despite the lack of cooperation by Canadian authorities. It took the World Bank a few years (and 3 contracts later) to debar Acres International for 3 years and even then CIDA and EDC continued to work with them.[315]

A government agency's decision to suspend or debar a contractor from future business with the government is a direct result of whatever charges the prosecutor decides to bring against the company. However it should be remembered that the ultimate decision as to whether the government agency will award a contract to a company is the decision of that government agency. The discretionary rules on debarment of the World Bank might be useful to review.[316] The practice of applying cross debarment measures might also be useful to review. Five multilateral development banks signed an agreement to cross-debar firms and individuals found to have engaged in wrongdoing in MDB financed development projects.[317]

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[313] Mike Koehler, *supra* note 283.

[314] One of the oldest debarment systems at the national level is the US Federal Acquisition Regulations (FAR) which provides for the debarment of contractors on several grounds including for bribery in procurement-related activities. The relevant debarment provisions of FAR similarly call for agencies to consider leniency when (1) the company conducted a thorough internal investigation of the matter, (2) it reported the findings of its investigation to the government, (3) the agency believes the corrupt employee or employees were adequately disciplined, (4) measures were implemented to ensure future compliance with the FCPA, and (5) adequate deterrent measures were in place when the violation occurred. Under 48 CFR 9.406 a government contracting officer "may" suspend a contractor from public contracting upon indictment of an FCPA anti-bribery offense and "may" debar the contractor upon conviction of an FCPA anti-bribery offence. See John Hatchard, *supra* note 297.

[315] Lori Ann Wanlin "The Gap Between Promise and Practice in the Global Fight Against Corruption" (2006) VI Asper Review 209.

[316] The World Bank is in charge of its own debarment decisions when it comes to World Bank financed or executed projects. Examples: World Bank's debarment of Macmillan Ltd and recently 4 companies and 2 individuals for fraudulent practices in projects in India and Afghanistan following inquiries by the WB's Integrity Vice Presidency. In one case, debarment is for 3 years. Can be reduced to 2 years if the companies put in place and implement effective corporate compliance programs. The World Bank notes that the above cases are eligible for cross debarment under the April 2010 Agreement for Mutual Enforcement of Debarment Decisions entered into by the African Development Bank Group, Asian Development Bank, the European Bank for Reconstruction and Development, the World Bank Group and the Inter-American Development Bank Group.

[317] See reference to the September 2006 agreement by MDBs. The five MDB are World Bank, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank Group.

9.4. *Debarment in Canada*

The rules related to debarment vary significantly from country to country. At least compared to the US and the UK, Canada's federal debarment laws are fairly severe.[318] This raises the question whether Canada's federal debarment rules should be altered or loosened in any respect. The following excerpt from Gerry Ferguson, *Global Corruption: Law, Theory and Practice*[319] sets out the previous and current federal government debarment policies and some of the concerns that some commentators still have with the current policy. Discussion of debarment policies is also relevant to whether Canada should adopt a system of deferred prosecutions (see sections 8.1.4 and 8.1.5 above).

BEGINNING OF EXCERPT

> Public Works and Government Services Canada (PWGSC) is responsible for acquiring goods and services on behalf of the departments and agencies of the Government of Canada. PWGSC awards hundreds [and hundreds] of contracts annually [worth approximately $15 billion annually] and [has approximately 12,000 employees and] spends more than $6 billion per year [in carrying out these functions].[320]
>
> PWGSC states online:
>
> > PWGSC has a strong framework in place to support accountability and integrity in its procurement and real property transactions. This includes policies, procedures and governance measures to ensure fairness, openness and transparency. Over time, the department has put in place numerous measures that demonstrate its commitment to doing business with suppliers that respect the law and act with integrity.
>
> PWGSC is responsible for implementing the federal government's debarment policies. The history leading up to Canada's current debarment policies reflects a trend of increasing severity, resulting in resistance from the business community and various interest groups, followed by attempts to introduce greater leniency into the debarment regime.[321]
>
> In November, 2007, PWGSC began including a *Code of Conduct for Procurement* in its solicitation documents. This code included provisions relating to debarment. The intent

[318] US, UK and Canada's debarment rules and policies are discussed in Gerry Ferguson, *supra* note 11, pp. 7.55-7.67.
[319] Gerry Ferguson, *supra* note 11, pp. 7.61-7.67.
[320] [159] Public Works and Government Services Canada, "Overview of the Department", online: <https://www.tpsgc-pwgsc.gc.ca/apropos-about/cdi-mbb/1/survol-overview-eng.html>.
[321] [160] To track the evolution of Canada's debarment policies, see Public Works and Government Services Canada, "Integrity Provisions", Policy Notification 107 (9 November 2012), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107>; Public Works and Government Services Canada, "Integrity Provisions", Policy Notification 107U1 (1 March 2014), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107U1>; Public Works and Government Services Canada, "New Integrity Regime", Policy Notification 107R1 (3 July 2015), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R1>; Public Works and Government Services Canada, "Update to the Integrity Regime", Policy Notification 107R2 (4 April 2016), online: <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R2>.

was to use debarment to ensure that government contracts are awarded only to "reliable and dependable" contractors. The primary purpose of debarment was seen as preserving the integrity of the public procurement process.

In October, 2010, PWGSC added the following categories of offences that would render suppliers ineligible to bid on procurement contracts:

- corruption;
- collusion;
- bid-rigging; and
- any other anti-competitive activity.

In July, 2012, PWGSC established a formal "Integrity Framework". The Integrity Framework set out a rules-based system that left no room for the exercise of discretion with respect to debarment. The Integrity Framework provided for automatic disqualification from bidding on public contracts if the company or any of its affiliates was convicted of a list of Canadian offences. Initially, conviction under a foreign offence did not result in automatic ineligibility. In addition to the list of offences set out in its previous debarment policies, PWGSC added the following new categories of offences that would render suppliers ineligible to bid on procurement contracts:

- money laundering;
- participation in activities of criminal organizations;
- income and excise tax evasion;
- bribing a foreign public official (e.g., contrary to Canada's *Corruption of Foreign Public Officials Act*); and
- offences in relation to drugs.

In March, 2014, PWGSC introduced several fundamental changes to the Integrity Framework. PWGSC added the following new categories of offences that would render suppliers ineligible to bid on procurement contracts:

- extortion;
- bribery of judicial officers;
- bribery of officers;
- secret commissions;
- criminal breach of contract;
- fraudulent manipulation of stock exchange transactions;
- prohibited insider trading;
- forgery and other offences resembling forgery; and
- falsification of books and documents.

PWGSC also amended the Integrity Framework such that convictions under offences in foreign jurisdictions that are "similar" to the listed Canadian offences would result in ineligibility. Germany-based Siemens was the first major government supplier to receive confirmation of its debarment under the "similar offences" provision of the Integrity Framework.[322] Siemens paid a $1.6-billion USD fine after pleading guilty in 2008 to

[322] [161] Barrie McKenna, "Ottawa Could Face Lawsuits for Strict Corruption Rules: Report", *The Globe and Mail* (24 November 2014), online: <http://www.theglobeandmail.com/report-on-business/international-business/ottawa-

corruption-related offences in the US and Germany.[323]

PWGSC also added a new automatic ineligibility time period: all suppliers convicted of a relevant offence became automatically debarred for ten years. Once the ten-year debarment period has passed, bidders have to certify that adequate measures have been put in place to avoid recurrence. Prime contractors were also required to apply the provisions of the Integrity Framework to their subcontractors.

The March 2014 expansion proved highly controversial. Businesses, NGOs and bar associations argued that Canada's Integrity Framework had become so inflexible, punitive and far-reaching that it had become counterproductive to its primary objective—namely, preserving the integrity of the public procurement process. Key criticisms included the following:

- The strictness of the Integrity Framework could deprive the government, and the taxpaying public, of certain specialized expertise and high-quality goods and services.
- The policy's harshness and inflexibility discouraged companies from acknowledging and remediating wrongdoing. Companies were offered no strong incentives to cooperate with authorities or to seek to bring about wide-ranging cultural reforms within the corporation.
- The mandatory ten-year ineligibility period failed to provide any scope for reduction or leniency in light of the gravity of the offence or the supplier's remediation efforts. This rigid stance stood in contrast with the more flexible, forgiving position taken in the US, the EU, and other jurisdictions whose procurement regimes grant credit for mitigating circumstances and remediation efforts. Notably, Transparency International criticized the finality and rigidity of the ten-year debarment policy, pointing out that the World Bank's debarment policy "provides for regular third-party reviews of a company's compliance measures which provide an opportunity for the World Bank to determine if the company's debarment should be lifted".[324]
- Debarment based on the commission of "similar" foreign offences, with PWGSC being the arbiter of what constitutes a "similar" foreign offence, was seen as being too subjective. In many cases, it could not be said with any certainty whether a particular foreign offence would be sufficiently "similar" to be captured under the Integrity Framework. Furthermore, concerns were raised about the unfairness of the severe consequences that would follow if a company were to be convicted in a foreign jurisdiction under circumstances that, in Canada, would be seen as unfair or unjust. Such a conviction would result in the company's being debarred in Canada without having a meaningful opportunity to contest the unfair conviction.
- The foreign affiliates policy meant that law-abiding Canadian companies could be held responsible for a distant affiliate's criminal conduct occurring abroad in circumstances where the Canadian company had no participation or involvement. This policy came under considerable scrutiny after PWGSC announced that it was investigating whether Hewlett Packard, the Government of Canada's largest computer hardware supplier, might be at risk of debarment due to the actions of an

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could-face-lawsuits-for-strict-trade-corruption-rules-report/article21739211/>.

[323] [162] *Ibid*.

[324] [163] Letter from Transparency International to the Honourable Diane Finley, Minister of Public Works and Government Services (17 February 2015) at 5.

overseas affiliate.[325] In 2014, a Russian subsidiary of Hewlett Packard entered a guilty plea in the US for violating anti-bribery provisions contained in the US FCPA.[326] Executives of the Russian subsidiary had bribed Russian government officials for the purpose of securing government contracts. It soon became apparent that, in light of the Integrity Framework's provisions regarding "similar foreign offences" and affiliate responsibility, Hewlett Packard might be debarred in Canada.[327] Although fears over Hewlett Packard's potential debarment were never realized, the notion that an important and well-respected government supplier might be debarred for ten years, with existing contracts being either terminated or continued under strict monitoring, raised eyebrows.

In November, 2014, *The Globe and Mail* reported that the federal government might face a challenge from the World Trade Organization and NAFTA investor lawsuits due to the strictness of Canada's debarment rules.[328] Further concerns were expressed over the implications for trade. The severity of Canada's debarment policy gave rise to the possibility that Canadian companies could face "tit-for-tat retaliation" by countries in which major companies that have been debarred are headquartered.[329]

In response to these and other criticisms, PWGSC replaced the "Integrity Framework" with a new "Integrity Regime" on July 3, 2015.[330] The new Integrity Regime emphasizes the importance of fostering ethical business practices and reducing the risk of Canada entering into contracts with suppliers convicted of an offence linked to unethical business conduct. Some commentators have applauded the Integrity Regime for moving away from the notion of punishment and retribution and moving toward the goal of preserving the integrity of public procurement processes. However, many have observed that the new Integrity Regime is still strict in comparison to US, UK, and World Bank debarment regimes.

The debarment policy contained in the 2015 Integrity Regime is more lenient than that contained in the previous Integrity Framework in several ways. For the purposes of this section, three policy changes are particularly noteworthy.

- First, the new Integrity Regime eliminates automatic debarment of companies for an affiliate's conduct. Only where a supplier is found to have participated or been involved in the impugned conduct will the supplier be debarred. This can be seen as a significant improvement, enhancing both the fairness and logic of PWGSC's debarment policy.

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[325] [164] Andy Blatchford, "Anti-Corruption Rules on Suppliers a Threat to Canadian Economy: Study", *Ottawa Citizen* (23 November 2014), online: <http://ottawacitizen.com/news/national/anti-corruption-rules-on-suppliers-a-threat-to-canadian-economy-study>.

[326] [165] *Ibid*. Hewlett Packard's Russian subsidiary was fined $58.7 million USD for the FCPA violation.

[327] [166] Robert A Glasgow, Brenda C Swick & Tyler Wentzell, "The First Test of the Supplier Integrity Rules", McCarthy Tétrault LLP (29 September 2014), online: <http://www.mccarthy.ca/article_detail.aspx?id=6895>.

[328] [167] Barrie McKenna, "Ottawa Could Face Lawsuits for Strict Corruption Rules: Report", *The Globe and Mail* (24 November 2014), online: <http://www.theglobeandmail.com/report-on-business/international-business/ottawa-could-face-lawsuits-for-strict-trade-corruption-rules-report/article21739211/>.

[329] [168] *Ibid*.

[330] [169] See Public Works and Government Services Canada, "Government of Canada's Integrity Regime" (14 July 2016), online: <http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>. See also John W Boscariol & Robert A Glasgow, "Canada Implements New Integrity Regime for Public Procurement", McCarthy Tétrault LLP (6 July 2015), online: <http://www.mccarthy.ca/article_detail.aspx?id=7126>.

- Second, the ten-year debarment period is no longer set in stone. Where a supplier can demonstrate that it has (1) cooperated with law enforcement and/or (2) undertaken remedial actions, the debarment period can be reduced by up to five years, though this will require that an administrative agreement be put in place whereby enforcement authorities can monitor the corporation's ongoing behaviour. (Note, however, that a conviction on a charge of fraud against the government [or ss. 120 and 124 bribery and corruption] under the *Criminal Code* or *Financial Administration Act* results in *permanent* debarment [under s. 750(3) of the *criminal Code*] unless a record suspension [or an exemption by the Governor in Council] is obtained.) The possibility of receiving a shortened debarment period gives companies a compelling incentive to cooperate with authorities and to remedy the misconduct. This new policy is more forward-looking in orientation, rather than retributive, as compared to the previous Integrity Framework.
- Third, Milos Barutciski and Matthew Kronby point out that the new regime increases transparency in the process of determining ineligibility through the addition of the "due process" provisions.[331] Christopher Burkett and Matt Saunders, both practitioners specializing in white-collar crime at Baker McKenzie LLP in Toronto, summarize the due process provisions in the following terms:

> Suppliers are notified of their ineligibility/suspension and provided information of the process(es) available to them. A supplier is able to come forward at any time and ask for an advanced determination. Upon a determination of ineligibility, the supplier would see their ineligibility period begin immediately. This will incent suppliers to come forward and proactively disclose wrongdoing. An administrative review process of the assessment of affiliates would be available to the supplier.
>
> This process is a step in the right direction, as it provides for proactive advance determinations and a review process for the assessment of affiliates, which will oversee the factually complex issue of control, participation or involvement. The due process provision does not appear to cover the decision as to whether the period should be reduced from 10 to five years, however.[332]

Under the new Integrity Regime, debarment remains, for the most part, automatic, not discretionary. The Integrity Regime provides for automatic debarment if the company or any members of its board of directors have, in the past three years, been found guilty of or have been discharged (absolutely or conditionally) from a list of offences under Canadian law or a similar foreign offence. All prospective suppliers must certify upon bidding that the company, its directors, and its affiliates have not been charged, convicted, or absolutely or conditionally discharged of the listed offences or similar foreign offences in

[331] [170] Milos Barutciski & Matthew Kronby, "The New Integrity Regime Still Tilts Toward Punishment", *The Globe and Mail* (13 July 2015), online: <http://www.theglobeandmail.com/report-on-business/rob-commentary/new-integrity-regime-of-procurement-rules-still-tilts-toward-punishment/article25475524/>. See also Sean Silcoff, "Industry Players Say Ottawa's Revised Integrity Rules Still Too Harsh", *The Globe and Mail* (7 July 2015), online: <http://www.theglobeandmail.com/report-on-business/industry-players-say-ottawas-integrity-regime-still-unfair/article25334479/>.

[332] [171] Christopher Burkett & Matt Saunders, "The New Integrity Regime in Canada: Revised Debarment Rules Still Too Strict?", Baker McKenzie LLP (16 July 2015), online: <http://www.canadianfraudlaw.com/2015/07/the-new-integrity-regime-in-canada-revised-debarment-rules-still-too-strict/>.

the past three years. Providing a false or misleading certification is itself cause for debarment. A supplier already doing business with the Government of Canada may be suspended for up to 18 months if the supplier admits guilt to an offence listed in the Integrity Regime or is charged with such an offence. This provision is discretionary, rather than automatic. [See the discussion of the suspension "option" in the context of SNC-Lavalin, discussed below].

Despite the changes to PWGSC's debarment policy, many commentators continue to criticize Canada's debarment regime for being too strict. Barutciski and Kronby argue that the new regime still "tilts too heavily toward punishment and retribution at the expense of promoting a fair and competitive public procurement market and value for the taxpayer."[333] Barutciski and Kronby note that a five-year debarment "can still be a death penalty for some companies" and criticize the lack of flexibility and relief for companies that cooperate and implement remedial measures.[334] Barutciski and Kronby conclude that "[t]he new integrity regime fails to strike the right balance between punishment and deterrence of misconduct (principally the domain of criminal law) and protecting the integrity of federal procurement and taxpayer dollars (the domain of procurement rules)."[335]

John Manley, President and CEO of the Business Council of Canada and former deputy prime minister, points out that corporations in Canada have a strong disincentive to self-report wrongdoing or cooperate in investigations, since a guilty plea or conviction triggers the harsh debarment regime, and deferred prosecution agreements (DPAs) remain unavailable in Canada.[336] Manley advocates for the introduction of DPAs in Canada to incentivize cooperation and provide prosecutors with an additional tool for fighting corporate crime. On the other hand, Stephen Schneider, professor of sociology and criminology at Saint Mary's University, sees DPAs as a means of allowing corporations that are "too big to fail" to escape criminal liability, which makes corporations "more apt to behave badly."[337] For further discussion of DPAs, as well as the debate around whether such agreements should be made available in Canada, see Chapter 6.

Some have expressed concerns that the strictness of Canada's debarment policies may leave the government unable to call upon the specialized expertise and in-depth knowledge of certain goods and services providers who have no close competitors.[338] This, in turn, can result in economic losses to the government, as well as harm to

[333] [172] Milos Barutciski & Matthew Kronby, "The New Integrity Regime Still Tilts Toward Punishment", *The Globe and Mail* (13 July 2015), online: <http://www.theglobeandmail.com/report-on-business/rob-commentary/new-integrity-regime-of-procurement-rules-still-tilts-toward-punishment/article25475524/>. See also "The 'Integrity Framework' Is Still Too Tough", Editorial, *The Globe and Mail* (8 July 2015), online: <http://www.theglobeandmail.com/opinion/editorials/the-integrity-framework-is-still-too-tough/article25373384/>.
[334] [173] Barutciski & Kronby, *ibid*.
[335] [174] *Ibid*.
[336] [175] John Manley, "Canada Needs New Tools to Fight Corporate Wrongdoing", *The Globe and Mail* (29 May 2015), online: <http://www.theglobeandmail.com/report-on-business/rob-commentary/canada-needs-new-tools-to-fight-corporate-wrongdoing/article24675411/>.
[337] [176] Stephen Schneider, "Deferred Prosecution Won't Put a Dent in Corporate Crime", *The Globe and Mail* (2 June 2015), online: <http://www.theglobeandmail.com/report-on-business/rob-commentary/deferred-prosecution-wont-put-a-dent-in-corporate-crime/article24758293/>.
[338] [177] "The 'Integrity Framework' Is Still Too Tough", Editorial, *The Globe and Mail* (8 July 2015), online: <http://www.theglobeandmail.com/opinion/editorials/the-integrity-framework-is-still-too-tough/article25373384/>.

Canadian taxpayers.[339] An added concern is the detrimental impact the Integrity Regime's debarment policy may have on Canadian companies and their employees. Responding to the severity of Canada's debarment policies, a report commissioned by the Canadian Council of Chief Executives emphasizes that "[d]ebarment imposes a direct cost on the debarred firms, but also on innocent parties and society at large".[340] The report suggests that a "typical" major supplier headquartered overseas would lose sales of over $350 million CAD per year and lay off 400 workers as a result of debarment, resulting in a net loss to the Canadian economy of over $1 billion CAD over the ten-year debarment period.[341] The report raises concerns over the following potential collateral effects of Canada's debarment policy:[342]

(1) a reduction in the number of potential suppliers, which could lead to less variety, poorer quality, and higher prices;
(2) supply-chain impacts, such as small- and medium-sized firms losing contracts due to suspensions of larger companies;
(3) a "chilling effect" on foreign investment in Canada by firms concerned about the stigma of being debarred in a G7 country; and
(4) the Canadian government's procurement rules being out of step with, and harsher than, those in many other countries.

A further basis for criticism is that Canada's approach to debarment remains uncodified. The US, by contrast, has legally codified its debarment provisions under the *Federal Acquisition Regulation*. Canada's lack of codified debarment policies may leave contractors with a lack of certainty and predictability. Moreover, an uncodified debarment framework is not subject to the sort of legislative review and scrutiny it would otherwise receive if it were codified.

Commentators have argued that the harshness of the Integrity Regime provides a disincentive for companies to participate in the Canadian Competition Bureau's immunity and leniency programs.[343] Under the Integrity Regime, companies are automatically debarred if they are convicted of cartel offences (e.g., conspiracies and bid-rigging), and no exception or allowance is made in this regard for parties who participate in the Competition Bureau's immunity and leniency program. Since the success of the immunity and leniency program depends upon cartel participants being incentivized to come forward and cooperate in return for either full immunity from prosecution or a reduction in penalties, and since the Integrity Regime works against such incentives, companies may feel reluctant to cooperate with either the Competition Bureau or PWGSC.

In April, 2016, PWGSC added a new requirement that all bidders, offerors, or suppliers provide a complete list of all foreign criminal charges and convictions pertaining to themselves, their affiliates and their proposed first-tier subcontractors that, to the best of

[339] [178] Andy Blatchford, "Anti-Corruption Rules on Suppliers a Threat to Canadian Economy: Study", *Ottawa Citizen* (23 November 2014), online: <http://ottawacitizen.com/news/national/anti-corruption-rules-on-suppliers-a-threat-to-canadian-economy-study>.
[340] [179] *Ibid*.
[341] [180] *Ibid*.
[342] [181] *Ibid*.
[343] [182] See Mark Katz, "Canada's Integrity Regime and Cartel Enforcement", Davies Ward Phillips & Vineberg LLP (5 July 2016), online: <http://kluwercompetitionlawblog.com/2016/07/05/canadas-integrity-regimeunintended-consequences-for-canadian-cartel-enforcement/>.

the entity's knowledge and belief, may be similar to one of the listed offences.[344] In submitting a bid, the bidder, offeror, or supplier must certify that it has provided a complete list. If, in the opinion of PWGSC, a supplier has provided a false or misleading certification or declaration, the supplier is rendered automatically ineligible for ten years. Barutciski *et al.* criticize the new reporting requirement in the following terms:[345]

> … the certification requirement with respect to affiliate charges and convictions, in conjunction with the severe penalty for false reporting, seems destined to create compliance nightmares for large multinational companies. Given the broad range of offences – both in Canada and abroad – that might be captured by the new provisions, and the obligation to include charges as well as convictions, this requirement will inject yet further compliance cost and uncertainty into the process for uncertain benefits from the standpoint of preserving integrity in government procurement as opposed to punishment.

Currently, the government and private industry are at odds about certain aspects of debarment practice. SNC-Lavalin, Canada's largest engineering firm, is currently debarred by the World Bank for corruption relating to the Padma Bridge project (see Chapter 1 at pages 2-4). After SNC-Lavalin agreed with the World Bank to a ten-year ban, the RCMP laid corruption and fraud charges against SNC-Lavalin and two subsidiaries over alleged bribery in Libya. While the company disputes the charges, it argues that the strict Canadian debarment rules could destroy the company.[346] In December, 2015, SNC-Lavalin became the first corporation to sign an administrative agreement under the new Integrity Regime, which confirmed the company's eligibility as a supplier to the Canadian government while the foreign bribery charges are pending.[347]

Quebec's *Act Respecting Contracting by Public Bodies*[348] contains a debarment policy similar in nature to PWGSC's current debarment policy. Quebec's legislation provides for automatic debarment from the public sector bidding process where the corporation has been found guilty of prescribed offences—including offences under the *CFPOA*—in the preceding five years.

For further commentary on Canada's Integrity Framework and the role of debarment within that framework, see [Gerry Ferguson, *supra note 11*] Chapter 11, Section 6.4.4.

END OF EXCERPT

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[344] [183] See Milos Barutciski et al, "Changes to Canada's Integrity Regime for Public Procurement Create Onerous New Reporting Requirement", Bennett Jones LLP (8 April 2016), online: <https://www.bennettjones.com/Publications/Updates/Changes_to_Canada_s_Integrity_Regime_for_Public_Procurement_Create_Onerous_New_Reporting_Requirement>.

[345] [184] *Ibid*.

[346] [185] Barrie McKenna, "SNC Case Shows Downside of Ottawa's Strict Anti-Corruption Regime", *The Globe and Mail* (19 February 2014), online: <http://www.theglobeandmail.com/report-on-business/snc-case-shows-downside-of-ottawas-strict-anti-corruption-regime/article23087586/>.

[347] [186] SNC-Lavalin, Press Release, "SNC-Lavalin Signs an Administrative Agreement under the Government of Canada's New Integrity Regime" (10 December 2015), online: <http://www.snclavalin.com/en/administrative-agreement-under-canada-new-integrity-regime>.

[348] [187] *Act Respecting Contracting by Public Bodies*, RSQ, c-65.

9.5. *Sentencing Options and Sentencing Guidelines*

Canada does not have a formal sentencing guideline system like the systems in either the US or in England.[349] For that reason, a comparable discussion of sentencing practices and methods in England, US and Canada has limited utility.[350] Secondly, with only three corporate convictions and sentences for bribery under *CFPOA* and a conviction of only one individual, it is not possible or wise to generalize about sentencing practices in respect to bribery under *CFPOA*. As already noted, the sentencing principles that apply to crimes in the *Criminal Code* apply equally to offences of foreign bribery under the *CFPOA*. In addition, it should be noted:

- The *Criminal Code* in s. 718.2 sets out additional factors to be considered in respect to the sentencing of corporations and other organizations;
- There is no maximum ceiling on the amount of a fine which can be imposed apart from the general principles stated in the *Criminal Code* such as the fundamental principle of proportionality in s. 718.1 of the *Criminal Code*;
- Corporations may be placed on probation and additional conditions of probation in s. 732.1(3.1) may be imposed such as "(b) establish policies, standards and procedures to reduce the likelihood of the organization committing a substantial offence" as well as the "publication [sometimes called "shaming"] order" in s/ 732.1(3.1)(f).

10. Mandatory Disclosure of Beneficial Ownership of Shell Companies and Trusts: An Essential Tool in Detection and Prevention of Laundering of Corruption Proceeds[351]

Money laundering is the lifeblood and oxygen that enables corruption to flourish. To fully enjoy the ill-gotten proceeds of corruption, those proceeds need to be laundered. Catching money launderers is one way of directly or indirectly catching corrupt officials and hopefully those who bribe them. It is estimated by UNODC that up to $2 trillion (from corruption, organized crime and terrorist financing) are laundered every year. Money laundering is accomplished most often through one or more of the following methods:

(1) use of shell corporations often located in multiple jurisdictions where the identities of beneficial owners are not disclosed;
(2) use of trusts, where the beneficial owner(s) is hidden;
(3) transactions in cash;
(4) use of fake invoices, grossly exaggerated purchase or sale prices for assets, off-the-book

[349] Julian Roberts and Andrew Ashworth "The Evolution of Sentencing Plicy and Practice in England and Wales 2003-2015" (2016) 45 Crime and Justice 307.
[350] For a description of the principles and purposes of sentencing in Canada, see Gerry Ferguson "A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the *Criminal Code*" (Research and Statistics Division, Department of Justice Canada: August 10, 2016), retrieved from http://www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/RSD_2016-eng.pdf.
[351] This section is based on a Power Point presentation prepared by Gerry Ferguson and delivered at the "Follow the Money" conference organized by ICCLR in Vancouver on October 28, 2016, and a revised version of that presentation for the NJI Joint Education Session of the BC and Alberta Courts of Appeal on May 11, 2017.

accounting records, etc.; and

(5) use of high-cash business like casinos and other lawful betting enterprises to place and layer the proceeds of corruption.

10.1. *UNCAC Requirements*

UNCAC recognizes the key role that money laundering plays in corruption. It also recognizes that the transnational nature of money laundering requires universal regulation and prevention standards as well as effective international mutual assistance in detecting, investigating and prosecuting corruption. Article 14 of UNCAC requires ratifying countries to establish preventative money laundering standards and procedures. Article 23 on UNCAC requires the enactment of four money laundering related offences and procedures to enforce those offences. Canada complies with the mandatory requirement in Article 14 concerning money laundering offences, but not some of the non-mandatory "recommended" provisions in Article 14. Article 14 of UNCAC requires each country to establish a comprehensive regulatory and supervisory regime for banks and other financial institutions as well as other bodies particularly susceptible to money laundering. These regulatory regimes should include the following elements:

(a) know your customer (KYC);
(b) beneficial ownership identification;
(c) keeping and maintaining proper transaction records;
(d) reporting suspicious transactions and movement of significant amounts of cash;
(e) enhanced due diligence for some types of transactions; and
(f) international mutual assistance.

Of particular note for this section of this paper, Canada has not adopted a mandatory disclosure regime (item (b) above) for beneficial ownership identification in commercial transactions.

10.2. *FATF Requirements*

The Financial Action Task Force on Money Laundering (FATF) was formed in 1989 by the G7 countries. FATF consists of 34 countries. It is viewed as the leading global institution for setting anti-money laundering standards. It works collaboratively with at least 198 jurisdictions through the Egmont Group. Occasionally it publishes warnings on non-FAFT countries such as Iran, Algeria and Korea who are high risk money laundering countries with little or no anti-money laundering standards. FATF's main functions are to create and monitor money laundering standards globally. FATF promulgated 40 recommendations in 1993 to prevent, deter and detect money laundering. In 2001, FATF expanded its mission to include combatting terrorist financing and added 9 more recommendations in that respect in 2003. In 2012, FATF merged its 40 + 9 Recommendations into the current 40 Recommendations.

FATF Recommendation 29 requires each country to establish a Financial Intelligence Unit [FIU] to collect and analyze information from financial institutions on suspicious transactions and pass that information on to law enforcement agencies for investigation. Canada has established the Financial Transactions and Reports Analysis Centre (FINTRAC) which is an independent group within Finance Canada. The US has established Financial Crimes Enforcement Network

(FinCEN), an independent group reporting to the Secretary of the Treasury under the *Bank Secrecy Act*, and the UK has established its Financial Intelligence Unit (FIU) within law enforcement as a department of the National Crime Agency (NCA). The FIUs in Canada and USA have more autonomy and wider power than the FIU in England (e.g. power to search businesses without warrant for investigative purposes).

FAFT also recommends implementing a detailed regulatory scheme for the financial sector, including:

(a) Conducting customer due diligence (CDD) on the identity of customers [Recommendation 10];
(b) retaining full and accurate records of all financial transactions for at least 5 years [Recommendation 11];
(c) reporting suspicious transactions to their FIU [Recommendation 20]; and
(d) ascertaining beneficial ownership of legal entities [Recommendations 24-25].

10.2.1 *Customer Due Diligence*

FATF Recommendation 10 states that customer due diligence (CDD) should be conducted, using a risk-based approach, to

(a) identify and verify the customer's identity using reliable independent sources;
(b) to identify the beneficial owner, and in the case of companies and similar enterprises, identify the ownership and control structure of that enterprise;
(c) obtain information on the nature of the business relationship; and
(d) conduct on-going due diligence of transactions.

FATF Recommendation 12 provides that enhanced CDD should be conducted for foreign politically exposed persons (PEPs) in regard to their identity as a customer or beneficial owner and that reasonable measures should be taken to establish the source of their wealth.

10.2.2 *Suspicious Transaction Reporting*

FATF Recommendation 20 requires member states to create legal requirements for financial institutions to promptly report suspicious transactions to their FIU. US and Canada (but not UK) also require the reporting of all transactions over $10,000, whether suspicious or not.

10.3. *Basel Institute's Anti-Money Laundering Index (2016)*

The 5th Basel AML Index ranks 149 countries in regard to their risk of (i.e. vulnerability to) money laundering. The Index does not measure the actual amount of money laundering, but rather the risk of money laundering based on a number of factors including each country's anti-money laundering legal framework. As the following chart shows, 43 countries our of 149 countries have lower money laundering risk rates than Canada. Some comparative rankings (from lowest to highest risk) are set out below:

Ranking (/149)	Country	Score
1	Finland	3.05
5	New Zealand	3.86
28	United Kingdom	4.77
32	South Africa	4.86
38	Singapore	4.91
44	Canada	5.00
52	USA	5.17
91	Russia	6.22
110	China	6.70
124	Panama	7.09
149	Iran	8.61

10.4. *Disclosure of Beneficial Ownership*

Shell companies are a serious bar to determining true ownership of major assets. It has been estimated by the World Bank and OECD that at least 25 to 35% of corruption proceeds are laundered through shell companies where the identity of the true, beneficial owner is hidden. That figure is estimated by FINTRAC to be well over 70% in countries like Canada. True beneficial ownership is also hidden in a large number of other cases through the use of trusts or nominees such as lawyers or investment professionals. Although UNCAC and FATF [Recommendations 24 and 25] have for years repeatedly emphasized the necessity of disclosing beneficial ownership in financial transactions as a mechanism of identifying corrupt proceeds, in general most countries have been very slow in moving toward full disclosure of beneficial ownership in a whole range of transactions. Finally, the G20 leaders at their November 2014 Summit in Brisbane adopted a series of 10 Principles entitled "High-Level Principles on Beneficial Ownership Transparency" and they declared implementation of these principles was a "high-priority" issue.

Those G20 Principles and Canada's score on each principle according to TI's "Just for Show? Reviewing G20 Promises on Beneficial Ownership" report[352]	**Canada's score**
1. Beneficial ownership definition	25%
2. Identifying and mitigating risk	80%
3. Acquiring accurate beneficial ownership information	0%
4. Access to beneficial information	14%
5. Beneficial ownership of trusts	67%
6. Access to beneficial ownership of trusts	33%
7. Duties of businesses and professionals	19%
8. Domestic and international cooperation	33%
9. Beneficial ownership and tax evasion	58%

[352] Transparency International "*Just for Show? Reviewing G20 Promises on Beneficial Ownership*" (Transparency International, November 2015), retrieved from http://www.transparency.org/whatwedo/publication/just_for_show_g20_promises.

10. Bearer shares and nominees	13%

However, a Transparency International evaluation has shown that most G20 countries have been in no rush since then to implement the 10 Beneficial Ownership Principles.[353] TI's "Just for Show?" Report evaluates the extent to which each G20 country's legal framework for beneficial ownership transparency conforms to the G20's 10 Beneficial Ownership Transparency Principles. Those results are as follows:

Ranking	Number	Country
Very Strong Framework	1	UK
Strong Framework	3	Argentina, France & Italy
Average Framework	9	Germany, Indonesia, Japan, Mexico, Russia, Saudi Arabia, South Africa & Turkey
Weak Framework	6	Australia, Brazil, Canada, China, South Korea & USA
Very Weak Framework	0	

As can be seen, UK has a very strong framework and Canada and the US have a weak framework.

10.5. *Beneficial Ownership: United Kingdom*

UK scored 100% on 4 of the G20's 10 High Level AML Principles and 80% on 4 more of those 10 Principles. Its only weakness relates to transparency in beneficial ownership of trusts. UK's very strong rating is primarily related to its adoption of legislation establishing a publicly accessible central registry listing the beneficial ownership of companies.

UK is the first G20 country to establish a publicly accessible central registry on beneficial ownership. The public registering of beneficial ownership applies to English companies and limited partnerships, as well as *Societas Europaea*. One weakness in the UK regime is that it does not apply to UK's Overseas Territories and Crown Dependencies such as Cayman Islands, Bermuda, British Virgin Islands, Turks and Caicos, Jersey, Guernsey and Isle of Man. A second weakness is that it does not apply to foreign companies (i.e. who purchase property of other assets in the UK but are neither incorporated nor carrying on business in the UK). However, the UK's Department for Business Innovations & Skills' Consultation Paper (March 2016) entitled "Beneficial Ownership Transparency" makes it pretty clear, as do subsequent Ministerial Statements, that the government plans in 2017 to extend the public registry on beneficial ownership to foreign legal entities that (a) purchase real estate in the UK, or (b) apply for UK government procurement contracts.

Real estate is a prime area for laundering corruption proceeds. It is estimated that 100 billion pounds is laundered through the UK every year and that a significant portion (several hundred million) of that goes into the purchase of luxury real estate in London. However, the UK is also

[353] *Ibid.*

on the verge of another significant anti-money laundering and corrupt assets recovery initiative. In October 2016, the UK introduced the Crime Finances Bill which has five significant elements or initiatives designed to make its anti-money laundering efforts more effective. The fifth and most controversial initiative allows specified law enforcement agencies, such as the Serious Fraud Office and the Revenue and Customs Office, to apply to the High Court for an "unexplained wealth order" forcing the owner of an asset over £100,000 to explain how they acquired that asset if ownership of the asset appears to be disproportionate to their income or known wealth. If the owner cannot demonstrate a legal source of funds, the law enforcement agency will be given a court order to seize the asset. The *Crime Finance Act* received Royal Assent on April 27, 2017.[354]

10.6. *Beneficial Ownership: Canada*

As already noted, Canada received failing scores on 7 of the 10 G20 Principles, average scores on 2 more Principles and a strong score on only one Principle. The strong score relates to Principle 2: "Identifying and Mitigating Risks". This strong score is attributable to the Department of Finance carrying out and publishing a detailed report entitled: "Assessment of Inherent Risks in Money Laundering and Terrorist Financing in Canada".[355]

In September 2016, FATF completed a detailed evaluation of Canada's overall "Anti-money Laundering and Counter-terrorist Financing Measures". In FATF's 40 money laundering Recommendations, there are 11 compliance effectiveness factors. FATF has rated Canada's compliance with these 11 factors as follows: Substantial = 5; Moderate = 5; Low = 1. The low ranking was for lack of beneficial ownership transparency in respect to legal entities (i.e. companies, trusts and other similar enterprises). As noted, FINTRAC estimates that well over 70% of all Canadian money laundering cases involve legal entities. So there is a great need in Canada for compulsory beneficial ownership reporting. The FATF Evaluation clearly indicates the areas Canada needs to work on. The FATF Evaluation concludes:

(1) legal entities in Canada are at high risk of misuse for money-laundering and its mitigating measures are insufficient both in scope and effectiveness;
(2) some basic shareholder information is publicly available on legal persons, but not generally for nominee shareholders or bearer shares;
(3) Trust and Company Service Providers (TCSP), including those operated by lawyers, are outside the scope of the AML obligations;
(4) Designated Non-Financial Business and Professions [DNFBP] are not required to collect beneficial ownership information;
(5) for the majority of trusts in Canada, beneficial ownership information is not collected;
(6) financial institutions do not verify beneficial ownership information in a consistent manner; and
(7) law enforcement agencies do not pay adequate attention to the potential misuse of legal entities and trusts for money laundering, and that is particularly so in cases of complex

[354] *Criminal Finances Act*, 2017 c. 22 (UK). See UK Parliament "*Criminal Finances Act 2017*", retrieved from http://services.parliament.uk/bills/2016-17/criminalfinances.html.
[355] Department of Finance Canada "*Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada*" (July 2015), retrieved from http://www.fin.gc.ca/pub/mltf-rpcfat/index-eng.asp.

structures and arrangements.

In December 2016, TI-Canada published a report entitled “”No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts”. After analyzing problems associated with anonymous companies and trusts, TI Canada concludes in its Report:

> Beneficial ownership disclosure is not a silver bullet, but it is a key measure that is urgently needed to address the scourge of corruption and other crimes. There are several steps that the Canadian government can take to meet its international commitments to improve transparency, enable more effective law enforcement and tax collection, and deter the corrupt from using Canada as a safe haven.

As a result, TI Canada concludes its report with the following recommendation:

> The Government of Canada should work with the provinces to establish a central registry of all companies and trusts in Canada, and their beneficial owners. The registry should be available to the public in an open data format. Corporate directors and trustees should be responsible for submitting beneficial ownership information and keeping it accurate and up to date.

11. Conclusion

This paper has addressed possible gaps or weaknesses in Canada's response to corruption. It seeks to contribute by offering some of the more interesting practices from other jurisdictions to assist Canada in further defining and generating ideas for improving our efforts to address corruption. In particular:

(1) While it is still a bit early for conclusively evaluating the effects of the new UK anti-bribery law, Canada should monitor how effective the strict liability offence of failure of commercial organisations to prevent bribery appears to be as an anti-corruption strategy. Will such an offence, coupled with the codified compliance defence for corporations of instituting an adequate internal compliance regime, be an effective way to promote corporations' anti-corruption compliance? How does this compare to the positive obligations of maintaining "books and records" provisions found in the FCPA and the *CFPOA* and charging companies with "books and records" offences when these obligations are not met?

(2) Canada, along with a handful of other States, continues to exempt facilitation payments from our definition of bribery of foreign officials. A review of international instruments, States' practices, NGO and academic reports seems to indicate that the tolerance for small bribes or facilitation payments is fading. The impact of the recent prohibition in the UK law, the Australian government's consultation on its earlier plan to ban facilitation payments, and the increasing practice of US authorities of reading out the exception of facilitation payments, are developments that Canada and Canadian multinational corporations need to consider. If Canada does not eliminate the facilitation payment exemption, we suggest in this paper other possible amendments to it.

(3) Canada should monitor the voluntary and mandatory self-reporting schemes introduced in the UK and the practice of crediting voluntary disclosure in the US. Given the difficulties of detecting and investigating corruption cases, many countries are looking at different approaches to enhancing detection. However, as some commentators have noted, it is important to set up such processes to avoid or limit abuse.

(4) The practice of debarment, whether mandatory or discretionary, has been the subject of much debate. While debarment is seen by many as a useful practice to ensure that corporations take anti-corruption responsibilities seriously, some concerns about lengthy, mandatory debarment have been raised.

(5) We recommend an expansion of the Canadian test for territorial jurisdiction in *Libman* at least in the case of corruption of foreign public officials.

(6) We recommend that Canada seriously consider introducing a deferred prosecution agreement scheme, perhaps like the one in England.

(7) We recommend that, in accordance with our FATF and G20 commitments, Canada should follow the lead of England and move quickly to create a system of mandatory disclosure and reporting of beneficial ownership of shell companies and trusts conducting financial transactions.

(8) As part of an integrated and advanced anti-corruption enforcement program, Canada should consider creation of a national anti-corruption agency to examine and recommend new anti-corruption policies, to collect information on corruption charges, prosecutions and sentences and to assess the effectiveness of existing anti-corruption legislation, policies and practices. This could be accomplished with minimum new money by amalgamating into one unit or agency existing government personnel dealing with these aspects of international corruption.

As stated at the beginning of this paper, we are now in a new phase of international anti-corruption standards and enforcement. Many of the practices in other states reviewed in this paper reflect a shift in attitude towards corruption and increasing efforts to combat it. Examining these practices will assist Canada in its obligations and commitments to vigorously combat corruption of foreign officials by Canadian entities.