



## **Transparency International Canada Inc.**

### **COMMITTEE OF EXPERTS ON THE MECHANISM FOR FOLLOW-UP ON THE IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION**

#### **REPORT ON THE IMPLEMENTATION IN CANADA OF THE CONVENTION PROVISIONS SELECTED FOR REVIEW IN THE THIRD ROUND, AND ON FOLLOW-UP TO THE RECOMMENDATIONS FORMULATED TO THAT COUNTRY IN PREVIOUS ROUNDS.**

#### **I - INTRODUCTION**

##### **1. Contents of the Report**

- a. This report presents, first, a review of the implementation in Canada of the Inter-American Convention against Corruption selected by the Committee of Experts of the Follow-up Mechanism (MESICIC) for review in the third round: Article III, paragraphs 7 and 10, and Articles VIII, IX, X and XIII.
- b. Second, the report will examine the follow up to the recommendations that were formulated by the MESICIC Committee of Experts in the previous rounds, which are contained in the reports adopted by the Committee and published at the following web pages:
  - i. [http://www.oas.org/juridico/english/mec\\_rep\\_can.pdf](http://www.oas.org/juridico/english/mec_rep_can.pdf) (First Round)
  - ii. [http://www.oas.org/juridico/english/mesicic\\_II\\_inf\\_can\\_en.pdf](http://www.oas.org/juridico/english/mesicic_II_inf_can_en.pdf) (Second Round)
- c. This report was prepared primarily based on inputs from members including Directors of Transparency International Canada. The Directors of Transparency International Canada and its members comprise an extensive resource of experience. There is a significant representation from members of the legal profession engaged in international trade practices and from the accountancy profession – in particular those engaged in forensic practices. There is representation from academics and from industry.
- d. Mr. Thomas C. Marshall, Q.C., is the Vice-chair and Director of Transparency International Canada, and Chair of the International Development Committee of

the Canadian Bar Association. Mr. Marshall is a lawyer with over 40 years of experience. For most of that time he was employed in increasingly responsible positions with the Ministry of the Attorney General for the Province of Ontario. His practice was largely restricted to administrative and public law issues and he has experience in all levels of court in Ontario and before the Supreme Court of Canada. He is now retired from the Ontario Public Service.

- e. This report was prepared with the advice and assistance of Peter Dent, CA•IFA, CA•CIA, CPA•CFF, CFE, Partner & National Practice Leader, Forensic & Dispute Services, Financial Advisory, Deloitte & Touche, LLP, and TI-Canada Board Member. Peter has 15 years of experience practicing in the areas of investigating and providing expert testimony regarding allegations of fraud and corruption with a focus in the global arena, in addition to providing anti-fraud and anti-money laundering management strategies in the public and private sectors. Between 2000 and 2004 Peter was the Team Leader of the Forensic Services Unit within the Department of Institutional Integrity of the World Bank Group in Washington, DC leading international fraud and corruption investigations into World Bank financed projects. Prior to joining Deloitte in 1992, Peter was a Police Constable with the York Regional Police Force. Peter was assisted by Patricia Lee and Gordon de Villiers, both Managers in Deloitte's Forensic & Dispute Services group.

## **2. Brief Description of the Canadian Legal-Institutional System**

- a. Canada is a federal state comprised of a national parliament, ten provinces and three territories each with its own separate elected legislature. Canada is a constitutional democracy governed by the rule of law. Canada has a population of some 34 million people. Ontario is the Province with the largest population- about 13 million people – and contains major industrial and commercial centres. In terms of population size Ontario is followed by Quebec, British Columbia and Alberta (as the provinces with the largest populations). Canada is very diverse in the composition of its population including over 1.3 million aboriginal persons (2010 Statistics Canada).
- b. The *Constitution Act, 1867* (formerly the British North American Act, 1867) provides for the division of powers between the Federal and Provincial legislatures. Subject to constitutional limitations established by the *Constitution Act, 1982* (the Charter of Rights and Freedoms) and certain constitutional conventions developed over time or implicit to these fundamental constitutional instruments, the exercise of these powers is largely exclusive. While the criminal law is the exclusive responsibility of the federal government and applies throughout Canada, matters relating to property and civil rights are the responsibility of the provinces. The division of powers, however, is not always completely straight forward so that matters of financial regulation, commerce and trade will have shared aspects. Where there is conflict, jurisdiction is resolved by agreements-there is considerable cooperation and coordination between provinces/territories and the federal government, or through the courts.

- c. Canada has a respected and independent judiciary and this independence is guaranteed under the constitution and in practice. Municipal governments do not have separate sovereign recognition under the constitution. Municipalities are established and their powers conferred by provincial statute. There is a trend developing to allow Municipalities with the sophistication, maturity and capacity to assume greater responsibility for the conduct of their affairs. While the provinces remain the authority with legislative oversight of municipal governance and conduct, this trend proposes a lessening in direct municipal supervision. The City of Toronto (the capital of Ontario), for example, has a population and budget larger than at least six of the provinces.
- d. In any consideration of the subject matter of the Inter-American Convention Against Corruption and the implementation of its provisions in Canada (or the OECD Convention Against Bribery in International Commercial Transactions or the UN Convention against Corruption - UNCAC) it is necessary to understand this complex of governance and accordingly accountability issues across the country.
- e. Matters of foreign affairs are largely matters of federal responsibility, e.g. the North American Free Trade Agreement (NAFTA) and a host of bi-lateral arrangement, but close links are maintained with provincial partners in the process of negotiation and implementation. Indeed, where disputes arise under NAFTA or in respect of WTO Trade Rules, provincial interests are inevitably involved.
- f. In the context of Canadian Federalism there are many federal provincial/territorial channels of communication and opportunities to share information where common interests including political interests are involved. It is probably not an exaggeration to say that there are daily interchanges between federal and provincial/territorial officials on a wide variety of subjects. Governing does not occur in a vacuum (usually), and consultation is essential.
- g. The IACAC and the implementation of its provisions within Canada should be no exception. In May 2010, the current questionnaire was circulated to primarily justice officials in provinces and territories across Canada requesting comments by way of assisting in the Canadian government response to the questionnaire. The details of the request (other than mentioned) are not available and the responses will likely not be available in any time frame to assist us. This circumstance is likely due to the nature of the task to collect relevant responses in such a timely way from government departments not only in the government of Canada but through the provincial contacts. (Source: the Canadian OAS Expert in Ottawa).
- h. It may not be possible to determine whether particular initiatives, legislation or practices developed at the federal, provincial, municipal or indeed the corporate level (in the form of corporate responsibility policies, risk management and anti-corruption compliance measures), which are consistent with the mandated actions under IACAC, were motivated by the Convention. We observe that in the

corporate context anti-corruption commitments must be fundamental to a responsible corporate policy.

- i. One can only look at developments and conclude that they are consistent with those requirements. In Canada, there is in political as well as business contexts an ethic that condemns corruption. These values are reflected in mechanisms and measures to encourage the maintenance of “clean” government some of which predate the inception of international conventions.
- j. We observe, therefore, that a full report on the extent to which Canada has met and continues to advance the principles set out in the IACAC will require a description of measures taken at the provincial level and indeed how Canadian corporations (in particular those engaged in international trade or development work) are expressing and carrying into effect policies that address and enforce responsible corporate conduct policies. This last observation applies as well to NGOs and aid agencies working overseas.
- k. In Ontario, the Ministry of Economic Development and Trade supports businesses expanding their exports. If the business is expanding into international markets, then the Ministry’s International Trade Branch offers consulting services, market specific seminars and workshops, assistance with market research and analysis, help with export strategies and marketing plans. Ontario has developed various strategies to promote Canadian business abroad. The International Trade Branch will be meeting with TI-Canada representatives to consider how TI-Canada’s expertise might assist the International Trade Branch in the discharge of its mandate. This illustrates the relevance of considering the roles, responsibilities and commitments of actors at the provincial levels.
- l. Effective in 2007, the Ontario government amended the Municipal Act to provide greater powers to Municipalities to promote and develop greater transparency and increased accountability, in the conduct of government administration. As previously mentioned, this is an example of the Province investing municipalities in the terms of the act with greater powers to develop their own institutions for ensuring greater transparency in the conduct of business and accountability to the electors.
- m. We recommend that future questionnaires call for a comprehensive examination of Provincial and Municipal initiatives to promote transparency and accountability in public administration to be undertaken to complement the review of actions taken at the Federal level. Limited funding for such an initiative would need to be sourced.

### **3. Approach and Method of Analysis**

- a. TI-Canada would like to acknowledge the information in this report provided by the Canadian Expert’s Response to the Questionnaire dated April 30, 2010. TI-Canada would also like to note that, with regard to new government moves reported in this report, TI-Canada is not making judgments upon said innovations but merely identifying them for future comparison purposes.

- b. The responses in this report were prepared through consultation of legislative acts, regulatory guidelines, and other publicly available reports as referenced and annexed to this report.

## **SECTION I**

### **II- REVIEW, CONCLUSIONS AND RECOMMENDATIONS ON IMPLEMENTATION BY THE STATE PARTY OF THE CONVENTION PROVISIONS SELECTED FOR THE THIRD ROUND**

#### **1. DENIAL OR PREVENTION OF FAVOURABLE TAX TREATMENT FOR EXPENDITURES MADE IN VIOLATION OF THE ANTICORRUPTION LAWS (ARTICLE III(7) OF THE CONVENTION)**

a. *Description of the laws, rules and/or measures that expressly deny or prevent favorable tax treatment for any individual or corporation for expenditures made in violation of the Corruption of Foreign Public Officials Act (CFPOA), Canada's anticorruption legislation.*

- i. As a general matter, neither the Federal Government of Canada nor any of the Provincial Governments permits favourable tax treatment for expenditures made in violation of International Conventions. The response below is largely descriptive of the existing situation.
- ii. The Federal and Provincial governments of Canada levy taxes upon all tax-paying entities in order to finance various public sector needs. The Constitution Act, 1867, divides the power to tax between the Federal and Provincial governments. The Federal Parliament obtains the authority to levy tax from s. 91(3) of the *Constitution Act, 1867*, which states that the federal government may raise money "by any Mode or System of Taxation". Section 92(2) of the *Constitution Act, 1867*, grants the Provincial Legislatures the power to impose a direct tax in order to raise "Revenue for Provincial Purposes". *The Income Tax Act* ('Act')<sup>1</sup> is the primary source of tax law in Canada. In addition to the Act, there are several other sources of tax law, these are: Income Tax Regulations, bilateral international tax treaties, Income Tax Application Rules, and case law<sup>2</sup>.
- iii. We note that, although Canadian provinces can also levy provincial taxes in addition to those levied by Canada's Federal government, our comments will be restricted to Federal income tax legislation as opposed to documenting provincial income tax regulations.
- iv. The non-deductibility of expenditures made in violation of the CFPOA<sup>3</sup> is covered in the following section of the Income Tax Act:

#### *Non-deductibility of illegal payments*

*67.5 (1) In computing income, no deduction shall be made in respect of an outlay made or expense incurred for the purpose of doing anything that is an offence under section 3 of the Corruption of Foreign Public Officials*

<sup>1</sup> <http://laws.justice.gc.ca/en/I-3.3/>

<sup>2</sup> This overview of the Canadian income tax system from [www.taxationlawyers.ca](http://www.taxationlawyers.ca)

<sup>3</sup> The Corruption of Foreign Public Officials Act came into force in 1999 as part of a government bill (S-21) which also amended other federal laws to combat corruption, notably the Income Tax Act and the Criminal Code (Source: THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT - A GUIDE (May 1999) <http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcape/index.html>)

*Act or under any of sections 119 to 121, 123 to 125, 393 and 426 of the Criminal Code, or an offence under section 465 of the Criminal Code as it relates to an offence described in any of those sections.*

The sections of the *Criminal Code*<sup>4</sup> included above address various bribery and corruption offences committed in Canada as follows:

119. The payment (or offer) or acceptance (or soliciting) of bribes to/by judicial officers, etc.

120. The payment (or offer) or acceptance (or soliciting) of bribes to/by officers (including justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law)

121. The payment (or offer) or acceptance (or soliciting) of bribes to/by officials or any members of their family in connection with “any matter of business relating to the government”.

123. The payment (or offer) or acceptance (or soliciting) of bribes to/by a municipal official or to/by anyone for the benefit of a municipal official.

125. The payment (or offer) or acceptance (or soliciting) related to influencing or negotiating appointments or dealing in offices.

393. The payment (or offer) or acceptance (or soliciting) related to the collection a fare, toll, ticket or admission.

426. The payment (or offer) or acceptance (or soliciting) of secret commissions.

- v. It should be noted that Subsection 67.5(2) essentially supersedes the assessment deadlines and empowers the Canada Revenue Agency (CRA) to re-assess when necessary to trigger the disallowance for illegal payments under subsection 67.5(1), i.e., CRA can disallow an illegal payment at their discretion.
- vi. Penalties, fines and interest related to illegal payments are also not deductible (subsection 67.6 and IT bulletin IT-533 par. 34).

b. *Description of the means or mechanisms to enforce the respective laws, rules and/or measures taken to prevent, investigate and/or sanction those who obtain favorable tax treatment expenditures made in violation of CFPOA.*

- i. A number of legislative bodies are responsible for the administration of Canada’s Income Tax Law

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<sup>4</sup> <http://laws.justice.gc.ca/PDF/Statute/C/C-46.pdf>

- I- The Department of Finance is responsible for drafting tax legislation and developing policies to meet the objectives of Canada's taxation system.
  - II- The Department of Justice handles litigation arising in income tax cases.
  - III- The Canada Revenue Agency is responsible for the administration and enforcement of the Income Tax Act.
- ii. The CRA has approximately thirty offices across Canada which deal with public inquiries, to collect taxes, audit income tax returns and to investigate tax compliance in their respective jurisdictions.
  - iii. Routine Audits
    - I- As part of its regular activities, the CRA also selectively performs audits of income tax returns of individuals and corporations. The process for audits is outlined in the CRA publication "What you should know about audits" (<http://www.cra-arc.gc.ca/E/pub/tg/rc4188/rc4188-07e.pdf>). Following an audit, the subject's tax return(s) subject to audit may be reassessed and additional tax and related interest may be levied. Should individuals or corporations subject to audit disagree with the reassessment, an appeals process is available. The process is outlined in a brochure entitled "P148 Resolving Your Dispute: Objection and Appeal Rights Under the Income Tax Act."
    - II- As stated in Canada's report to the OECD entitled "FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATION OF THE CONVENTION AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS<sup>5</sup>", the CRA "has developed a section in its Audit Manual to deal with the application of section 67.5 of the Income Tax Act as it relates to outlays and expenses incurred under section 3 of the CFPOA, September 2004. As well, the CRA revised its Investigation Manual to include a reference to the CFPOA and a link from the reference to the CFPOA to the section of the Manual dealing with non-deductibility of illegal payments, in February 2005. In conjunction with the changes to the Audit and Investigations Manuals, auditors were advised of the manual changes by a "What's New" reference on the Audit Manual Intranet site to make them aware of the implications of the Act."
  - iv. Enforcement Programs

<sup>5</sup> <http://www.oecd.org/dataoecd/5/6/36984779.pdf>

I- The CRA describes its enforcement programs as follows:

*“The CRA operates four programs to deal with suspected cases of tax evasion, fraud, and other tax offences, as well as non-compliance with Canada's tax laws by those who earn income from illegal activities.*

*Canada's tax system is based on self-assessment. The CRA's enforcement activities help preserve public confidence in the fairness and integrity of those systems.*

*Our investigative programs reflect the CRA's mandate to use responsible enforcement to promote awareness of and compliance with the laws we administer.”<sup>6</sup>*

II- The CRA's four enforcement programs consist of the following:

- a. Voluntary disclosure program
- b. Informant Leads program
- c. Special enforcement program
- d. Criminal investigations program

III- The CRA describes its Voluntary Disclosures Program as follows:

*“The Voluntary Disclosures Program (VDP) allows taxpayers to come forward and correct inaccurate or incomplete information or to disclose information they have not reported during previous dealings with the CRA, without penalty or prosecution.”<sup>7</sup>*

IV- In order for a disclosure to be valid under the CRA program, it must meet all four of the following criteria<sup>8</sup>:

- a. It must be voluntary. In addition, the taxpayer must not be aware of any enforcement action by the CRA or any other authority regarding the information being disclosed, but the enforcement action would be likely to uncover the information being disclosed.
- b. It must be complete for all taxation years where inaccurate information was filed.
- c. The disclosure must involve the application, or potential application of a penalty, and

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<sup>6</sup> <http://www.cra-arc.gc.ca/gncy/nvstgtns/menu-eng.html>

<sup>7</sup> <http://www.cra-arc.gc.ca/gncy/nvstgtns/vdp-eng.html>

<sup>8</sup> INCOME TAX INFORMATION CIRCULAR NO.: IC00-1R2 DATE: October 22, 2007 SUBJECT: Voluntary Disclosures Program (<http://www.cra-arc.gc.ca/E/pub/tp/ic00-1r2/ic00-1r2-e.pdf>)

- d. It must include information that is at least one year past due.

V- In order to encourage compliance with tax law, the CRA has also implemented the Informant Leads Program, whose mandate is to “*is to co-ordinate all leads that the CRA receives from informants, to determine if there is an element of non-compliance with tax legislation, and to ensure that appropriate enforcement action is taken.*” The program is managed from five regional offices across the country.

VI- The Special Enforcement Program<sup>9</sup> consists of conducting audits and undertaking civil enforcement action against individuals suspected of earning income from illegal sources.

VII- The Criminal Investigations Program<sup>10</sup> investigates cases of suspected tax fraud and tax evasion, and other serious violations of tax laws.

VIII- Applicants who wish to do so can appeal CRA decisions resulting from audits. There are several courts in Canada that deal with tax issues. The Tax Court of Canada is where tax appeals commence. Applicants may then appeal decisions of the Tax Court of Canada to the Federal Court of Appeal and ultimately to the Supreme Court of Canada.

IX- The CRA publishes all convictions on their website (<http://www.cra-arc.gc.ca/nwsrm/cnvctns/menu-eng.html>). It does so in order to maintain confidence in the self-assessment system, and also for the deterrent effect of public disclosure. The information published is solely information available from court records and not confidential information held by the CRA.

- c. *Objective results obtained in applying the respective laws, rules, and/or measures, for the past two years.*

- i. While the CRA does not publish statistics related to violations of specific articles of the Income Tax Act, its Criminal Investigations Program resulted in 164 cases being referred to the Public Prosecution Service of Canada (PPSC) for prosecution in 2008-2009, compared to 180 cases in the previous year. According to the CRA website<sup>11</sup>:

*As a result of referrals to the PPSC (current and previous years), 257 cases resulted in convictions for tax evasion or fraud in 2008-2009. The courts imposed \$19.8 million in fines and 63.67 years of jail sentences.*

<sup>9</sup> <http://www.cra-arc.gc.ca/gncy/lrt/spcl-eng.html>

<sup>10</sup> <http://www.cra-arc.gc.ca/gncy/lrt/crmnl-eng.html>

<sup>11</sup> <http://www.cra-arc.gc.ca/gncy/lrt/crmnl-eng.html>

*These convictions related to revenue loss of \$22.4 million. The CRA obtained convictions in 98% of cases prosecuted.*

It should be noted that the CRA is not required by law to report information it receives as part of its voluntary disclosure program to other Canadian authorities, such as the Royal Canadian Mounted Police (RCMP). This implies that where a voluntary disclosure is made related to income earned from illegal sources, such as a bribe received by a domestic official or any other proceeds of crime, the amount may be reported to the CRA as income under the voluntary disclosure program without any information thereon being reported to the RCMP or any other authority charged with investigating violations to the Canadian Criminal Code.

An example of this is the case referred to as the “Airbus Affair”, where former Canadian Prime Minister Brian Mulroney came under scrutiny for his dealings with businessman Karlheinz Schreiber in the early 1990s, and later admitted to have received cash payments totaling \$225,000 from Schreiber during 1993-1994. Mr. Schreiber was charged in Germany with fraud, bribery and tax evasion in connection with the affair. While it was alleged that the payments were made in exchange for Mr. Mulroney’s lobbying the Canadian federal government on behalf of Airbus in relation to the purchase of airplanes by the government-owned airline, he claimed they were consulting fees related to some of Mr. Schreiber’s other businesses.

Mr. Mulroney did not disclose these payments during an investigation by the RCMP or a lawsuit he brought against the Canadian government for defamation which settled in Mr. Mulroney’s favour in 1997. He disclosed the payments to the CRA in 1999, and it was not until 2003 that the payments became public. An inquiry was launched into the affair starting in 2008, and, in 2010, Justice Jeffrey O’Leary ruled that Mr. Mulroney acted inappropriately in accepting the funds. Although the case had been in the news prior to 1999, the CRA was not under obligation to disclose these payments, which may have assisted investigators in the matter.

While it is unclear in this case whether disclosure by the CRA to authorities in 1999 would have changed the outcome of the case, it highlights a need for better communication between authorities, when it comes to disclosure of income received which may be related to the proceeds of crime, as well as any disallowed expenses which may be related to illegal acts, such as violations of the CFPOA.

d. *Conclusions and recommendations*

- i. The CRA voluntary disclosure program may need to be altered so that if the funds that are being disclosed may form a part of another crime, the subject or person cannot gain the protections of the program.

## 2. PREVENTION OF BRIBERY OF DOMESTIC AND FOREIGN GOVERNMENT OFFICIALS (ARTICLE III (10) OF THE CONVENTION)

- a. *Description of the laws and/or other measures in your country to deter or impede bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.*

### I- Background

- a. Article III (10) of the Convention relates to preventive measures to create, maintain and strengthen “deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts”.

### II- Canada has several provisions related to the prevention of bribery of domestic and foreign government officials:

- a. The *Corruption of Foreign Public Officials Act*<sup>12</sup> which addresses the bribery of foreign government officials will be discussed in Chapter 3, which addresses transnational bribery. It does not directly address accounting issues – it does not have a similar accounting and record-keeping provision that the *FCPA* does. Although amendments to the CFPOA have been proposed under Bill C-31 to address the nationality jurisdiction issue (as discussed in Chapter 3), they do not provide amendments to the CFPOA to include any books and records provisions at this time.
- b. Statutory provisions found in the Canadian Criminal Code<sup>13</sup> address the bribery of domestic officials, i.e., Part IV “Offences Against the Administration of Law and Justice”, namely sections 118-125, of which the following are noted:
  - i. Subsection 119(1) provides that “Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years who (a) being the holder of a judicial office, or being a member of Parliament or of the

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<sup>12</sup> <http://laws.justice.gc.ca/PDF/Statute/C/C-45.2.pdf>

<sup>13</sup> <http://laws-lois.justice.gc.ca/PDF/Statute/C/C-46.pdf>

legislature of a province, directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by them in their official capacity, or (b) directly or indirectly, corruptly gives or offers to a person mentioned in paragraph (a), or to anyone for the benefit of that person, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by that person in their official capacity.”

- ii. Section 120 provides that “Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years who (a) being a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law, directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment with intent (i) to interfere with the administration of justice, (ii) to procure or facilitate the commission of an offence, or (iii) to protect from detection or punishment a person who has committed or who intends to commit an offence; or (b) directly or indirectly, corruptly gives or offers to a person mentioned in paragraph (a), or to anyone for the benefit of that person, any money, valuable consideration, office, place or employment with intent that the person should do anything mentioned in subparagraph (a)(i), (ii) or (iii).”
- iii. Subsection 121(1) states that “Every one commits an offence who (a) directly or indirectly (i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or (ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person, a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with (iii) the transaction of business with or any

matter of business relating to the government, or (iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be; (b) having dealings of any kind with the government, directly or indirectly pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which the dealings take place, or to any member of the employee's or official's family, or to anyone for the benefit of the employee or official, with respect to those dealings, unless the person has the consent in writing of the head of the branch of government with which the dealings take place; (c) being an official or employee of the government, directly or indirectly demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind for themselves or another person, unless they have the consent in writing of the head of the branch of government that employs them or of which they are an official; (d) having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with (i) anything mentioned in subparagraph (a)(iii) or (iv), or (ii) the appointment of any person, including themselves, to an office; (e) directly or indirectly gives or offers, or agrees to give or offer, to a minister of the government or an official, or to anyone for the benefit of a minister or an official, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence, or an act or omission, by that minister or official, in connection with (i) anything mentioned in subparagraph (a)(iii) or (iv), or (ii) the appointment of any person, including themselves, to an office; or (f) having made a tender to obtain a contract with the government, (i) directly or indirectly gives or

offers, or agrees to give or offer, to another person who has made a tender, to a member of that person's family or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or (ii) directly or indirectly demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind for themselves or another person as consideration for the withdrawal of their own tender.”

- iv. Every one who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
- v. Section 121 is broad in scope and prohibits bribes to or for the benefit of government officials by or on behalf of those who have dealings with the government.
- vi. Section 122 deals with the Breach of Trust by a Public Officer and states that “Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.”
- vii. Subsection 123(3) deals with Municipal Corruption. It defines a “municipal official” as a member of a municipal council or a person who holds an office under a municipal government. 123(1) provides that “Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who directly or indirectly gives, offers or agrees to give or offer to a municipal official or to anyone for the benefit of a municipal official — or, being a municipal official, directly or indirectly demands, accepts or offers or agrees to accept from any person for themselves or another person — a loan, reward, advantage or benefit of any kind as consideration for the official (a) to abstain from voting at a meeting of the municipal council or a committee of the council; (b) to vote in favour of or against a measure, motion or resolution; (c) to aid in

procuring or preventing the adoption of a measure, motion or resolution; or (d) to perform or fail to perform an official act.”

- viii. Sections 124 and 125 provides for other domestic offences: Selling or Purchasing Office and Influencing or Negotiating Appointments or Dealing in Offices, respectively.
- ix. Section 393 addressed the payment (or offer) or acceptance (or soliciting) related to the collection a fare, toll, ticket or admission
- x. Section 426 addresses the payment (or offer) or acceptance (or soliciting) of secret commissions.

*III*-The Part X “Fraudulent Transactions Relating to Contracts and Trade” of the *Criminal Code* also addresses the falsification of books and documents in sections 397-400:

- a. Subsection 397(1) provides that “Every one who, with intent to defraud, (a) destroys, mutilates, alters, falsifies or makes a false entry in, or (b) omits a material particular from, or alters a material particular in, a book, paper, writing, valuable security or document is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.”
- b. Section 399 deals with false returns by public officers, and states that “Every one who, being entrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes a false statement or return of (a) any sum of money collected by him or entrusted to his care, or (b) any balance of money in his hands or under his control, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.”
- c. Additionally, section 402 discusses the criminalization of traders failing to keep accounts and states that “Every one who, being a trader or in business, ... (c) has not kept books of account that, in the ordinary course of the trade or business in which he is engaged, are necessary to exhibit or explain his transactions... is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years”. Subsection 402(2) offers a relief in that “No person shall be convicted of an offence under this section (a) where, to the satisfaction of the court or judge, he (i) accounts for his losses, and (ii) shows that his failure to keep books was not intended to defraud his creditors.”

IV- It is noted that while there are several corruption-related provisions as discussed above, there are no explicit accounting provisions contained in the *Criminal Code* (off-books accounting is not explicitly prohibited), nor are there explicit descriptions of what types of records should be maintained. There are no amendments anticipated to the *Criminal Code* at this time to address this limitation.

V- Statutory provisions in the *Canada Business Corporations Act*<sup>14</sup> address accounting issues and govern federally incorporated companies in Canada. Subsection 155(1) provides that "...the directors of a corporation shall place before the shareholders at every annual meeting comparative financial statements as prescribed... (and) the report of the auditor, if any". Section 44 and 45 require that the financial statements be prepared in accordance with the standards of the Canadian Institute of Chartered Accountants (CICA) as set out in the *CICA Handbook*.

VI- Therefore, federally incorporated companies need to look to the *CICA Handbook* for guidance on keeping adequate books and records, but it does not place detailed legal requirements on a company's management on how it records financial transactions. It also does not directly prohibit a company's management from establishing off-books accounts for the purpose of bribing foreign public officials or other illegal activities. The assurance recommendations state that the auditor's responsibility is to detect material misstatements in an audit of financial statements<sup>15</sup>. Overall responsibility lies with a company's management.

VII- The *CICA Handbook* does provide additional guidance to auditors about material misstatements arising from the consequences of illegal acts<sup>16</sup>. Additional guidance is provided in Section 5136 because the special nature of illegal acts significantly affects the auditor's ability to detect illegal acts and material misstatements arising from the consequences of illegal acts. Management is responsible for establishing and maintaining policies and procedures to assist in achieving its objective of ensuring, as far as practical, the orderly and efficient conduct of the entity's business. This responsibility includes policies and procedures to identify and monitor compliance with laws and regulations that affect the entity, and

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<sup>14</sup> <http://laws-lois.justice.gc.ca/PDF/Statute/C/C-44.pdf>

<sup>15</sup> CICA Handbook, Section 5135 "The auditors' responsibility to consider fraud". Note this Section is harmonized with International Standard on Auditing (ISA) 240, issued by the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC), entitled "The Auditor's Responsibility to Consider Fraud in an Audit of Financial Statements."

<sup>16</sup> Handbook, Section 5136 "Misstatements – illegal acts". This section defines 'illegal act' as a possible violation of a domestic or foreign statutory law or government regulation attributable to the entity under audit in jurisdictions that it operates, or to management or employees acting on the entity's behalf.. Final determination of whether an illegal act has occurred can only be made by a court of law.

to prevent and detect illegal acts. The auditor should apply his or her understanding of the entity and its environment, including internal control, and make enquiries of management to identify laws and regulations that, if violated, could reasonably be expected to result in a material misstatement in the financial statements. This section of the *CICA Handbook* discusses each of management and the auditor's responsibility with respect to illegal acts, but does not provide specific guidance or provisions for maintaining adequate books and records with the view to impede or deter bribery of domestic and foreign public officials.

VIII- Part IV of the *Canada Business Corporations Act*, subsection 20(2) "Directors Records" and 20(2.1) "Retention of Accounting Records" provides that "...a corporation shall prepare and maintain adequate accounting records" and "Subject to any other Act of Parliament and to any Act of the legislature of a province that provides for a longer retention period, a corporation shall retain the accounting records referred to in subsection (2) for a period of six years after the end of the financial year to which the records relate". Subsection 20(6) provides that "A corporation that, without reasonable cause, fails to comply with this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars".

IX- The *Canada Business Corporations Act* requires corporations to keep "adequate" records, but does not specify what it must contain to be considered "adequate". No changes to this Act are forthcoming at this time.

X- In Canada, securities laws and instruments are administered by provincial securities commissions. For example, the Ontario Securities Commission administers the *Securities Act* (Ontario)<sup>17</sup>, in which the provision under Part VII "Record Keeping and Compliance Reviews", subsection 19.(1) "Record-Keeping" states that "Every market participant shall keep 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 and shall keep such other books, records and documents as may otherwise be required under Ontario securities law". Subsection 122(1) provides that generally "Every person or company that... (c) contravenes Ontario securities law, is guilty of an offence and on conviction is

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<sup>17</sup> [http://www.e-laws.gov.on.ca/html/statutes/english/e\\_laws\\_statutes\\_90s05\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/e_laws_statutes_90s05_e.htm)

liable to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both”.

XI- Other significant provincial regulators are the British Columbia Securities Commission, the Alberta Securities Commission, and the Autorité des marchés financiers (Québec). Canada is currently exploring the implementation of a national regulator to replace the various provincial securities regulators which would bring some uniformity around the regulation of share issuers and their record-keeping.

XII- The Canadian Income Tax Act<sup>18</sup> also contains provisions for record retention in Part XV “Administration and Enforcement”. Section 230 describes that the records and books of account should be kept for six years, which should include “the records and books of account..., together with every account and voucher necessary to verify the information contained therein”. However, it does not describe in detail what the records and books must contain.

b. *Objective results that have been obtained in enforcing the respective laws and/or other measures to which it refers, such as steps taken to prevent or investigate their infringement and penalties imposed in that regard, providing any relevant statistical data available in your country for the last two years.*

- i. **Enforcement**<sup>19</sup> - Specifics are unknown. Information regarding active criminal investigations (including those relating to foreign bribery) is not made available by law enforcement agencies in Canada, as this information is considered confidential and could result in actionable damage to a person or company being investigated, if the fact of the investigation were to be made public prior to charges being laid. Nor is it possible to obtain any information as to how many investigations are currently in process.
- ii. Generally, however, the Integrated Markets Enforcement Team, under the imperative of the Department of Justice of Canada, has performed investigations which have led to charges of the following Criminal Code offences: false prospectus, fraud affecting public market, fraud over \$5,000, falsification of books and documents, laundering proceeds of crime, forgery, assault, robbery, theft, and conspiracy to commit an indictable offence. Additional charges are anticipated in the foreseeable future as current investigations come to a close<sup>20</sup>.

c. *Conclusions and recommendations*

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<sup>18</sup> <http://laws.justice.gc.ca/en/I-3.3/index.html>

<sup>19</sup> <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/9-report-rapport.aspx#enforce>

<sup>20</sup> <http://www.rcmp-grc.gc.ca/pubs/imets-eipmf/2009-eng.htm>

- i. Consider amending the CFPOA to include a meaningful and enforceable books and records provision that requires the maintenance of accurate books and records, similar to other member states (i.e., the USA's *FCPA*).
- ii. Consider amending the Criminal Code, the Canada Business Corporations Act, and the Income Tax Act to provide explicit descriptions of what types of records constitute adequate records to be maintained.

### 3. TRANSNATIONAL BRIBERY (ARTICLE VIII OF THE CONVENTION)

#### a. *Criminalization of transnational bribery – description of legal framework*

##### i. Background

*I-* Canada signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention), in Paris, on December 17, 1997.

*II-* In response to the Convention, Canada introduced Bill S-21, *An Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts*, in the Senate on December 1, 1998. The Bill received Royal Assent on December 10. Canada ratified the OECD Convention on December 17, 1998, and the Corruption of Foreign Public Officials Act (CFPOA) entered into force on February 14, 1999<sup>21</sup>.

##### ii. Offence

*I-* The CFPOA contains provisions against the bribing of foreign public officials “to obtain or retain an advantage in the course of business”. Section 3 of the CFPOA states:

- i. *3. (1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public*

<sup>21</sup> <http://laws.justice.gc.ca/PDF/Statute/C/C-45.2.pdf>

*international organization for which the official performs duties or functions.*

iii. **Applicability**

I- The CFPOA's definition of *person* refers to section 2 of the Criminal Code, which defines *person* as follows:

*“every one”, “person” and “owner”, and similar expressions, include Her Majesty and an organization;*

II- The use of the Criminal Code definition of person implies that the CFPOA applies to corporations as well as individuals. Also, under the Common Law system used in Canada, corporations can be prosecuted for offences.

III- The CFPOA's definition of business is as follows:

*“business” means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit.*

IV- This definition of business, which includes business carried on in Canada, therefore implies that the CFPOA may apply even in cases where business does not cross borders. For example, where a bribe may be paid to an employee of a foreign embassy with respect to a contract to build or renovate an embassy located in Canada.

V- The CFPOA defines foreign public official as follows:

a. *“foreign public official” means*

*(a) a person who holds a legislative, administrative or judicial position of a foreign state;*

*(b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and*

*(c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.*

VI- Further, based on the CFPOA definition of Foreign State, it is clear that the CFPOA applies to bribery of foreign public officials at

any level of government, whether it be federal, provincial or municipal:

“foreign state” means a country other than

Canada, and includes

(a) any political subdivision of that country;

(b) the government, and any department or branch, of that country or of a political subdivision of that country; and

(c) any agency of that country or of a political subdivision of that country.

#### **iv. Jurisdiction**

I- The CFPOA has “territorial” jurisdiction, meaning that Canada has jurisdiction over the bribery of foreign public officials when the offence is committed in whole or in part in its territory, i.e., within Canada. According to *THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT - A GUIDE*, published by the Department of Justice of Canada,

*“to be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting the offence must take place in Canada. There is a sufficient basis for jurisdiction where there is a real and substantial link between the offence and Canada. In making this assessment, the court must consider all relevant facts that happened in Canada that may legitimately give Canada an interest in prosecuting the offence. Subsequently, the court must then determine whether there is anything in those facts that offends international comity. (See R. v. Libman (1985), 21 C.C.C. (3d) 206 (S.C.C.))”*

II- This renders the prosecution of Canadian nationals for acts committed outside of Canada more challenging. There have been multiple calls for Canada to adopt the concept of “nationality” jurisdiction within the CFPOA in order to make it more effective in the fight against corruption. As such, proposed amendments to the CFPOA have been presented as part of Bill C-31, which is discussed further in section viii below.

#### **v. Penalties**

I- The maximum sentence for individuals convicted under the Act is five years in prison. There are no maximum fines for

corporations set out in the CFPOA, and as such fines are to be set at the discretion of the courts.

## vi. Exceptions

### I- Saving Provision:

- a. The CFPOA does provide exceptions for certain types of payments, including:
  - i. *if the loan, reward, advantage or benefit*
    1. *is permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions; or*
    2. *was made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to*
      - a. *the promotion, demonstration or explanation of the person's products and services, or*
      - b. *the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.*

### II- Facilitation payments

- a. The CFPOA provides an exception for facilitation payments, which it defined as follows:

*(4) For the purpose of subsection (1), a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage in the course of business, if it is 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, including:*

  - (a) the issuance of a permit, licence or other document to qualify a person to do business;*
  - (b) the processing of official documents, such as visas and work permits;*
  - (c) the provision of services normally offered to the public, such as mail pick-up and delivery,*

*telecommunication services and power and water supply; and*

*(d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.*

b. It further explains:

*(5) For greater certainty, an “act of a routine nature” does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision.*

**vii. Accounting and internal control provisions**

I- The CFPOA does not contain specific provisions related to record-keeping or internal controls intended to prevent offences.

**viii. Proposed Amendments**

I- Bill C-31, An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act, was introduced to Canadian Parliament on May 15, 2009. Bill C-31 would amend the CFPOA to apply nationality jurisdiction to Canadians who engage in bribery or other forms of corruption involving foreign public officials outside of Canada. However, Bill C-31 was scheduled to receive second reading in the House of Commons in October 2009, and on two occasions was delayed. Additionally, there is some opposition to some of the non-CFPOA changes to other legislation, which are also contained in Bill C-31.

II- Bill C-31 proposes that the CFPOA be amended by adding the following after section 3:

- a. 4. (1) Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counseling in relation to, an offence under that section — is deemed to have committed that act or omission in Canada if the person is (a) a Canadian citizen; (b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act who, after the commission of the act or

omission, is present in Canada; or (c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.

- b. (2) If a person is alleged to have committed an act or omission that is deemed to have been committed in Canada under subsection (1), proceedings for an offence related to that act or omission may, whether or not that person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished for that offence as if the offence had been committed in that territorial division.

b. *Criminalization of transnational bribery – enforcement*

- i. Foreign Affairs and International Trade Canada reported the following in its Ninth Report to Parliament (December 2, 2008), *Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act*<sup>22</sup>:

*I- Enforcement - In February 2005, the Royal Canadian Mounted Police (RCMP) appointed a commissioned officer to provide functional oversight of its anti-corruption programs. The corruption of foreign public officials is now specifically referenced in the RCMP Commercial Crime Program's mandate. Current RCMP policy specifically identifies the CFPOA as a Commercial Crime Branch responsibility. The RCMP has the capability to track CFPOA cases being handled by the Force and is confident that credible allegations reported to other law enforcement agencies or Canadian foreign missions will be reported through to the RCMP.*

*II- In October 2008, the RCMP established two seven person International Anti-corruption Units, based in Ottawa and Calgary. These units are charged with investigating allegations that a Canadian person/business has bribed a foreign public official, allegations that a foreign person has bribed a Canadian public official that may have international repercussions, and allegations that a foreign public official has secreted or laundered money in, or through, Canada. They also deal with requests for international mutual legal assistance. The RCMP provides functional oversight of the International Anti-Corruption Teams and anti-corruption enforcement activities through a commissioned officer at National Headquarters. The International Anti-corruption Teams' law*

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<sup>22</sup> <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/9-report-rapport.aspx#enforce>

*enforcement mandate is aligned with Canada's obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as well as the United Nations Convention against Corruption.*

*III- The Trade Commissioner Service of The Department of Foreign Affairs and International Trade (DFAIT) has developed instructions to Canadian missions abroad, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or attempted to bribe a foreign public official. In April 2004, an internal committee was established, chaired by the Chief Trade Commissioner, to consider and review cases where Canadian individuals or companies have been found guilty of bribery or corruption overseas and this committee would advise the Minister responsible. Although no such cases have been referred to the committee to date, some members of the committee do meet to discuss allegations against Canadian individuals and companies.*

*IV- In order to clarify its policy on bribery, in 2004, Export Development Canada (EDC) introduced its Anti-Corruption Policy Guidelines (a public document), which outlines the measures EDC will apply to combat corruption, including a section on debarring companies convicted of bribery as well as a section on disclosure to law enforcement authorities. Furthermore, EDC developed a detailed internal procedural document which outlines the process for disclosure to law enforcement where there is credible evidence of bribery. EDC also developed a detailed internal procedural document relating to the debarment of convicted companies, and such process essentially provides that any party who has been convicted of bribery will be debarred from support until EDC is satisfied that they have taken appropriate measures to deter further bribery. Such measures include replacing individuals who have been involved in bribery; adopting an effective anti-corruption program; and submitting to audit and making the results of such audit available. In 2006, under the auspices of the OECD Export Credit and Credit Guarantees Group, EDC worked with other export credit agencies to enhance the OECD Action Statement on Bribery. Revisions to the Action Statement necessitated a number of changes to EDC's anti-corruption practices. In addition to providing a no-bribery declaration, exporters seeking export credit agency EDC-backed support will now be required to indicate whether they have been previously convicted of bribery, and whether they have been debarred by the World Bank, the Asian Development Bank, the*

*European Development Bank or the African Development Bank, for which the ECAs agreed to undertake enhanced due diligence. Furthermore, EDC will ask for details about agents and commissions should they deem it necessary as part of their due diligence process. ECAs also agreed to do their part to raise awareness among their exporting communities about the consequences of engaging in bribery as well as to encourage them to develop, apply and document appropriate management control systems that combat bribery.*

- V- The Canadian International Development Agency (CIDA) has a Protocol for Dealing with Allegations of Corruption that states that situations of allegations of criminal activity may require referral to police authorities. The Protocol includes specific internal procedures for reporting allegations of corruption to the relevant Director and to the Chief Audit Executive for appropriate action. The Protocol ensures a thorough assessment of the allegations regarding CIDA financing so that senior management can ascertain whether there exists “credible evidence” of a violation of the CFPOA.*
- VI- CIDA’s Office of the Chief Audit Executive has drafted, for management approval, principles and guidelines intended to be used as guidance in the conduct of investigations of fraud, corruption and wrongdoings, including disclosures of wrongdoings made by public servants. The principles and guidelines will require CIDA employees to report to the Chief Audit Executive allegations or evidence of fraudulent and corrupt practices, including violations of the CFPOA, related to CIDA-financed activity. The principles and guidelines also state that all losses of money and suspected cases of fraud, defalcation or any other offence or illegal act against Her Majesty must be reported to law-enforcement authorities.*
- VII- CIDA also has in place a policy that requires entities wishing to take part in CIDA development projects to declare previous corruption-related offences (see Contracting).*
- VIII- The Canadian Commercial Corporation (CCC) has included in all its domestic contracts with Canadian suppliers a clause prohibiting the bribery and corruption of government officials. As such, should a Canadian supplier be convicted of bribing a government official while under a contract with CCC, the Corporation will apply various sanctions which could include the termination of the contract with the supplier.*
- IX- The Public Servants Disclosure Protection Act (PSDPA), as amended by the Federal Accountability Act, came into force on*

*April 15, 2007. The Canada Public Service Agency (formally known as the Public Service Human Resources Management Agency of Canada) is responsible for leadership and support to organizations in the implementation of the PSDPA.*

*X- The purpose of the PSDPA is to encourage employees in the public sector to come forward if they have reason to believe that serious wrongdoing has taken place, and to prohibit reprisal against them if they do so. It also provides a fair and objective process for those against whom allegations are made. In addition, the PSDPA establishes the Public Sector Integrity Commissioner as an agent of Parliament. It gives the Commissioner a mandate to conduct independent reviews of disclosures of wrongdoing, issue reports of findings to enable organizations to take appropriate remedial action, and submit annual and special reports to Parliament. Although there is nothing in the PSDPA that specifically addresses bribery of foreign public officials, the Act nevertheless provides a means by which a public servant could report the bribery and be protected from reprisal. Public servants may make disclosures within their organization or to the Commissioner, and members of the public may provide information concerning wrongdoing in the federal public sector to the Commissioner.*

*XI- At the Department of Foreign Affairs and International Trade (DFAIT), employees who have knowledge of corruption - such as bribery of foreign public officials, being in possession of property or proceeds of such bribery and laundering the proceeds of bribery, may report it via the disclosure of wrongdoing process. DFAIT employees have three venues for making a disclosure: they may disclose either to their supervisor, the departmental Senior Officer for Disclosure or the Public Sector Integrity Commissioner. All supervisors who receive a disclosure of wrongdoing are required to promptly transfer it to the Senior Officer for Disclosure for screening and follow-up and they shall advise the employee who made the disclosure of this transfer. DFAIT's Internal Disclosure Procedures for the Implementation of the PSDPA can be found on the departmental site: [Disclosure of Wrongdoing](#).*

*XII- **Prosecution** - There has been one successful prosecution under the Corruption of Foreign Public Officials Act (reported in previous Canada Reports). Hydro Kleen Group Inc.. (a company based in Red Deer, Alberta), its president and an employee, were charged under the CFPOA with, among other things, two counts of bribing Hector Ramirez Garcia, a U.S. immigration officer who worked at the Calgary International Airport. Hydro-Kleen entered a plea of guilty in the Court of*

*Queen's Bench in Red Deer, Alberta on January 10, 2005. The company admitted to one count under s. 3(1)(a) of the CFPOA and was ordered to pay a fine of \$25,000. Two other charges against a director and an officer of the company were stayed. Mr. Garcia pleaded guilty in July 2002 to accepting bribes. He received a 6 month sentence and was subsequently deported to the United States.*

- ii. A Canadian company, Niko Resources Ltd. (“Niko”), made a public statement, in mid-January 2009, that the RCMP was investigating allegations that Niko, or a Niko subsidiary, may have made improper payments to government officials in Bangladesh. We have had no confirmation from the RCMP as to whether such an investigation is ongoing or whether the matter that was reported to be under investigation involves a serious allegation of bribery. We are unaware of the status of this reported investigation<sup>23</sup>.
- iii. In May 2010, the RCMP arrested Nazir Karigar, a Canadian citizen, for violations of the CFPOA. While the RCMP did not disclose the name of Karigar’s company, the charges were related to payments made to Indian government officials in relation to the award of a multi-million dollar airport security contract. Karigar was charged with one count of Corruption under Section 3(1)(b) of the CFPOA. In its press release, the RCMP stated that the investigation began in June 2007, when it received information with regard to allegations of bribery involving representatives of a Canadian company.
- iv. As the RCMP does not disclose the status of its investigations publicly, it is uncertain at this time how many investigations are ongoing. However, the RCMP has confirmed that it has several investigations underway.
- v. Other noteworthy developments<sup>24</sup>:
  - I- On March 3, 2010, DFAIT released its Policy and Procedures for Reporting Allegations of Bribery Abroad by Canadians or Canadian Companies. Under the terms of this policy, any information DFAIT officers receive regarding suspected bribery or foreign public officials, or related offences, by Canadian individuals or companies is to be forwarded to the RCMP, in accordance with the procedure set out in the policy. Related offences include: conspiracy to bribe, attempting to bribe, aiding and abetting, counseling, an intention in common to bribe and possession of property or proceeds of property obtained or derived from bribery or laundering that property or

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<sup>23</sup> The following is an excerpt from an article that appeared in the Canadian “Financial Post”: “[The investigation] relate[s] to possible improper payments to officials in Bangladesh by either Niko or our subsidiary over there,” Murray Hesje, Niko’s chief financial officer, said in an interview yesterday. “There were no specifics [from the RCMP] other than they named the country that was involved...Niko denies any wrongdoing and welcomes a Canadian review of the company’s processes. Niko intends to cooperate with any review process in this regard”. Carrie Tait, Financial Post, With files from Reuters. Published: Friday, January 16, 2009.

<sup>24</sup> Source: “2010 TI Progress Report on Enforcement against Foreign Bribery: Questionnaire for Canada”, Bruce N. Futterer (Director, Transparency International Canada), April 2010

those proceeds. The policy does not apply to allegations of fraud, embezzlement or bribery implicating Canadian government staff, or any other alleged illegal acts against the Crown. These allegations are handed by a separate policy (*Malfeasance, losses of money and other illegal acts against the Crown*) administered by the Special Investigations Unit under the Office of the Inspector General. The policy attempts to strike a balance by asking officials to pass on information that is received in the course of their professional activities, while not charging them to seek out such information. The policy also encourages DFAIT officers to proactively inform Canadian companies about the CFPOA and its main implications, most particularly that it is an offence under Canadian law to bribe a foreign public official.

*c. Conclusions and recommendations*

- i. The CFPOA does not currently permit prosecutions within Canada based strictly on Canadian nationality but requires a nexus between the alleged offence and Canada. Amendments to the statute addressing the lack of nationality jurisdiction were proposed in the previous parliamentary session but the amendments were not passed before the Canadian parliament was prorogued earlier in the year. It is not clear as of the date of this report whether the earlier proposed nationality jurisdiction amendment will be re-introduced in the current parliamentary session. The recommendation is to ensure that the amendments be passed as soon as possible.
- ii. The CFPOA explicitly permits facilitation payments, which in our view is an unnecessary exception. We would recommend the elimination of this exception except in cases where the “facilitation payment” is required to protect the affected individual’s physical safety and well-being.
- iii. It appears that CIDA senior management make the determination regarding whether an allegation of corruption is unfounded or not in the public interest to pursue. We would recommend that all allegations of corruption received by CIDA be referred to the Department of Justice to make that determination.
- iv. It appears that the DFAIT disclosure of wrongdoing process does not provide an avenue for anonymous “whistleblower” disclosures of wrongdoing. We would recommend the implementation of such a process.

#### **4. ILLICIT ENRICHMENT (ARTICLE IX OF THE CONVENTION)**

- a. This offense of Illicit Enrichment is per Article IX of the Convention. Canada made the following Statement of Understanding of Article IX, Illicit Enrichment:

*“Article IX provides that the obligation of a State Party to establish the offence of illicit enrichment shall be “Subject to its Constitution and the fundamental principles of its legal system”. As the offence contemplated by Article IX would be contrary to the presumption of innocence guaranteed by Canada's Constitution, Canada will not implement Article IX, as provided for by this provision.”*

- b. As mentioned above, Canada views the adoption as being contrary to the presumption of innocence guaranteed by Canada's Constitution, and as such Canada will not implement Article IX.
- c. *Conclusions and recommendations:* N/A – see above.

## **5. NOTIFICATION OF THE CRIMINALIZATION OF TRANSNATIONAL BRIBERY AND ILLICIT ENRICHMENT (ARTICLE X OF THE CONVENTION)**

- a. This Chapter is not applicable. The CFPOA came into effect on February 14, 1999, prior to Canada ratifying the Convention, which occurred on June 1, 2000. Canada does not intend to implement Article IX for the reasons outlined in Chapter 4 above.

## **6. EXTRADITION (ARTICLE XIII OF THE CONVENTION)**

- a. *Description of laws and/or other measures related to extradition in connection with the offenses it has criminalized in accordance therewith.*
- b. Extradition in Canada is governed by the *Extradition Act* (S.C. 1999, c. 18)<sup>25</sup>
- c. Extraditable conduct is described in Part II of the Extradition Act as follows:
  - i. EXTRADITION FROM CANADA - EXTRADITABLE CONDUCT

### *I- General principle*

3. (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on — or enforcing a sentence imposed on — the person if

(a) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment, and

(b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,

<sup>25</sup> <http://laws.justice.gc.ca/PDF/Statute/E/E-23.01.pdf>

(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

- d. Given that the offences covered in the CFPOA meet the criteria set out in Section 3(1) of the Extradition Act, they are considered extraditable offences.
- e. *Objective results that have been obtained in enforcing the existing rules and/or other measures on extradition for the aforementioned offences, such as extradition requests made to other states parties for the purpose of investigating or prosecuting those offences and procedures initiated by Canada to attend to requests received by it from other states parties with the same purpose, as well as the results thereof in the past five years.*
- f. Statistical information is not publicly available and we are not able to comment.
- g. *Conclusions and recommendations*  
Not applicable

## **SECTION II**

### **FOLLOW-UP ON THE RECOMMENDATIONS FORMULATED IN THE NATIONAL REPORTS IN PREVIOUS REVIEW ROUNDS**

The follow up issues on the recommendations in the previous reports have not been further examined than in the Canadian Progress Report dated March 2010 (refer to Appendix B).

**SECTION III**

**INFORMATION ON THE OFFICIAL RESPONSIBLE FOR COMPLETION OF THIS QUESTIONNAIRE**

Please provide the following information:

(a) State Party: Canada

(b) The official to be consulted regarding the responses to the questionnaire is:

( ) Mr.: Thomas Marshall

( ) Ms.: \_\_\_\_\_

Title/position: Vice-Chair

Agency/office: Transparency International

Canada \_\_\_\_\_

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