

MECHANISM FOR FOLLOW-UP ON THE
IMPLEMENTATION OF THE INTER-AMERICAN
CONVENTION AGAINST CORRUPTION
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CANADA

FINAL REPORT

(Adopted at the June 27, 2008 plenary session)

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

**REPORT ON IMPLEMENTATION IN CANADA OF THE CONVENTION PROVISIONS
SELECTED FOR REVIEW IN THE SECOND ROUND, AND ON FOLLOW-UP TO THE
RECOMMENDATIONS FORMULATED TO THAT COUNTRY IN THE FIRST ROUND¹**

INTRODUCTION

1. Contents of the Report

This Report presents, first, a review of the implementation in Canada of the provisions of the Inter-American Convention against Corruption selected by the Committee of Experts of the Follow-up Mechanism (MESICIC) for review in the second round: Article III, paragraphs 5 and 8, and Article VI.

Second, the Report will examine follow-up to the implementation of the recommendations that were formulated to Canada by the MESICIC Committee of Experts in the first round, which are contained in the Report on that country adopted by the Committee at its Eighth Meeting, and published at the following web page: http://www.oas.org/juridico/english/mec_rep_can.pdf

2. Ratification of the Convention and adherence to the Mechanism

According to the official register of the OAS General Secretariat, Canada ratified the Inter-American Convention against Corruption on June 1, 2000 and deposited the instrument of ratification on June 6, 2000.

In addition, Canada signed the Declaration on the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption on June 4, 2001.

I. SUMMARY OF INFORMATION RECEIVED

1. Response of Canada

The Committee wishes to acknowledge the cooperation that it received throughout the review process from Canada, and in particular from the Department of Justice, which was evidenced, *inter alia*, in the Response to the Questionnaire and in the constant willingness to clarify or complete its contents. Together with its Response, Canada sent the provisions and documents it considered pertinent.

For its review, the Committee took into account the information provided by Canada up to November 2, 2007, and that requested by the Secretariat and the members of the review subgroup, to carry out its functions in keeping with its Rules of Procedure and Other Provisions.

¹ This report was adopted by the Committee in accordance with the provisions of Article 3(g) and 26 of its Rules of Procedure and Other Provisions, at the plenary session held on June 27, 2008, at its Thirteenth meeting, held at OAS Headquarters, June 23-27, 2008.

2. Document submitted by civil society

The Committee also received, within the deadline established in the Calendar for the Second Round adopted at its Ninth Meeting,² a document from the Transparency International – Canada, which was sent electronically.³

II. REVIEW OF IMPLEMENTATION BY THE STATE PARTY OF THE CONVENTION PROVISIONS SELECTED FOR THE SECOND ROUND

A. SCOPE OF THIS REPORT

Canada responded to the sections of the questionnaire describing those which it considered to be the principal systems at the federal level, and referring to all the specific aspects on which the questionnaire requested particular information. Canada's response with respect to acts of corruption applies to all levels of government.

Taking into account the foregoing, this Report will focus on a review of the federal government of Canada, while acknowledging the efforts of the country under review to undertake, with the provinces and territories, the ongoing dialogue, exchange of information and consultations with provincial and territorial senior officials and conflict of interest commissioners, as noted in Part A of Chapter IV of this report. In this regard, the Committee encourages Canada to continue developing these types of actions and to strengthen cooperation and coordination between the federal government and the provincial and territorial governments for the effective implementation of the Convention. The Committee will formulate a recommendation in this regard (see Recommendation in Part A of Chapter III of this Report).

B. REVIEW OF THE IMPLEMENTATION IN THE FEDERAL GOVERNMENT OF CANADA OF THE PROVISIONS OF THE CONVENTION SELECTED FOR THE SECOND ROUND

1. SYSTEMS OF GOVERNMENT HIRING AND PROCUREMENT OF GOODS AND SERVICES (ARTICLE III (5) OF THE CONVENTION)

1.1. SYSTEMS OF GOVERNMENT HIRING

1.1.1. Existence of provisions in the legal framework and/or other measures

Canada has a set of provisions related to the systems of government hiring, among which the following provisions related to the principal systems should be noted:

- Statutory and other legal provisions applicable to a majority of public servants in the Executive and Judicial branch, among which the following should be noted:

- The Preamble to the Public Service Employment Act (PSEA),⁴ which states that the authority to make appointments to the public service⁵ is vested in the Public Service Commission, which can

² This Meeting was held from March 27 to 31, 2006, at OAS Headquarters in Washington D.C., United States

³ These documents were received electronically on November 2, 2007, Response from Transparency International Canada, http://www.oas.org/juridico/spanish/mesicic2_can_sp.htm

⁴ Public Service Employment Act, <http://laws.justice.gc.ca/en/P-33.01/index.html>

⁵ Public service is defined under this act as "several positions in or under

delegate this authority to deputy heads.⁶ The Preamble also states that “*Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded.*”

- Section 11 of the PSEA, which states that the mandate of the Commission is to a) appoint, or provide, for the appointment of, persons to the public service in accordance with the Act; b) conduct investigations and audits in accordance with the Act; and c) administer the provisions of the Act relating to political activities of employees and deputy heads. Section 29(1) also provides that the Commission has the exclusive authority to make appointments to the public service, except as otherwise provided for in the Act, and Section 29(3) states that the Commission may establish policies respecting the manner of making and revoking appointments and take corrective measures.⁷

- Section 15(1) of the PSEA, which allows for the delegation of the authority to make appointments to the public service to the Deputy Heads. Section 16 further provides that in exercising this power, a deputy head is subject to any policies established by the Commission under section 29(3).⁸

- Section 30(1) of the PSEA, which provides that appointments are to be made on the basis of merit and must be free of political consideration. An appointment is made on the basis of merit when the person appointed meets the essential qualifications, having regard to any additional qualifications that constitute an asset for the work of the organization, and having regard to the organization’s current or future needs and operational requirements.⁹

- Section 31 of the PSEA, which states that the employer may establish qualification standards in relation to education, knowledge, experience, occupational certification, language or other qualifications that the employer considers necessary or desirable having regard to the nature of the work to be performed and the present and future needs of the public service.¹⁰

(a) the departments named in Schedule I to the Financial Administration Act;
(b) the organizations named in Schedule IV to that Act; and
(c) the separate agencies named in Schedule V to that Act.”

The Financial Administration Act is found at <http://laws.justice.gc.ca/en/showtdm/cs/F-11>

⁶ Section 2 of the Public Service Employment Act defines ‘deputy heads’ as:

“(a) in relation to an organization named in Schedule I to the Financial Administration Act, its deputy minister;
(b) in relation to any organization or part of an organization that is designated as a department under this Act, the person that the Governor in Council designates as the deputy head for the purposes of this Act; and
(c) in relation to any organization named in Schedule IV or V to the Financial Administration Act to which the Commission has the exclusive authority to make appointments, its chief executive officer or, if there is no chief executive officer, its statutory deputy head or, if there is neither, the person designated by the Governor in Council as its deputy head for the purposes of this Act.”

Public Service Employment Act, *supra* note 4.

⁷ Section 50 of the Public Service Employment Act also provides that the Commission may appoint a person as a casual worker to the public service and that the period of employment may not exceed 90 working days in one calendar year in any particular department or other organization, *ibid.*

⁸ Section 29(2) also provides that the Commission’s authority to make an appointment may only be exercised at the request of a deputy head of the organization to which the appointment is to be made, Public Service Employment Act, *ibid.*

⁹ Section 30(2), *ibid.* In addition, Section 30(4) provides that the Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.

¹⁰ Employer is defined in the PSEA as:

“(a) the Treasury Board, in relation to an organization named in Schedule I or IV to the *Financial Administration Act*; or
(b) in relation to a separate agency to which the Commission has exclusive authority to make appointments, that separate agency.”

- Section 33 of the PSEA, which provides that in making an appointment, the Commission may use an advertised or non-advertised appointment process. Positions that are advertised are found at the following website: <http://jobs-emplois.gc.ca/>
- Section 34 of the PSEA, which states that the Commission, for purposes of eligibility in any appointment process, may determine an area of selection by establishing geographic, organizational or occupational criteria or by establishing, as a criterion, belonging to any of the designated groups within the meaning of Section 3 of the Employment Equity Act.¹¹
- Section 36 of the PSEA, which states that the Commission may use any assessment method that it considers appropriate, such as review of past performance and accomplishments, interviews and examinations, to determine whether a person meets the merit qualifications found in Section 30 of the Act. In addition, Section 37 states that an examination or interview may be conducted in either English or French, when conducted for the purpose of assessing qualifications.
- Section 58 of the PSEA, which provides that an employee whose appointment or deployment is for a specified term ceases to be an employee at the expiration of that term. This term may be extended by the deputy head. In addition, Section 59 states that employments for a specified term may be converted to indeterminate employment.¹²
- Section 66 of the PSEA, which states that the Commission may investigate an external appointment process¹³ and if satisfied that the appointment was not made or proposed to be made on the basis of merit, or there was an error, an omission or improper conduct, the Commission may revoke the appointment, not make an appointment or take any corrective action it considers appropriate. Section 68 further provides that the Commission may take these same corrective measures if it has reason to believe that an appointment or proposed appointment was not made free from political influence and similarly, under Section 69, if the Commission has reason to believe that fraud may have occurred in the appointment process.
- Sections 18 and 18.1 of the Federal Courts Act,¹⁴ which provides the basis for judicial review for decisions of the Public Service Commission. The grounds of review are set out in Section 18.1(4). The Federal Court may grant relief when it is satisfied that the Commission: (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record; (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; (e) acted, or failed to act, by reason of fraud or perjured evidence; or (f) acted in any other way that was contrary to law.

¹¹ Section 3 of the Employment Equity Act defines a designated group as “women, aboriginal peoples, persons with disabilities and members of visible minorities,” <http://laws.justice.gc.ca/en/showtdm/cs/E-5.401>

¹² Such appointments are reviewable by the Public Service Commission; must comply with the statement of merit criteria and their qualifications must be demonstrated. Both the proposal to appoint and notification of appointment are published.

¹³ Section 2 of the PSEA defines ‘external appointment process,’ as: “a process for making on or more appointments in which persons may be considered whether or not they are employed in the public service,” *supra* note 4.

¹⁴ Federal Courts Act, <http://laws.justice.gc.ca/en/showtdm/cs/F-7>

- The Appointment Framework of the Public Service Commission,¹⁵ which “guides deputy heads in developing appointments systems tailored to their own organization’s needs and requires them to respect legislative requirements, the staffing values and the PSC policy.”¹⁶ This Framework contains the Public Service Commission Appointment Policy,¹⁷ which applies to all appointment in the public service made in accordance with the PSEA. The requirements in this Policy are binding and provide that the guiding values of fairness, transparency, access and representativeness are to guide managerial decision-making in the appointment process with a system where authorities can be sub-delegated to those closest to the decision point. In this Policy document, the following should be noted:

- Deputy heads are to establish and communicate criteria for the use of non-advertised processes and ensure that a written rationale demonstrates how the non-advertised process meets the established criteria and the appointment values.¹⁸
- External advertisements are to be advertised, at a minimum, on the internet at <http://www.jobs-emplois.gc.ca>, as well as on Infotel or an alternative telephone service provider.¹⁹
- Advertisements are to provide sufficient information regarding the criteria to be used in the screening of persons in the area of selection and any other information necessary for persons in the area of selection to apply.²⁰
- Provide upon further request, information regarding the essential qualifications, including the official language proficiency that must exist; asset qualifications, operational requirements and organizational needs that may be used when making an appointment; and the name of the person or organization to whom questions about the appointment process may be directed.²¹
- Deputy Heads are to inform the persons that are to be assessed in a timely manner, of the assessment methods to be used, their right to accommodation and how to exercise that right.²²
- Ensure that those responsible for assessment have, among others, the necessary competencies to ensure a fair and complete assessment of the person’s qualifications; have the language proficiency required to permit effective communication with the person being assessed in the official language in order to fairly assess a person’s qualifications; are not in conflict of

¹⁵ Appointment Framework of the Public Service Commission, <http://www.psc-cfp.gc.ca/plcy-pltq/index-eng.htm>. It should be noted that section 16 of the Public Service Employment Act states that in exercising or performing any of the Commission’s powers and functions, a deputy head is subject to any policies established by the Commission.

¹⁶ Response to the Questionnaire, pg. 2, http://www.oas.org/juridico/spanish/mesicic2_can_sp.htm

¹⁷ Public Service Commission Appointment Policy, <http://www.psc-cfp.gc.ca/plcy-pltq/frame-cadre/policy-politique/appointment-nomination-eng.htm>

¹⁸ Choice of Appointment Process, <http://www.psc-cfp.gc.ca/plcy-pltq/frame-cadre/policy-politique/choix-choix-eng.htm>

¹⁹ Advertising in the Appointment Process, <http://www.psc-cfp.gc.ca/plcy-pltq/frame-cadre/policy-politique/advertising-publicite-eng.htm>

²⁰ *Ibid.*

²¹ *Ibid.*

²² Assessment, <http://www.psc-cfp.gc.ca/plcy-pltq/frame-cadre/policy-politique/assessment-evaluation-eng.htm>

interest; and obtain the Public Service Commission's approval before using tests of personality, intelligence, aptitude or tests of like nature.²³

- Persons proposed for appointment or appointed meet all the essential qualifications; are within the area of selection, where required; meet any asset qualifications, operational requirements and organizational needs that were used to make the appointment decisions; and applied within the period for receiving applications.²⁴
- The reasons for the appointment decision have been documented.²⁵

The Appointment Framework also provides guides to assist human resource advisors in understanding the expectations of the Public Service Commission in the creation of the Appointment Policy. They also serve to put into practical terms the application of the Policy, among which the following should be noted:

- Guide to Implementing the Choice of Appointment Process Policy,²⁶ which states that the PSEA values will lead managers to consider the use of advertised appointment processes more often than non-advertised processes and that the Public Service Commission expects to see advertised appointment processes as the standard practice. A choice to use non-advertised process requires a rigorous demonstration of how this process respects these values. Deputy heads are required to establish and communicate criteria for the use of non-advertised process.²⁷
- Guide to Implementing the Advertising in the Appointment Process Policy,²⁸ which requires, at a minimum, that departments must advertise on the internet at www.jobs-emplois.gc.ca, via Infotel or an alternate telephone service provider. It also states that advertising in the appointment process must be in accordance with the Official Languages Act,²⁹ which requires, as a general rule, that advertised appointment processes must be in both official languages including those advertised on the internet. Advertisements are to include, as a minimum, sufficient information regarding the criteria to be used in the screening of persons and any other information necessary for persons in the area of section to apply. The advertisement must include the merit criteria to be used in the screening, information as to whom applications should be addressed, any closing date for receipt of applications, and any

²³ *Ibid.*

²⁴ Selection and Appointment, <http://www.psc-cfp.gc.ca/plcy-pltq/frame-cadre/policy-politique/selection-eng.htm>

²⁵ *Ibid.*

²⁶ Guide to Implementing the Choice of Appointment Process Policy, <http://www.psc-cfp.gc.ca/plcy-pltq/guides/choix-choix/index-eng.htm>

²⁷ Canada reports that the Choice of Appointment Process Policy, which includes a requirement for organizations to implement monitoring and review provisions, was developed in response to a concern about the percentage of non-advertised posts. Further, section 77(1)(b) provides that an abuse of authority by the Commission in choosing between and advertised and non-advertised internal appointment process is a ground for appeal to the Public Service Staffing Tribunal.

²⁸ Guide to Implementing the Advertising in the Appointment Process Policy, <http://www.psc-cfp.gc.ca/plcy-pltq/frame-cadre/policy-politique/advertising-publicite-eng.htm> The Guide further states that with respect to a reasonable opportunity to apply, it must look at two aspects: (a) reasonable access and an opportunity to apply for employment opportunities and (b) sufficient information to make an informed decision. Reasonable access and opportunity refers to effectively advising/informing potential candidates in an area of selection about employment opportunities, such as advertisement made through electronic or print media or face-to-face contact and providing persons in the area of selection with a reasonable period of time to apply and demonstrate eligibility. Sufficient information refers to providing people with the necessary knowledge up front to help decide whether or not to apply for an advertised job opportunity.

²⁹ Official Languages Act, <http://laws.justice.gc.ca/en/showtdm/cs/O-3.01>

application requirements such as a required form or medium of application and methods used to receive documents, such as mail, email, fax and internet. Deputy heads are also to provide further information upon request, such as the person or organization to whom questions about the appointment process may be directed. Deputy heads also have the discretion to determine a reasonable period of time for applicants to respond to an advertisement. The 'reasonable period of time' has not been defined in order to allow organizations the flexibility to establish time periods that are appropriate for their specific circumstances.³⁰

- Guide to Implementing the Assessment Policy,³¹ which states that persons to be assessed are to be informed, in a timely manner, of the assessment methods to be used, their right to accommodation and how to exercise that right. In addition, it states that assessment boards are to be established at a minimum for assessing the qualifications of candidates to the Executive group.³²

Finally, the Appointment Framework also provides considerations to assist human resource advisors in understanding the expectations of the Public Service Commission in the creation of the Appointment Policy. The Advertising Policy Considerations³³ states that deputy heads should consider a reasonable period of time to respond to an advertisement, which ensures that: a sufficient number of persons make up the candidate pool; the process can proceed in a timely manner; the use of different media such as internet, telephone, newspapers magazines, special journals, career fairs and other recruitment fora are utilized to communicate employment opportunities; and methods such as mail are used to receive documents is taken into account. In addition, advertisements should be documented to support decisions made regarding an appointment process.

- The Classification System and Delegation of Authority Policy,³⁴ which is designed to ensure that the classification system described in the policy establishes the relative value of all work in the Public Service in an equitable, consistent, efficient and effective manner, and provides a basis for the

³⁰ See Guide to Implementing the Advertising in the Appointment Process, *supra* note 28. Considerations may include: a) the number of positions to be filled; b) the area of selection established; c) the number of applications desired to provide a sufficient pool of candidates; d) whether it is an external or internal process; e) the degree of urgency to fill the position; f) the diverse practices across the country (e.g., where an organization has chosen to have an extended period of time to include persons on various work cycles); g) geographic variations, such as different time zones; h) holiday periods; i) the choice of media such as electronic or print, used to communicate employment opportunities to persons; and j) the acceptable method for submitting applications, for example through the mail, electronically, etc.

³¹ Guide to Implementing the Assessment Policy, <http://www.psc-cfp.gc.ca/plcy-pltq/guides/assessment-evaluation/index-eng.htm>. The Guide further states that the policy statement for assessment requires that:

- “the assessment is designed and implemented without bias, political influence or personal favouritism and does not create systemic barriers,
- the assessment processes and methods effectively assess the essential qualifications and other merit criteria identified and are administered fairly, and
- the identification of persons who meet the operational requirements and organizational needs is carried out objectively.”

³² ‘Executive group’ is defined as those “positions located no more than three hierarchical levels below the Deputy or Associate Deputy level and that have significant executive managerial or executive policy roles and responsibilities or other significant influence on the direction of a department or agency. Positions in the Executive Group are responsible and accountable for exercising executive managerial authority or providing recommendations and advice on the exercise of that authority,” Canada Gazette, Part 1, Vol. 133, No. 13, March 27 1999, pg. 821 <http://canadagazette.gc.ca/part1/1999/19990327/pdf/g1-13313.pdf>

³³ Appointment Policy Considerations, <http://www.psc-cfp.gc.ca/plcy-pltq/frame-cadre/policy-politique/consideration/advertising-publicite-eng.htm>

³⁴ Classification System and Delegation of Authority Policy, http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TBM_111/csda-pscd_e.asp

compensation of Public Service employees. Deputy Heads are authorized to classify positions in their respective departments in accordance with this Policy, the appropriate classification standard and the guidelines developed and issued by the Treasury Board Secretariat. In addition, the Policy states that the level of each position shall be established by the evaluation of the work description for that position through the use of the appropriate classification standard³⁵ as determined by the relevant occupational group definition³⁶ for that standard.

- Statutory and other legal provisions applicable to public servants in the Legislative branch, among which the following should be noted:

- Section 2 of the Parliamentary Employment and Staff Relations Act,³⁷ which states that the Act applies to and in respect of every person employed by, among others, the Senate, House of Commons, Office of the Senate Ethics Officer or Office of the Conflict of Interest and Ethics Commissioner. The Act governs the employment and employer and employee relations in the aforementioned entities.

- Section 3 of the Parliamentary Employment and Staff Relations Act, which defines as 'employer': a) the Senate, as represented by such committee or person as the Senate by its rules or orders designates; b) the House of Commons, as represented by such committee or person as the House of Commons by its orders designates; c) the Office of the Senate Ethics Officer, as represented by the Senate Ethics Officer; and d) the Office of the Conflict of Interest and Ethics Commissioner, as represented by the Conflict of Interest and Ethics Commissioner.

- Section 19.3(a) of the Parliament of Canada Act,³⁸ which states that the Standing Senate Committee on Internal Economy, representing the Senate, may act on all financial and administrative matters respecting the Senate, its premises, its services and its staff.

- Section 52.3(a) of the Parliament of Canada Act, which states that the Board of Internal Economy, representing the House of Commons, shall act on all financial and administrative matters respecting the House of Commons, its premises and its staff.

- Section 20.4(3) further states that the Senate Ethics Officer may employ any officers and employees and may engage the services of any agents, advisers and consultants that the Senate Ethics Officer considers necessary for the proper conduct of the work of the office the Senate Ethics Officer.

- Section 84(3) of the Parliament of Canada Act, which states that the Conflict of Interest and Ethics Commissioner may employ any officers and employees and may engage the services of any agents and mandataries, advisers and consultants that the Commissioner considers necessary for the proper conduct of the work of the office the Commissioner.

- The Senate Administration Staffing and Recruitment Policy,³⁹ whose objective is, among others, to support merit as well as to apply the appointment values of fairness, transparency and access to all

³⁵ List of Classification Standards, Point Levels and Ranges,

³⁶ Occupational Group Definitions, http://www.psagency-agencefp.gc.ca/classification/OrgGroupStruct/OGD_e.asp

³⁷ Parliamentary Employment and Staff Relations Act, <http://laws.justice.gc.ca/en/showtdm/cs/P-1.3>

³⁸ Parliament of Canada Act, <http://laws.justice.gc.ca/en/showtdm/cs/P-1>

³⁹ Senate Administration and Staffing and Recruitment Policy. The Policy is applicable to all employees of the Senate Administration, other than (a) the Clerk of the Senate and Clerk of the Parliaments; (b) the Usher of the Black Rod; (c) the Deputy-Clerk of the Senate; (d) the Law Clerk and Parliamentary Counsel; or (e) a member of the staff of any Senator.

staffing and recruitment activities within the Senate Administration. In this Policy document, the following should be noted:

- Section 2.1, which states that appointment decisions are based on the principle of merit, meaning that a person meets all the essential qualifications and any asset qualifications, operational requirements or organizational needs that may have been identified by the manager.⁴⁰
- Section 2.2, which states that the appointment process and decision respect the key values of fairness, transparency and accessibility.⁴¹
- Section 3.2, which states that an area of selection, which determines who is eligible to participate in a staffing or recruitment process and who has a right of recourse, may be established based on geographical and organizational criteria.
- Section 3.4, which states that the individual selected for an appointment must possess all the essential qualifications, meet any asset qualifications, operational requirements and organizational needs and be in the area of selection.
- Section 3.6, which states that an employee⁴² may grieve, in writing, an appointment or proposed appointment within 15 business days of the date of notification, indicating the grounds of complaint. The Clerk of the Senate, or authorized representative considers the complaint, and the decision is final and conclusive unless the grievance is sent to arbitration under Section 63(1)(e) of the Parliamentary Employment and Staff Relations Act.⁴³

- The House of Commons Staffing Policy,⁴⁴ whose objective, among others, is to provide direction for staffing at the House of Commons that produces a consistent approach to staffing and that establish policy principles that support fair, transparent and accountable staffing practices. In this Policy document, the following should be noted:

- Section 4, which states that following principles are to guide its staffing actions and decisions: a) valuing employees; b) fairness; c) flexibility; d) transparency; e) competence; f) non-partisanship; and g) accountability.

⁴⁰ This document also states that ‘merit’ is respected when: a) the manager appoints a person who meets all essential qualifications; and b) the manager gives consideration to any additional criteria deemed an asset to the work to be performed or that meets any current or anticipated operational needs or organizational requirements of the Senate. See also Section 3.1.

⁴¹ These terms are defined as follows, “Fairness means decisions are made objectively, free from bureaucratic, personal and political favouritism; policies and practices reflect the fair and equitable treatment of employees and applicants. Transparency means information about decisions, policies and practices is communicated in an open and timely manner. Access means having a reasonable opportunity to apply and be considered for a position within the Senate Administration.”

⁴² ‘Employee’ is defined for the purpose of the policy as meaning a person employed in the Senate Administration on an indeterminate basis or a person employed for a specified period of six months or more.

⁴³ Section 63(1)(e) of the Parliamentary Employment and Staff Relations Act states: “63. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to... (e) where the employee has been denied an appointment, the employer’s evaluation of the skill, fitness and ability of the employee with respect to the employee’s qualification for the appointment... and the grievance has not been dealt with to the satisfaction of the employee, the employee may refer the grievance to adjudication,” *supra* note 37.

⁴⁴ House of Commons Staff Policy. The policy is applicable to employees of the House of Commons Administration.

- Section 7.2.3, which states that managers are responsible for determining the area of selection from which candidates will be drawn for staffing purposes and for determining whether competitions are open or closed.
- Section 7.2.4, which states that competitive staffing process is normally used to fill a vacancy.
- Section 7.2.4.1, which states that job opportunities are to be communicated and sufficient time needed for potential candidates to express their interest in a position.
- Section 7.2.5, which states that selection, is based on an assessment of a candidate's competencies and qualifications required to fulfill the duties of a position. The selection is made through a three-step process: screening applications, assessment and appointment.⁴⁵
- Section 7.2.6, which states that non-competitive processes may be used to fill a position. A manager must obtain approval from a Service Head with the appropriate delegation of authority.
- Section 7.5, which states that employees may raise concerns regarding a staffing process, informally, via individual feedback, or formally through the grievance process in the Parliamentary Employment and Staff Relations Act.
 - Statutory and other legal provisions applicable to public servants in oversight bodies, among which the following should be noted:

- Section 15(1) of the Auditor General Act,⁴⁶ which provides that the officers and employees that are necessary to enable the Auditor General to perform his or her duties are to be appointed in accordance with the Public Service Employment Act and that the provisions of that Act apply to those office and employees.

- Section 15(2) of the Auditor General Act, which states that the Auditor General may exercise the powers and perform the functions of the employer and deputy head under the PSEA, within the meaning of that Act.

- Section 15(3) of the Auditor General Act, which provides that the Auditor General may exercise the powers and perform the functions of the Public Service Commission under the PSEA.

1.1.2. Adequacy of the legal framework and/or other measures

With respect to the legal provisions that refer to the systems of government hiring that the Committee has examined, based on the information available to it, they constitute a set of measures relevant to promoting the purposes of the Convention.

⁴⁵ The three step process is explained as thus: “1) *Screening applications*: At this stage, the applications of the candidates are reviewed to ensure that they meet the prerequisites identified in the notice of job opportunity. Only candidates meeting the prerequisites will be considered. 2) *Assessment*: Managers, in consultation with Human Resources, are responsible for using a variety of assessment methods to determine to what extent the candidates possess the competencies or qualifications required for the position. Managers ensure that the processes are thorough and transparent and that the results are well documented. 3) *Appointment*: When qualified candidates have been identified, managers will appoint the candidate who, following the assessment, best meets the needs of the organization.”

⁴⁶ Auditor General Act, <http://laws.justice.gc.ca/en/showtdm/cs/A-17>

Notwithstanding, the Committee considers it appropriate to make a number of observations on the advisability of developing and complementing certain legal provisions that refer to those systems.

The Committee observes that the PSEA, as noted in the previous section, is applicable to employment in the public service in departments, organizations and separate agencies listed in Schedules I, IV and V of the Financial Administration Act. However, a number of separate employers, such as the Canada Revenue Agency and Canada Post, are not governed by the PSEA and conduct their own recruitment.⁴⁷ In this regard, as noted under Section 1.1.1., the Office of the Auditor General, although not governed by the PSEA, conducts its recruitment in accordance with the PSEA. The Committee observes that this is an indication that these institutions have been taking steps to conduct government hiring consistent with the principles and objectives of the PSEA. Nevertheless, the Committee believes it advisable for those institutions not covered by the PSEA to consider conducting its recruitment based on the principles of merit and non-partisanship and in which these values are independently safeguarded. In this regard, the Committee will make a recommendation (see Recommendation 1.1(a) in Chapter III of this Report).

The Committee would also like to note that the Office of the Senate Ethics Officer and the House of Commons Office of the Conflict of Interest and Ethics Commissioner, while separate and distinct from the Senate and the House of Commons, do form part of the Legislative branch.⁴⁸ Their duties and functions include providing advice and recommendations regarding the conflict of interest rules in the Senate and the House of Commons. As such, it helps ensure the integrity of these legislative bodies and increase confidence in the parliamentary and government institutions through greater transparency and accountability.⁴⁹ This, in turn, suggests that these Offices should also maintain a high degree of integrity, transparency and accountability in their respective recruitment process. As noted by the Senate Ethics Officer,

*“One of our priorities is to ensure that we inspire confidence in the Senate Ethics Office and its work. This means that we, internally, must expect the highest standards of behaviour of ourselves. In the course of this last year, the Senate Ethics Office has adopted a number of policies and procedures in order to ensure that we are transparent, accountable and effective. We believe we should expect of ourselves what is expected of others.”*⁵⁰

In both Offices, the Committee has not found policies regarding staffing and recruitment, though this is explained by their relatively recent establishment and staffing needs. For example, the Senate Ethics Officer reported in its 2005 – 2006 Annual Report that it was deemed more efficient and cost-effective to finalize a multi-year agreement with the Senate Administration for the provision of support services, on a cost-recovery basis, including human resource services for its Office.⁵¹ As for the Office of the Conflict of Interest and Ethics Commissioner, it was established in 2005⁵² and nine

⁴⁷ For a full list of the governmental organizations not governed by the PSEA, see http://jobs-emploi.gc.ca/menu/useful-info_e.htm#nonpsea

⁴⁸ See the 2006 – 2007 Office of the Senate Ethics Officer Annual Report, pg. 2, <http://www.sen.parl.gc.ca/seocse/PDF/AnnualRep0607-e.pdf> and the 2004 - 2005 Annual Report of the Ethics Commissioner, pg. 5, http://www.parl.gc.ca/ciec-ccie/en/archives/ethics_commissioner/annual_reports/reports/AR05_MP_EN.pdf

⁴⁹ See Office of the Senate Ethics Officer, <http://www.sen.parl.gc.ca/seocse/eng/Home-e.html>

⁵⁰ 2006 – 2007 Office of the Senate Ethics Officer Annual Report, pg. 21, *supra* note 48.

⁵¹ 2005 – 2006 Office of the Senate Ethics Officer Annual Report, pg. 20,

<http://www.sen.parl.gc.ca/seocse/PDF/AnnualReport0506-e.pdf>

⁵² As initially the Office of the Ethics Commissioner before the change in name with the recent amendments to the Parliament of Canada Act through the Federal Accountability Act (Amendment to the Parliament of Canada Act), Section 28,

of twenty employees that worked in the Office of the Ethics Counsellor , the precursor to the current Office, accepted to continue working in the new one.⁵³ Since then, it has an office of 35 full-time employees and the Office:

*“[C]ontinues to work toward the development and implementation of internal human resources policies and practices to improve the effectiveness and efficiency of the Office and the quality of the workplace. As part of this effort, the employer-employee committee has continued to make recommendations to the Ethics Commissioner on policies, practices and procedures in human resources management.”*⁵⁴

The Committee notes with appreciation the commitment by the Office of the Senate Ethics Officer and the Office of the Conflict of Interest and Ethics Commissioner to adopt appropriate hiring practices. The Committee encourages these Offices to continue with the work. In this regard, the Committee will formulate a recommendation (see Recommendation 1.1(b) in Chapter III of this Report).

1.1.3. Results of the legal framework and/or other measures

With respect to results, the Committee notes that Canada provided relevant statistics government hiring for the period 2005-2006:⁵⁵

“There was a total of 100,230 staffing actions in 2005-2006. Over three quarters of a million applications were received and 15,000 Canadians were hired into the public service...

In 2005-2006, 56% of the appointments to the public service were advertised, and 44% were not advertised. In the case of promotions within the public service, 39% were advertised and 61% were not advertised.

In 2005-2006, 500 requests for investigations were received. Of this number, 232 cases were opened for investigation. In the same year, 159 investigation cases were closed: in 32 cases (20%) the complaints were founded; 66 (42%) were resolved through mediation or some other informal resolution mechanism; 37 (23%) complaints were deemed unfounded; and 24 (15%) were either withdrawn or discontinued.

In 2005-2006, the average time for concluding an investigation was 148 days, if all investigation requests are taken into account, but 267 days if we do not include requests for which an official investigation was not opened.

In 2005-2006 fiscal year, 1,098 selection processes, involving 2,217 appellants, were appealed to the Commission. In all, 1,035 appeals were dealt with during this fiscal year 126 (12%) were allowed and 331 decisions were written. Appeals were allowed for a variety of reasons, including the following:

- *improper assessment of qualifications by the selection board;*

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=2614169&file=4>

⁵³ 2004 - 2005 Annual Report of the Ethics Commissioner, pg. 5, *supra* note 48.

⁵⁴ 2006 – 2007 Annual Report of the Ethics Commissioner, pg. 10,

http://www.parl.gc.ca/ciec-ccie/en/archives/ethics_commissioner/annual_reports/reports/AR07_MP_EN.pdf

⁵⁵ Response to the Questionnaire, pgs. 3 – 4, *supra* note 16.

- *failure to assess certain qualifications; or*
- *the conduct of the selection board was questioned (bad faith, bias or unfair advantage).*

In 2005-2006, 12 appointments were revoked following an allowed appeal. The average time for concluding an appeal in 2005-2006 was 84 calendar days. These statistics relate to appeals under the former PSEA Appeal Board, which was replaced by the Public Service Staffing Tribunal in January 2006. No statistics are available as yet for the new Tribunal.”

The 2006 – 2007 Annual Report of the Public Service Commission provides further statistics, regarding the operation of the government hiring system. For example, in 2006-2007, a total of 22.9 million visits were made to www.jobs.gc.ca and 70 588 calls were made to Infotel. During this time period, 5671 advertisements were posted on the web site, which represented approximately 10 500 positions. Over 1.07 million applications were received from over 260 000 individual job seekers.⁵⁶

In addition, in 2006-2007, the Commission opened 288 files regarding appointment processes under the PSEA, which might have warranted an investigation. Of these files, the Commission retained 90 files for an investigation and closed 128 without initiating an investigation because, for example, upon preliminary analysis the issue did not fall within the Commission’s jurisdiction. At the time of the publication of the Annual Report, the Commission had not made a decision on the remaining files. In addition, the Commission states the following as the types of issues under investigation:

- “Abuse of authority - Management actions were such that it is believed that the merit criteria were established to achieve the identification of a specific person as the "right fit" for the position.
- Assessment - The manner in which the assessment was conducted was not reasonable or was believed to be unfair (for example, applicants during the interview were not permitted to exceed a specified time limit).
- Basic screening - Applicants believed that their experience, as indicated on their applications, should have permitted them to continue in the process.
- Public Service Resourcing System (PSRS) - Applicant was eliminated from consideration at the pre-selection stage as a result of an out-of-date user profile on the PSRS electronic screening system.”⁵⁷

Seven investigations were completed in which two investigation files were unfounded; three investigations files were discontinued; and two were resolved through early intervention.

The Public Service Commission also makes public a supplementary table of statistics to its Annual Reports that contain overall hiring and staffing activities; tenure and previous employment status; staffing activity rates by occupational category and type of staffing activity; staffing activity rates by type and geographic area; staffing activities by type and employment equity designated groups; staffing activities by type and language group; staffing activities by type and official languages;

⁵⁶ 2006 – 2007 Public Service Commission Annual Report, pgs. 102 – 103, <http://www.psc-cfp.gc.ca/arp-rpa/2007/rpt-eng.pdf>

⁵⁷ *Ibid.*, pg. 89.

distribution of recruits under recruitment programs, by geographic area; and staffing activities by type and department.⁵⁸

Canada also states in its Response to the Questionnaire that:

“With respect to objective results, the PSC [Commission] conducts semi-annual surveys in support of its role in the oversight of merit-based staffing. The focus of the survey is to examine appointments made with merit, with a primary interest in indeterminate recruitment, promotions and lateral appointments. The information gathered contributes to a service-wide perspective of staffing needs and helps to identify areas where improvements can be made to the staffing system.”⁵⁹

Examples of these studies can be found at the following website: <http://www.psc-cfp.gc.ca/adt-vrf/index-eng.htm>

Regarding the information on the results available on the government hiring process undertaken by the Public Service Commission, the Committee notes that the country under review does maintain detailed statistics on the matter. Nevertheless, the Committee believes that Canada may consider maintaining statistics that break down the investigations conducted by the Commission regarding an appointment process. When looking at the numbers provided in the 2006 – 2007 Annual Report of the Public Service Commission and that provided in the Response to the Questionnaire, it is unclear how many investigations were conducted regarding an external appointment process (Section 66 of the PSEA), an internal appointment process (Section 67) and if any investigations were initiated due to political influence (Section 68) or fraud (Section 69). The Committee does take note that this might be due to the fact that the PSEA was recently restructured. In this regard, the Committee will formulate a recommendation (see Recommendation 1.1(c) in Chapter III of this Report).

1.2. GOVERNMENT SYSTEMS FOR THE PROCUREMENT OF GOODS AND SERVICES

1.2.1. Existence of provisions in the legal framework and/or other measures

Canada has a set of provisions related to the above-mentioned systems, among which the following should be noted:

- The Financial Administration Act,⁶⁰ which provides the legal framework for public financial administration in Canada, such as the collection and expenditure of public funds, including contracting practices, and is applicable to all three branches of government. The following provisions of the Act should be noted:

- Section 7(1)(a), which establishes that the Treasury Board is responsible for general administrative policy in the federal public administration, granting it the exclusive legislative authority to set procurement policy for Canada.⁶¹ Section 7(1)(c) further provides that the Treasury Board is responsible for matters relating to “financial management, including estimates, expenditures, financial commitments, accounts, fees or charges for the provision of services or the use of facilities, rentals, licences, leases, revenues from the disposition of

⁵⁸ 2006-2007 Annual Report Supplementary Tables (April 1, 2006 to March 31, 2007), <http://www.psc-cfp.gc.ca/arp-rpa/2007/st-ts/index-eng.htm>

⁵⁹ Response to the Questionnaire, pg. 4, *supra* note 16.

⁶⁰ Financial Administration Act, *supra* note 5.

⁶¹ Response to the Questionnaire, pg. 6, *supra* note 16.

property, and procedures by which departments manage, record and account for revenues received or receivable from any source whatever.”

- Section 40.1, which provides that the Government of Canada is committed to taking the appropriate measures to foster fairness, openness and transparency in the bidding process for the performance of work, the supply of goods or the rendering of services.
 - Section 41, which provides the authority to make regulations with respect to conditions under which contracts may be entered into.
 - Section 42, which provides the authority to make regulations regarding contracts, including, among others: a) a prohibition of payment of contingency fees by any party to a contract to a person to whom the Lobbyists Registration Act applies; b) regarding corruption and collusion in the bidding process for contracts; c) requiring that a bidder to a contract declare that the bidder has not committed an offence under section 121, 124 or 418 of the Criminal Code;⁶² and d) requiring the public disclosure of basic information on contracts that have a value in excess of \$10,000.
 - Section 80(1), which provides for sanctions, among others, for any officer or person acting in any office or employment connected with the collection, management or disbursement of public money who: conspires or colludes with any other person to defraud Her Majesty; permits any contravention of the law by any other person; or willfully makes or signs any false entry into any book or any false certificate or return. Section 80(2) also provides for sanctions when an officer or person acting in any office or employment connected with the collection, management or disbursement of public money defrauds Her Majesty of any money, securities, property or service through deceit, falsehood or other fraudulent means.
 - Section 154.01, which provides for sanctions for any director, officer or employee of a Crown corporation connected with the collection, management or disbursement of public money defrauds Her Majesty of any money, securities, property or service through deceit, falsehood or other fraudulent means.
- The Department of Public Works and Government Services Act,⁶³ of which the following provisions should be noted:
- Section 6, which provides that the Minister of Public Works and Government Services is the procurement arm of the Government of Canada. The Minister has the powers, duties and functions, among others, relating to the acquisition and provision of articles, supplies, machinery, equipment and other materiel for departments; the acquisition and provision of services or departments; the planning and organizing of the provision of materiel and services for departments; and the construction, maintenance and repair of public works, federal real property and federal immovables.

⁶² Criminal Code, <http://laws.justice.gc.ca/en/C-46/>. Section 121 addresses frauds on the government; section 124 on the selling or purchasing office; and section 418 on selling defective stores to Her Majesty.

⁶³ Department of Public Works and Government Services Act, <http://laws.justice.gc.ca/en/showtdm/cs/P-38.2>

- Section 9, which provides that the Minister shall exercise the powers in relation to the acquisition and provision of materiel for the use of any department that are conferred on any minister or other authority under any Act of Parliament.

- The North American Free Trade Agreement Implementation Act⁶⁴ and the World Trade Organization Agreement Implementation Act.⁶⁵ These Acts implement the North American Free Trade Agreement (NAFTA) and the World Trade Organization's Agreement on Government Procurement (WTO - AGP) into Canadian law and contain common detailed provisions regarding government procurement.⁶⁶ These provisions become applicable when minimum monetary thresholds are met.⁶⁷ As noted by the country under review in its Response:

*“As a party to NAFTA and the WTO-AGP, Canada has agreed to provide suppliers from other jurisdictions with an equal opportunity to compete with Canadian suppliers for covered goods, service and construction services bought by specified government departments, agencies and crown corporations. Notable exceptions to coverage are: communication services, transportation and relocation services, shipbuilding and repair, and goods and services related to military operations. The agreements also allow exemptions for reasons of national security and for small and minority businesses.”*⁶⁸

The following provisions should be noted:

- Each Party should ensure that tendering procedures⁶⁹ of its entities are applied in a non-discriminatory manner and that no Party may prepare, design or otherwise structure any procurement in order to avoid the obligations of the Agreements. In that regard, the Parties are to ensure that its entities do not provide any supplier information with regard to a specific procurement that would have the effect of precluding competition and provide all suppliers equal access to information with respect to a procurement. In addition, an entity may not select a valuation method or divide a procurement into separate contracts, to avoid the obligations of the trade agreements (NAFTA Articles 1002 and 1008; WTO - AGP, Articles II, III and VII);

⁶⁴ North American Free Trade Agreement Implementation Act, <http://laws.justice.gc.ca/en/showtdm/cs/N-23.8>. The Parties to the North American Free Trade Agreement are Canada, the United States and Mexico, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/index.aspx#PartIV>

⁶⁵ World Trade Organization Agreement Implementation Act, <http://laws.justice.gc.ca/en/showtdm/cs/W-11.8>

⁶⁶ In the case of the WTO, it is the Agreement on Government Procurement, http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm The Parties to the Agreement on Government Procurement are Canada; the European Communities; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; and the United States, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties

⁶⁷ Currently, in the case of the NAFTA, the thresholds are: \$28,200 (United States) or \$76,500 (Mexico) for goods; \$76,500 for services; and \$9,900,000 for construction. In the case of the WTO Agreement on Government Procurement, the thresholds are: \$217,400 for goods and services; and \$8,300,000 for construction, see Contracting Policy Notice 2007-05 dated December 14, 2007, http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2007/1214_e.asp

⁶⁸ Response to the Questionnaire, pg. 12, *supra* note 16.

⁶⁹ Tendering Procedure in the NAFTA is defined as “open tendering procedures, selective tendering procedures and limited tendering procedures,” *supra* note 64. The WTO – AGP also uses the same terms, see Article VII, *supra* note 66.

- In the process of qualifying suppliers in a tendering procedure, no Party may discriminate between suppliers of other Parties or between domestic ones and suppliers of other Parties (NAFTA Article 1009; WTO - AGP, Article VIII);
- Parties are to publish an invitation to participate in a tender, which shall contain, among others, description of the goods or services to be procured; whether the procedure is open,⁷⁰ selective⁷¹ or involve negotiation; time limits for receipt of tenders or applications; the address to which the tenders are to be submitted; a statement that interested suppliers should express their interest in the procurement and; the identification of a contact point within the entity awarding the contract from which further information may be obtained (NAFTA Article 1010; WTO - AGP, Article IX);
- Under a selective tendering procedure, an entity shall invite tenders from the maximum number of domestic suppliers and those from the other Parties. An entity that maintains a permanent list of qualified suppliers may select suppliers to be invited from among those listed and where an entity does not invite or admit a supplier, the entity shall promptly provide pertinent information to the supplier concerning its reasons, on request from the supplier (NAFTA Article 1011; WTO - AGP, Article X);
- Entities are to provide adequate time to allow suppliers to prepare and submit tenders.⁷² In an open tendering procedure, in general, the period of receipt of tenders is no less than 40 days from the date of publication of a notice; in a selective tender not involving a permanent list of qualified suppliers, the period for submitting an application to be invited to tender is no less than 25 days from the date of publication of a notice and the period of receipt of tenders is no less than 40 days; and in a selective tender involving the use of a permanent list of suppliers, the period for receipt is no less than 40 days from the date of the initial issuance of invitations to tender (NAFTA Article 1012, WTO - AGP, Article XI);
- Entities, when providing tender documentation, shall provide information necessary for suppliers to submit tenders, such as, among others: a) the address of entity to which the tenders should be sent; b) the address for obtaining supplementary information; c) closing date and time for receipt of tenders; d) a statement of any economical and technical requirements to be met; e) a complete description of goods or services required and any other technical specifications; and f) the criteria for awarding the contract, including factors other than price that are to be considered and the cost elements to be included in the evaluation, such as transport, insurance and inspection costs, and in the case of goods or services of any other Party, customs duties and other import charges, taxes and currency of payment (NAFTA, Article 1013, WTO - AGP, Article XII);
- An entity may conduct negotiations so long as the intention is published with the tender notice or where it appears from the evaluation of the tenders that no one tender is obviously

⁷⁰ Both the NAFTA and the WTO - AGP define open tendering as “those procedures under which all interested suppliers may submit a tender,” NAFTA, Article 1025 and WTO - AGP, Article VII(3)(a), *supra* notes 64 and 66, respectively.

⁷¹ Both the NAFTA and the WTO - AGP define selective tendering as “those procedures under which...those suppliers invited to do so by the entity may submit a tender,” NAFTA, Article 1025 and WTO - AGP, Article VII(3)(b), *supra* notes 64 and 66, respectively.

⁷² Article 1012(1)(b) further states that Parties “in determining a time limit, consistent with its own reasonable needs, take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated, and the time normally required for transmitting tenders by mail from foreign as well as domestic points,” NAFTA, *supra* note 64.

the most advantageous. All tenders are to be treated in confidence and in the course of negotiations, no entity may discriminate between suppliers and only eliminate them in accordance with criteria set out in the notices and tender documentation. Entities are also to provide in writing all modifications to the criteria or technical requirements to all suppliers remaining in the negotiation and permit all suppliers to submit new or amended tenders based on the modified criteria or requirements (NAFTA, Article 1014; WTO - AGP, Article XIV);

- Entities shall allow tenders to be submitted in writing directly or by mail, and the submissions must be confirmed promptly by letter or by dispatch of a signed copy of the telex, telegram teletype or electronic message, when these means of transmission are permitted. All tenders, under an open or selective tendering process, shall be received and opened under procedures and conditions guaranteeing the regularity of the opening of tenders. In addition, to be considered for award, tenders must, at the time of opening, conform to the essential requirements of the tender notice and that awards shall be made in accordance with the criteria and essential requirements specified in tender documentation. In addition, awards shall be made to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender that in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous. An entity shall, on request, promptly inform suppliers in a tendering process of the decision on the award and provide the unsuccessful bidder pertinent information concerning the reasons for not selecting its tender. The award of the contract is to be published no later than 72 days after it has been made⁷³ (NAFTA Article 1015, WTO - AGP, Articles XII, XIII and XVIII);
- Limited tendering⁷⁴ procedures may be used among others, for works of art; for reasons connected with the protection of intellectual property, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists; for reasons of extreme urgency brought about by unforeseeable events; for goods purchased on the commodity market; and for a contract to be awarded to the winner of an architectural design. Each entity is to prepare a report in writing on each of these contracts that justifies its use (NAFTA, Article 1016, WTO - AGP, Article XV);
- Each Party is to adopt and maintain bid challenge procedures in order to promote fair, open and impartial procurement procedures. Suppliers may submit bid challenges concerning any aspect of the procurement process after an entity has decided on its procurement requirement and continues through the contract award. A bid challenge may be initiated no less than 10 working days from the time the basis of the complaint became known or reasonably should have become known. For these purposes, each Party is to establish or designate a reviewing authority, which shall investigate the challenge expeditiously. The reviewing authority may delay the awarding of a contract pending the resolution of the challenge, except in cases of urgency or when the delay would be contrary to the public interest. Decisions are to be made in writing and in a timely manner and shall be made available to the Parties and interested persons (NAFTA Article 1017, WTO - AGP, Article XX);

⁷³ The award is to contain the following: "(a) a description of the nature and quantity of goods or services included in the contract; (b) the name and address of the entity awarding the contract; (c) the date of the award; (d) the name and address of each winning supplier; (e) the value of the contract, or the highest-priced and lowest-priced tenders considered in the process of awarding the contract; and (f) the tendering procedure used," Article 1015(7), *ibid*.

⁷⁴ Both the NAFTA and the WTO - AGP define limited tendering as "those procedures where the entity contacts suppliers individually," NAFTA, Article 1025 and WTO - AGP, Article VII(3)(c), *supra* notes 64 and 66, respectively.

- Exceptions to the provisions are allowed when, among other things, a Party considers it necessary for the protection of essential security interests relating to the procurement of arms, ammunition or war materials; necessary to protect public morals, order or safety; necessary to protect human, animal or plant life or health; or necessary to protect intellectual property (NAFTA Article 1018; WTO - AGP, Article XXIII).

- The Agreement on Internal Trade Implementation Act,⁷⁵ which implements a domestic trade agreement signed by the federal, provincial and territorial governments for the purpose of lowering internal trade barriers.⁷⁶ The Agreement on Internal Trade (AIT) contains provisions on government procurement that are very much similar to that of the NAFTA and the WTO Agreement on Government Procurement. As with those Agreements, these provisions become applicable when minimum monetary thresholds are met.⁷⁷ As noted by the country under review in its Response, with regard to this Agreement:

“[T]he federal government has agreed to provide all Canadian suppliers with equal access to procurement for most goods, services and construction services in the departments, agencies and Crown Corporations listed in the Annexes. Notable exceptions to coverage are advertising and public relations services, health services and social services as well as exemptions for national security, for measures with respect to aboriginal peoples and for regional economic development.”⁷⁸

Chapter Five of this Agreement sets out a framework for public sector procurement based on the principles of non-discrimination, transparency, openness and ease of access to tender information.⁷⁹ The following provisions should be noted:

- The Federal Government is to not discriminate between the goods and services of a particular Province or region, including those goods and services included in construction contracts (AIT, Article 504);
- No entity can prepare, design or otherwise structure a procurement, select a valuation method or divide a procurement in order to avoid the obligations of the AIT (AIT, Article 505);
- Call for tenders are to be carried out through a) the use of an electronic tendering system that is equally accessible to all Canadian suppliers; b) publication in one or more predetermined daily newspapers that are easily accessible to all Canadian suppliers; or c) the use of a source list. (AIT Article 506(2))
- A notice for call of tenders is to contain: a brief description of the procurement; the place where a person may obtain information on tender documents; the conditions for obtaining the tender documents; the place where tenders are to be sent; the date and time limit for submitting tenders; the time and place of the opening of tenders in the event of a public opening; and a statement that the procedure is subject to Chapter 5 of the AIT (AIT Article 506(4));

⁷⁵ Agreement on Internal Trade Implementation Act, <http://laws.justice.gc.ca/en/showtdm/cs/A-2.4>. A copy of this Agreement is found at <http://www.ait-aci.ca/en/ait/AIT%20Original%20with%20signatures.pdf>

⁷⁶ Nunavut, a territory in Canada, is not a signatory to the agreement and has observer status, see http://www.ait-aci.ca/index_en.htm.

⁷⁷ Currently, the thresholds are: \$25,000 for goods; \$100,000 for services; and \$100,000 for construction, Agreement on Internal Trade, Article 502, *supra* note 75.

⁷⁸ Response to the Questionnaire, pg. 12, *supra* note 16.

⁷⁹ Agreement on Internal Trade Government website, http://www.ait-aci.ca/index_en/procure.htm

- In the evaluation of tenders, a Party may take into account not only the submitted price, but also the quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other relevant criteria (AIT Article 506(6));
- Entities may limit tenders to suppliers qualified prior to the close of call for tenders. An entity may also limit a contract award to suppliers that have been assessed by an independent nationally recognized and industry supported organization (AIT Articles 506(7) and 506(8));
- Tender notices are to indicate whether the procurement is exempted from the obligations of the AIT (AIT Article 506(9));⁸⁰
- Entities that use a source list shall include information in its policies, procedures and practices; provide written confirmation of registration to any supplier; and on request, provide a Party with the tender notice and the list of suppliers that will be invited to bid on a specific tender (AIT Article 506(10));
- Entities may not follow the procurement procedures, among others, in the following circumstances, among others: for an unforeseen urgency; goods or services regarding matters of a confidential or privileged nature; where a contract is to be awarded under an international cooperation agreement; or where compliance would interfere with a Party's ability to maintain security or protect human, animal or plant life or health (AIT Article 506(11));
- Entities may use different procurement procedures when only one supplier is able to meet the requirements of a procurement in the following cases, among others: for goods purchased on the commodity market; for a contract to be awarded to the winner of a design contest; for the procurement of original works of art; and for the procurement of real property (AIT, Article 506(12)).

- The Federal Accountability Act,⁸¹ which established the Procurement Ombudsman in amendments to the Department of Public Works and Government Services Act. The Procurement Ombudsman will have the following functions:

- review procurement practices across government to assess their fairness, openness and transparency and make any appropriate recommendations for the improvement of those practices;
- handle complaints from potential suppliers respecting the compliance with any regulations made under the Financial Administration Act of the award of a contract;⁸²
- review complaints regarding contract administration;

⁸⁰ The exceptions to the procedures for procurement can be found at <http://www.marcan.net/english/index2.htm>. These include exceptions for services, non-application, circumstances for different procedures, circumstances for sole source, regional and economic development, legitimate objectives, aboriginal peoples, culture and national security.

⁸¹ Federal Accountability Act, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=2614169&file=4>

⁸² Complaints can only be made after the contract award has been made, and the Procurement Ombudsman may not recommend the cancellation of an award, section 306, *ibid*.

- ensure the provision of an alternative dispute resolution process for contracts; and
 - submit an annual report to be tabled in Parliament
- The Canadian International Trade Tribunal Act,⁸³ which provides that one of the Tribunal's responsibilities is to review bid challenges brought forward under the NAFTA, WTO - AGP and the AIT.⁸⁴ The following provisions should be noted:
- Section 30.11, which provides that a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract⁸⁵ and request that the Tribunal conduct an inquiry into the complaint.
 - Section 30.13, which provides that the Tribunal may order a government institution to postpone an award of a contract until the validity of the complaint is determined.
 - Section 30.15(2), which provides that when the Tribunal determines that a complaint is valid, it may recommend the following remedies: a) a new solicitation; b) the bids be re-evaluated; c) the designated contract be terminated; d) the designated contract be awarded to the complainant; or e) that the complainant be compensated by an amount specified by the Tribunal.
 - Section 30.15(3), which provides that the criteria to be applied in determining the appropriate remedy: a) seriousness in the deficiency in the procurement process; b) degree to which the complainant and all other parties were prejudiced; c) degree to which the integrity and efficiency of the competitive procurement system was prejudiced; d) whether the parties acted in good faith; and e) extent to which the contract was performed.
 - Section 30.17, which provides that an interested party may intervene in the proceedings, with leave of the Tribunal.
 - Section 30.18, which provides that government institutions are to implement the recommendations of the Tribunal to the greatest extent possible. If the recommendations are not implemented fully, the government institution must inform the Tribunal in writing of the reasons for not doing so. The government institution must also provide in writing, to the Tribunal, the extent to which it has implemented the recommendations.
- As aforementioned in Section 1.1.1., statutory provisions such as sections 18 and 18.1 of the Federal Courts Act,⁸⁶ which provides the basis for judicial review for decisions of a federal board, commission or other tribunal. The grounds of review are set out in Section 18.1(4). The Federal Court may grant relief when it is satisfied that a federal board, commission or other tribunal: (a) acted

⁸³ Canadian International Trade Tribunal Act, <http://laws.justice.gc.ca/en/C-18.3/index.html>

⁸⁴ Response to the Questionnaire, pg. 10, *supra* note 16.

⁸⁵ Section 30.1 defines this term as "a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations. This term is further defined under Section 3(1) of the Canadian International Trade Tribunal Procurement Inquiry Regulations as "For the purposes of the definition designated contract in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade or in Article I of the Agreement on Government Procurement, by a government institution, is a designated contract," <http://laws.justice.gc.ca/en/showfulldoc/cr/sor-93-602//en>

⁸⁶ Federal Courts Act, *supra* note 14.

without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record; (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; (e) acted, or failed to act, by reason of fraud or perjured evidence; or (f) acted in any other way that was contrary to law.

- The Criminal Code,⁸⁷ which contains specific provisions that set out criminal sanctions for inappropriate behavior related to the procurement process. These include section 121 (frauds on the government); section 124 (selling or purchasing office), section 380 (fraud); and section 418 (selling defective stores to Her Majesty). Furthermore, section 750(3) states that no person convicted under section 121, 124, 380 or 418 of the Criminal Code, or under section 80(1)(d), 80(2) or 154.01 of the Financial Administration Act may contract with the government or benefit from a government contract.

- The Code of Conduct for Procurement,⁸⁸ which “consolidates the federal government’s measures on conflict of interest and anti-corruption as well as other legislative and policy requirements relating specifically to procurement.”⁸⁹ It serves as a single point of reference that sets out key responsibilities and obligations in order to promote the highest standards of ethical conduct and ensure fairness, openness and transparency in the procurement process. The Code contains the following, among others:

- Responsibilities of public servants. Public servants are to uphold the democratic, professional, ethical and people values contained in the Values and Ethics Code for the Public Service and comply with the conflict of interest and post-employment measures contained therein.⁹⁰ They are also to comply with the Financial Administration Act in reporting to a superior officer any knowledge or information related to its contravention or of any fraud committed by any person against Her Majesty.
- Responsibilities of vendors.⁹¹ Vendors are to respond to bids in an honest, fair and comprehensive manner. They are also required to alert the contracting authority to any factual errors discovered in bid solicitations. All contracts subject to the Code are to contain clauses that prohibit the payment of contingency fees; prohibit corruption and collusion in the bidding process; and require bidders to make a declaration that the bidder has not committed an offence under sections 121, 124, 380 and 418 of the Criminal Code and sections 80(1)(d), 80(2) or 154.01 of the Financial Administration Act. A vendor must certify that it meets these provisions. In addition, a vendor is to avoid any action that would

⁸⁷ Criminal Code, <http://laws.justice.gc.ca/en/C-46/>

⁸⁸ Code of Conduct for Procurement, <http://www.pwgsc.gc.ca/acquisitions/text/cndt-cndct/cca-ccp-e.html>. The Code was introduced on September 19, 2007 as part of the implementation of the Federal Accountability Act.

⁸⁹ *Ibid.*

⁹⁰ Values and Ethics Code for the Public Service, http://www.psagency-agencefp.gc.ca/veo-bve/vec-cve/vec-cve_e.asp

⁹¹ Vendor is defined as follows in the Code: Vendor means “any person or other legal entity who has submitted an offer or may submit an offer to contract or who has been awarded a contract:

1. by a “department” as defined in section 2 of the Financial Administration Act, or
2. under which Public Works and Government Services Canada or an individual representing Public Works and Government Services Canada is specified to be the Contracting Authority.

This includes subcontractors, owners, directors, officers, employees, agents, or any affiliated body corporate (as defined in the Canada Business Corporations Act), to the extent that any of these is responsible for the performance under a contract.”

jeopardize a current or former public servant's ability to respect their obligations under the Values and Ethics Code for the Public Service.

- Sets out the role of the Canadian International Trade Tribunal and the Procurement Ombudsman in the settlement of procurement complaints.
- The Government Contract Regulations,⁹² which are enacted pursuant to the Financial Administration Act. The following provisions of the Regulations should be noted:

- Section 5, which requires a contracting authority⁹³ to solicit bids before any contract is entered into in the manner prescribed by section 7 of these Regulations.
- Section 6, which states that a contracting authority may enter into a contract without soliciting bids in the following circumstances: a) there is a pressing emergency in which a delay would be injurious to the public interest; b) the estimated expenditure does not exceed \$25,000; \$100,000 when the contract is for the acquisition of architectural, engineering and other services for the planning, design, preparation or supervision of the construction, repair, renovation or restoration of work; or \$100,000 for a contract of the Canadian International Development Agency in regard to an international development assistance program or project; c) the nature of the work is such that it would not be in the public interest to solicit bids; or d) only one person is capable of performing the contract.
- Section 7, which provides that a contracting authority shall solicit bids by: a) public notice of a call for bids that is consistent with generally accepted trade practices; and b) inviting bids from suppliers on the suppliers' list.

- The Canadian International Trade Tribunal Procurement Inquiry Regulations,⁹⁴ which apply to complaints by potential suppliers concerning designated contracts. These regulations are enacted pursuant to the Canadian International Trade Tribunal Act and contain provisions regarding the issuance of interim reports, postponement of award of contract, dismissal of complaints, determination and issuance of findings and recommendations. In addition, the following provisions of the Act should be noted:

- Section 6, which provides for the time limits for filing a complaint. Generally, a potential supplier is to file no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known.

⁹² Government Contracts Regulations, <http://laws.justice.gc.ca/en/showtdm/cr/SOR-87-402>. Section 3 states that the Regulations apply to all contracts except for the following: “(a) a contract entered into by the National Film Board; (b) a contract for the construction of buildings entered into under the Veterans' Land Act; (c) a contract entered into under the Indian Act that involves Indian moneys as defined in that Act; (d) subject to section 4, a contract for the performance of legal services entered into by or under the authority of the Minister of Justice; (e) a contract for the fit-up of an office or a residential accommodation where the contract for fit-up is part of a transaction authorized pursuant to the Federal Real Property Act or the regulations made thereunder; or (f) arrangements entered into under an Interchange Canada Agreement.” It should be noted that as of June 27, 2008, the exchange rate is \$1 Canadian dollar to \$ 0.98 US dollar.

⁹³ The Regulations define ‘contracting authority’ as: “(a) the appropriate Minister, as defined in paragraph (a), (a.1) or (b) of the definition “appropriate Minister” in section 2 of the Financial Administration Act, (b) a departmental corporation named in Schedule II to the Financial Administration Act, or (c) the National Capital Commission.”

⁹⁴ Canadian International Trade Tribunal Procurement Inquiry Regulations, section 4, *supra* note 85.

- Section 7, which provides for the conditions for inquiry. The Tribunal, within five working days after the day on which a complaint is filed, shall determine if a) the complainant is a potential supplier; b) the complaint is in respect of a designated contract; and c) the complaint discloses a reasonable indication that the procurement process has not been conducted in accordance with the NAFTA, WTO - AGP or the AIT.

- The Treasury Board Contracting Policy,⁹⁵ which is issued pursuant to section 7(1) and 41(1) of the Financial Administration Act. The Policy is to be read in conjunction with the provisions of statutory law as well as evolving judicial decisions that establish precedence in the application of the law.⁹⁶ The Policy, which is applicable to all departments, and agencies as set out in the Financial Administration Act, states that the “objective of government procurement contracting is to acquire goods and services and to carry out construction in a manner that enhances access, competition and fairness and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people.”⁹⁷ The following sections of the Policy should be noted:

- Section 4.2.2, which reiterates that suppliers convicted under sections 121, 124 and 418 of the Criminal Code are prohibited from contracting with the government or benefit from a government contract, unless this capacity has been restored or the individual has received a pardon, in accordance with section 748(3) of the Code;
- Section 4.2.3, which states that public servants must act within the law at all times and specifically prohibits the acceptance of bribes or other improper influence;
- Section 4.2.4, which states that contracting authorities are to observe the provisions of the NAFTA, WTO - AGP and the AIT;
- Section 4.2.15, which provides that departments must ensure that adequate management controls to protect the integrity of the bidding process are in place and that traditional hard copy documents or electronic bidding documents may be employed;
- Section 5.1.2, which requires all departments and agencies awarding contracts and/or amendments to submit an annual report to the Treasury Board Secretariat on all contracting activities;
- Section 5.3, which contains provisions on audit and evaluation of contracts. Contracting authorities are to include right to audit clauses to verify the correct amount was paid, where applicable. In addition, contracting authorities are to ensure that contract files are properly documented;

⁹⁵ Treasury Board Contracting Policy,

http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/Contracting/dwnld/contractingpol_e.rtf

⁹⁶ *Ibid.*, section 6.1.3.

⁹⁷ *Ibid.*, section 1. In addition, section 2 states, as a policy statement the following:

“Government contracting shall be conducted in a manner that will:

- (a) stand the test of public scrutiny in matters of prudence and probity, facilitate access, encourage competition, and reflect fairness in the spending of public funds;
- (b) ensure the pre-eminence of operational requirements;
- (c) support long-term industrial and regional development and other appropriate national objectives, including aboriginal economic development;
- (d) comply with the government’s obligations under the North American Free Trade Agreement, the World Trade Organization – Agreement on Government Procurement and the Agreement on Internal Trade.”

- Section 9.1, which sets out the manner to obtain best value. In procuring best value, consideration of all relevant costs over the useful life of the acquisition must be considered, not solely the initial or basic contractual cost. Best value is defined as “the combination of price, technical merit, and quality, as determined by the contracting authority prior to the bid solicitation and set out in the bid solicitation evaluation criteria, and which forms the basis of evaluation and negotiation between buyers and sellers to arrive at an acceptable basis for a purchase and sale.”⁹⁸
- Section 10.1, which reiterates the requirements of the Government Contracts Regulations whereby competitive bidding is the norm.
- Section 10.2, which provides further explanation on the application of the four exceptions to competitive bidding under Section 6 of the Government Contracts Regulations.⁹⁹ This section further provides that use of the four exceptions should be fully justified on the contract file and the contracting authorities are encouraged, whenever possible, to use the electronic bidding methodology to advertise the proposed award.
- Section 10.6, which states that the competitive process is the normal way to establish best value and price.
- Section 10.6.16, which provides that contracting authorities shall not structure a procurement, select a valuation method or divide a procurement requirement in order to avoid the obligations of the NAFTA, the WTO - AGP or the AIT.
- Section 10.7.1, which states that that the method of procurement used for a particular acquisition must give all qualified firms an equal opportunity for access to government business. If fewer than three bids are reached by established advertising practices, the advertising coverage or bid solicitation should be increased. Contracting authorities who keep a source list are encouraged to establish a regular way to inform industry of this practice, through briefings to industry associations and publicity in brochures, trade journal advertisements and newspapers.
- Sections 10.7.4 – 10.7.4.20, which set out the selection methods, among which the following should be noted:
 - i) Advertisement in the public press – to be used when it is the custom to be generally followed by the trade and when the contracting authority considers it the most effective means of ensuring adequate competitive response;

⁹⁸ Appendix A – Definition, Treasury Board Contracting Policy,
http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/Contracting/contractingpol_a_e.asp

⁹⁹ For example, the exception for a pressing emergency is further clarified by stating that an emergency is normally unavoidable and requires immediate action. It may be an actual or imminent life threatening situation, a disaster which endangers the quality of life or has resulted in the loss of life or one that may result in significant loss or damage to Crown property. In addition, the Response to the Questionnaire, Canada provided the following examples in footnote 7, page 7 of the Response: the evacuation of Canadians during the Lebanon-Israeli conflict in the summer of 2006; the loss of Swiss Air Flight 111 off the coast of Nova Scotia in 1998; September 11, 2001; the outbreak of Severe Acute Respiratory Syndrome (SARS) in the province of Ontario; the outbreak of Bovine Spongiform encephalopathy (BSE) in the prairie provinces; and the 1998 ice storm in Ontario and Quebec.

- ii) Mailing lists – to be used when it is appropriate to support national policies and objectives, it is customary in the trade for suppliers to be listed by potential buyers or the goods or service in common commercial supply are involved;
 - iii) Source lists – for selective tendering procurements subject to the NAFTA, WTO - AGP and the AIT. Electronic media may be used to advertise in order to develop an appropriate list of suppliers;
 - iv) Solicitation by electronic media – may be used to solicit bids or to give notice of a call for bids or an intention to award a direct contract (Advance Contract Award Notice);
 - v) Electronic bidding – this method is appropriate for competitive procurements of goods and services of at least \$25,000 or \$100,000, depending on the contracting authority, for publishing an Advance Contract Award Notice, or publishing procurements subject to the NAFTA, WTO - AGP and the AIT. The approved electronic information and bidding service is the Government Electronic Tendering System (GETS);¹⁰⁰
 - vi) Advance Contract Award Notice (ACAN) – this allows departments and agencies to post a notice, for no less than fifteen calendar days, an indication to a supplier that it intends to award a contract to a pre-identified contractor. If no other supplier submits, within fifteen days, a statement of capabilities that meets the requirements set out in the ACAN, the competitive requirements of the contracting policy have been met. However, if a supplier does submit a statement of capabilities that meets the requirement of the ACAN, the department or agency must proceed to a full tendering process in order to award the contract;
 - vii) Pre-selecting bidders – this is appropriate when the goods and services are not in common commercial supply and special government specifications are applicable, when the cost of bidding is so significant that it would be unfair to present firms of unknown capability with the risk of disqualification after they have incurred the expense of bidding, or owing to the special nature of the requirement, the competence of the bidder must be verified;
 - viii) Pre-qualification of bidders – when the size or complexity of a project necessitates further special assurance of the contractor's ability, all necessary tests of the competence of prospective contractors may be made in advance and bids are then invited only from the firms that have qualified.
- Section 10.8.16, which provides that contracting authorities are to resolve bid protests quickly and effectively so as not to delay the contracting process. Bid protests are to be referred to senior departmental management for resolution, especially for protests related to the impartiality of the process, and a decision should be communicated to the concerned or affected parties promptly. It further states that the Canadian International Trade Tribunal Procurement Inquiry Regulations apply when a bid protest is made pursuant to the NAFTA, WTO - AGP or the AIT.

¹⁰⁰ GETS is an on-line system that advertises government contracting opportunities to potential bidders and is operated by MERX which provides the service to the federal government under contract, www.merx.com.

- Section 10.8.17, which states that if identical low bids or proposals are received, the contract should be awarded on the basis of best value. In this determination, the following criteria should be used, among others: a) the bidder with a satisfactory past performance record be given preference over one to have an unsatisfactory one; b) the bidder with a good record in adequate after-sales office be given preference over one that has a poor record; c) when delivery is important, the bidder offering the best delivery date be given preference.
 - Section 10.8.18, which states that departments and agencies are to report to the Department of Industry any identical bids where collusion is suspected or the bid is so unreasonable that it is suspected it was established to lessen competition or eliminate a competitor.
 - Section 11.2.7, which provides that contracting authorities must not split contracts in order to avoid obtaining contract approval.
 - Section 12.1.3, which provides that if the contracting policy is ignored or the contracting practice or administration not acceptable, the Treasury Board may direct that sanctions may be imposed on either the contracting authority or the official responsible. Sanctions may include revocation of contracting authority; establishment of special financial allotments that would limit spending; or instructions to the contracting authority to apply sanctions against individual employees who have ignored the contracting policy.
 - Section 12.3, which provides that procurement files shall be established and structured to facilitate management oversight with a complete audit trail. This should contain contract details related to communications and decisions including the identification of involved officials and contracting approval authorities. In addition, in compliance with the NAFTA, WTO - AGP and the AIT, the contracting authorities are to maintain complete documentation and records, including all communications with suppliers.
 - Section 12.5, which reiterates the prohibitions found under the Criminal Code where a supplier convicted of an offence under section 121, 124 and 418 of the Code is prohibited from contracting with the government or benefit from a government contract, unless the capabilities have been restored, in whole or in part, or the individual has received a pardon. The contracting authority is responsible for ensuring that all suppliers are subject to screening and have not been convicted under the aforementioned sections of the Code.
 - Section 12.8, which sets out the manner to resolve disputes, from the use of dispute resolution clauses in contracts, the use of the Canadian International Trade Tribunal, negotiation, mediation, and arbitration.
- The Treasury Board Contracts Directive,¹⁰¹ which is mandatory, sets out the approved levels above which Treasury Board authority is required before entering into a contract. This Directive distinguishes between competitive and non-competitive contracts for determining the contract

¹⁰¹ Treasury Board Contracts Directive,
http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/contracting/contractingpol_c_e.asp

approval levels provided to contracting authorities and differentiates between the traditional and electronic bidding processes for competitive procurement of goods and services.¹⁰²

- The Treasury Board Policy on the Management of Projects,¹⁰³ which has as its objective that the appropriate systems, processes and controls for managing projects are in place, and support the achievement of project and program outcomes while limiting the risk to stakeholders and taxpayers. The expected results are that projects achieve value for money; sound stewardship of project funds is demonstrated; accountability for project outcomes is transparent; and outcomes are achieved within time and cost constraints. Under this policy, department heads are to ensure that a department-wide governance and oversight mechanism is in place, documented and maintained and that this mechanism is used to manage the initiation, planning, execution, control and closing of projects. They are to also ensure that the department conducts an accurate assessment of each project according to the Standard for Project Complexity and Risk.

- The Standard for Project Complexity and Risk,¹⁰⁴ establishes the mandatory assessment process that Treasury Board has approved for government-wide use. The Project Complexity and Risk Assessment Tool,¹⁰⁵ available on the Treasury Board Secretariat's website, provides the basis for determining the level of project risk and complexity and will assist in identifying areas of project risk and complexity warranting further assessment and active risk management. All projects that are subject to this standard must be assessed to determine their level of risk and complexity. The Project Complexity and Risk Assessment Tool rates the level of risk and complexity of individual projects across four levels by evaluating criteria in each of the following project knowledge areas: a) project characteristics; b) strategic management; c) contract or procurement characteristics; d) human resources; e) business; f) project management integration; and g) engineering or technical.

- The Proactive Disclosure Policy,¹⁰⁶ which states that all departments of the Government of Canada are required, among other things, to publish on their web sites all contracts entered into for amounts over \$10,000. Every three months, information regarding new contracts will be published at http://www.tbs-sct.gc.ca/pd-dp/dc/index_e.asp.

- The Supply Manual,¹⁰⁷ which sets out contracting procedures used by Public Works and Government Services Canada (PWGSC), the major common services procurement organization for the Government of Canada.¹⁰⁸ It explains why and how PWGSC carries out its supply activities and is used by PWGSC procurement officers.¹⁰⁹ The Manual sets out that the procurement activities are to be carried out in an open, fair and transparent manner.¹¹⁰ The following provisions should be noted:

- Section 5.001, which states that whenever possible, contractors are to be selected using a competitive process. The flexibility to depart from this approach depends on the procurement

¹⁰² See section 11.2.4 of the Treasury Board Contracting Policy, *supra* note 95.

¹⁰³ Treasury Board Policy on the Management of Projects,

http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/TBM_122/mp-gp_e.asp. It is applicable to all departments defined in section 2 of the Financial Administration Act, *supra* note 5.

¹⁰⁴ Standard for Project Complexity and Risk, http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/TBM_122/spcr-ncrp_e.asp

¹⁰⁵ This Tool is still not in effect as the policy instrument is still under development and not yet in effect, *ibid*.

¹⁰⁶ Proactive Disclosure, http://www.tbs-sct.gc.ca/pd-dp/index_e.asp

¹⁰⁷ Supply Manual, http://www.pwgsc.gc.ca/acquisitions/text/sm/pdf/SM_Combined_Nov2007-e.pdf

¹⁰⁸ Response to the Questionnaire, pg. 6, *supra* note 16.

¹⁰⁹ See the website of the Supply Manual, <http://www.pwgsc.gc.ca/acquisitions/text/sm/sm-e.html>

¹¹⁰ Supply Manual, pg. 1-1, *supra* note 107.

framework being followed. The type of competitive solicitation that may be used will also depend on the procurement framework;

- Section 5.041, which states that competitive procurements covered by the NAFTA, WTO - AGP and the AIT must be advertised on the GETS and provides additional guidance regarding-open and selective tendering processes;
- Section 5.043, which provides that for those procurements not subject to trade agreements, government policy requires that bids be solicited competitively before entering into a contract, either through the GETS or other public media or by referring to source lists;
- Section 5.044, which provides that the preferred process for notifying potential suppliers by the PWGS is through the GETS. Other public media, such as newspapers and trade journals may also be used when advertising through the GETS may not achieve the necessary results;
- Section 5.046, which provides that when public advertising is not considered the most effective means to notify potential suppliers, a source list must be used. Advertising on the GETS can be used to generate a source list;
- Section 6B.142, which provides that criteria to evaluate and differentiate between proposals must be developed in order ensure the complete and fair consideration of bids;
- Section 6B.143, which states that the number of criteria must be adequate for comparative judgment, which measures both the competence of the bidder and the worth of the bidder's particular technical approach. Competence measures include such factors as managerial structure, key personnel, prior industrial experience, facilities and financial strength;
- Section 6B.145, which states that a team may be established to evaluate proposals.
- Section 7A.015, which provides that all bid solicitations must specify the bid closing date, time and location;
- Section 7A.051, which states that bids may be received in writing, for all values; by telephone, when the contract is below \$25,000 or any amount in cases of documented extreme urgency; and by electronic transmission, for any amount, except for bids required under seal and bids required to contain a surety bond;
- Section 7B.160, which states that using the GETS is the preferred notification process for competitive procurements by the PWGSC;
- Section 7B.180, which states that contracting officers are responsible for preparing all procurement notices, and in the case of selective tendering, any annual notices, which establish and maintain a permanent list of qualified suppliers;
- Section 7B.190, which provides that contracting officers must forward bid solicitations to the GETS for each publicly advertised competitive solicitation. This may be forwarded either electronically or in a physical form such as paper, diskette or CD;

- Section 7B.210, which states that in determining a bid period, the setting of the closing date must take into account the level of complexity and the advertising medium so that a supplier has sufficient time to obtain the bid solicitation and prepare and submit a bid. For procurements not subject to the NAFTA or the WTO - AGP, the bidding period should be not less than 15 calendar days. Low dollar value procurements below \$25,000 may have a shorter timeframe, taking into account efficiency and cost effectiveness;¹¹¹
- Section 7B.219, which states that source lists are the basis for requesting firms to bid when a competitive bid process is not used. When available, the contracting officer should use these lists in the preparation of a bid solicitation list. For these purposes contracting officers should consider using the Supplier Information Registration Information system to identify potential sources of supply for low dollar value goods and services.¹¹²
- Section 7C.260, which allows for bidder conferences. Prior to the issuance of solicitation documents, Canada often makes use of bidder conferences to alert suppliers of upcoming procurements and to receive their advice regarding solutions. Under the trade agreements, parties shall ensure that any technical specification is, where appropriate, specified in terms of performance criteria rather than design or descriptive characteristics. Finally, once the notice of proposed procurement is published, suppliers may pose clarification questions. The answers are provided in writing to all prospective bidders.
- Section 7D.359, which provides that the evaluation of the responses must proceed according to the predetermined and published evaluation criteria;
- Section 7D.430, which provides that the contracting officer must notify Legal Services whenever there is an indication of bid rigging activities, collusion or fraud;¹¹³
- Section 7D.460, which states that the standard period for acceptance of bids is sixty days.
- Section 7F.710, which provides that contracting officers must notify unsuccessful bidders as soon as possible after the award of the contract;
- Section 7F.717, which states that for all posted procurements, award notices are generated automatically and posted on GETS. In addition, for procurements subject to the NAFTA and

¹¹¹ Section 7B.211, *ibid.* Section 7B.212 reiterates the time periods for receipt of bid periods for the NAFTA and the WTO - AGP.

¹¹² The Supplier Registration Information System is a database of registered suppliers interested in doing business with the federal government. The information provided by suppliers is used by federal government departments to identify sources of supply for the goods and services not subject to any of the trade agreements (for which they use GETS), <http://contractscanada.gc.ca/en/regist-e.htm>

¹¹³ The following examples are given as possible bid-rigging activities:

- “(a) where bid rates/prices are much higher than published price lists, engineering cost estimates, or previous bid rates/prices by the same suppliers, for no apparent reason;
- (b) where the successful bidder usually subcontracts work to suppliers submitting higher bids on the same project;
- (c) where bidders use identical wording to describe non-standard items, or submit identical bids for non-standard items;
- (d) where there are indications of unusual communications among suppliers prior to submitting the bids with regards to bid prices, or allocation of clients, or references to "standard industry prices," "industry self-regulation," etc.;
- (e) where the same supplier wins bids for specific clients, or in specific geographic locations, or for specific sizes or types of work, and loses most other bids on a regular basis; or
- (f) where a recognizable pattern of systematic or random low bid rotation exists.”

the WTO - AGP, an award notice must be posted on GETS within 72 days and although there is no time limit in the AIT, this time limit applies for reasons of consistency.¹¹⁴

- Section 11.225, which states that suppliers are to be removed from the source lists in the following instances: a) when the supplier requests removal; (b) in the event of bankruptcy or business failure; (c) in the event of permanent shutdown; (d) when fire or other disasters render the enterprise inoperable for an extended period; (e) when the supplier refuses to provide information necessary to confirm its listing(s); (f) when there is non-compliance with PWGSC policies or programs. If a supplier is removed for non-compliance with PWGSC policies or programs, its inclusion on other similar lists should be reviewed by the sectors/regions responsible for other lists.¹¹⁵

- The Government Electronic Tendering System (GETS), which is an on-line system that advertises government contracting opportunities to potential bidders and is operated by MERX, which provides the service to the federal government under contract, www.merx.com.

- The Supplier Registration Information Service, which is a database of registered suppliers interested in doing business with the federal government. The information provided by suppliers is used by federal government departments to identify sources of supply for the goods and services not subject to any of the trade agreements (for which they use GETS).¹¹⁶

- The Office of Small and Medium Enterprises,¹¹⁷ which assists small and medium enterprises (SMEs) in navigating the procurement system and works within the government to ensure the procurement system treats SMEs fairly. To this end, the Office, for example, has developed Professional Services Online, an electronic tool that assists federal departments in the procurement of (below NAFTA threshold) professional services.¹¹⁸ In this manner, SMEs can participate more efficiently.

- The Government of Canada Regulatory Policy¹¹⁹ requires regulatory authorities to consult with Canadians so that they have an opportunity to participate in developing or modifying regulations and regulatory programs. When regulatory authorities propose new regulatory requirements or changes to existing ones, they must carry out timely and thorough consultations with interested parties and clearly set out the process for those interested parties to provide their input.

- The Regulatory Process Guide¹²⁰ sets out the steps to be followed to bring a regulation into force once a department or agency decides to regulate. Part of this process requires that the draft regulations be published in the Canada Gazette for a comment period in which interested groups and individuals have an opportunity to review and comment on them. The standard period is usually 30 days.¹²¹ In addition, this Guide encourages that departments or agencies involve the public before drafting regulations in order to receive input and gain acceptance. This is done through Reports on

¹¹⁴ Section 7F.718.

¹¹⁵ Section 11.226.

¹¹⁶ Supplier Registration Information System, *supra* note 112.

¹¹⁷ The Office of Small and Medium Enterprises, <http://www.tpsgc-pwgsc.gc.ca/acquisitions/text/sme/osme-e.html>

¹¹⁸ Professional Services (PS) Online, <http://www.tpsgc-pwgsc.gc.ca/acquisitions/text/ps/online-e.html>

¹¹⁹ Government of Canada Regulatory Policy, http://www.tbs-sct.gc.ca/ri-qr/ra-ar/docs/publications/regulatory_policy_e.pdf

¹²⁰ Regulatory Process Guide, http://www.tbs-sct.gc.ca/ri-qr/ra-ar/docs/publications/regguide/regguide_e.pdf

¹²¹ *Ibid.* at pp. 25 – 26.

Plans and Priorities advising interested groups of upcoming regulatory initiatives, providing online information on departmental regulatory plans or publishing a Notice of Intent in the Canada Gazette soliciting the views of the public.¹²² For example, this consultative approach to making regulations occurred when there was a proposal to amend the Government Canada Regulations. On September 29, 2007, Canada provided notice of the proposed regulations. Interested persons were invited to make representations within 30 days after the date of publication of the notice.¹²³ The proposed regulations emanate from the Federal Accountability Act which involved extensive consultations and public involvement.

1.2.2. Adequacy of the legal framework and/or other measures

With respect to the legal provisions governing public procurement systems, the Committee notes that, on the basis of the information available to it, they constitute a set of measures that are relevant for promoting the purposes of the Convention.

The Committee nevertheless deems it appropriate to express some comments about certain provisions relating to the systems that the country under review could consider supplementing, developing or adapting the legal framework now in force, in light of the following:

The Committee would like to highlight the importance of the Procurement Ombudsman in assuring openness, equity and efficiency in the government system for the procurement of goods and services. Responsibilities such as reviewing the procurement practices of federal departments and agencies on an ongoing basis, recommending improvements to those practices and handling complaints from suppliers are important steps in promoting the purposes of the Convention. In September 2007, a Procurement Ombudsman Designate was appointed.¹²⁴ Nevertheless, though the Federal Accountability Act amended the Department of Public Works and Government Services Act for the establishment of the Office of the Procurement Ombudsman, these provisions do not come into force until regulations that prescribe the duties and functions of the Ombudsman are in place.¹²⁵ These

¹²² *Ibid.* at pp. 16 – 17. In addition, departments might want to advise the public about upcoming regulatory initiatives through departmental publications and web sites, trade, sectoral or professional publications.

¹²³ See <http://canadagazette.gc.ca/part1/2007/20070929/html/regle3-e.html>

¹²⁴ Mr. Shahid Minto was appointed Procurement Ombudsman Designate on September 19, 2007, *Canada's New Government Introduces New Measures to Enhance Fairness, and Transparency in Procurement*, <http://news.gc.ca/web/view/en/index.jsp?articleid=350369>

¹²⁵ See Section 314(1) of the Federal Accountability Act, *supra* note 54 and the Response to the Questionnaire, pg. 11, *supra* note 16. It should be noted that the country under review provided information that the appointment of the Procurement Ombudsman took effect on May 5, 2008 and that the final regulations were published in the Canada Gazette on May 14, 2008. The powers of the Ombudsman include the following general duties and functions: The Procurement Ombudsman shall, in accordance with the regulations, (a) review the practices of departments for acquiring materiel and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices; (b) review any complaint respecting the compliance with any regulations made under the Financial Administration Act of the award of a contract for the acquisition of materiel or services by a department to which the Agreement, as defined in section 2 of the Agreement on Internal Trade Implementation Act, would apply if the value of the contract were not less than the amount referred to in article 502 of that Agreement; (c) review any complaint respecting the administration of a contract for the acquisition of materiel or services by a department; and (d) ensure that an alternative dispute resolution process is provided, on request of each party to such a contract.

In addition, enforcement mechanisms for implementing the recommendations of the Procurement Ombudsman include: (a) regulation 6(1) which requires the Procurement Ombudsman to provide any recommendations made pursuant to section 22.1(3)(a) of the Department of Public Works and Government Services Act to the Minister of the department reviewed; and (b) section 22.3(1) of this Act requires the Ombudsman to deliver an annual report to the Minister of the Public Works and Government Services, who shall cause a copy of the report to be tabled in Parliament. Subsequently, deputy heads are accountable for ensuring that the management procedures and practices with respect to procurement comply with

regulations have not been prescribed therefore the Office is still not in operation. The Committee considers it advisable that once the Office is established, it has the necessary financial, human and technological resources to carry out its functions, given the important role it will have in ensuring fairness and transparency in the procurement process.¹²⁶ In this regard, the Committee will formulate a recommendation (see Recommendation 1.2 (a) in Section 1 of Chapter III of this Report).

The Committee also notes the adoption of the Code of Conduct for Procurement as an important step in promoting the purposes of the Convention. Before the adoption of the Code, the country under review sought input from key stakeholders, including suppliers and industry associations, and posted a draft version on the Public Works and Government Services Canada Web site and on GETS, the government's electronic tendering system from February 9 to March 14, 2007.¹²⁷ Some of the feedback focused on clarification of terms, incorporation of concrete examples of proper and improper conduct, and a clearer distinction between the role of the Canadian International Trade Tribunal and the Procurement Ombudsman in the settlement of disputes.¹²⁸ Respondents also indicated that seminars could be provided by government departments to promote the Code within the supplier community as well as use of the government websites to disseminate it.¹²⁹ The Committee considers it advisable for the country under review to continue setting up these seminars or other types of awareness building mechanisms in order help clarify the issues raised by the key stakeholders in the Code and thus assure better understanding and compliance. In this regard, the Committee will formulate a recommendation (see Recommendation 1.2 (b) in Section 1 of Chapter III of this Report).

1.2.3. Results of the legal framework and/or other measures

With respect to results, the Committee notes that Canada in its Response stated that the Government publishes, on the internet, statistics on the purchases and contracts conducted in departments and agencies.¹³⁰ These statistics are made available through annual Purchasing Activity Reports, which date back annually to 1995 and are available at the following website: http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/con_data/siglist_e.asp. The objective of these Reports is to provide a basic snapshot of purchasing activities by the Government of Canada.¹³¹ It is presented by a breakdown of the number and value of contracts by competitive and non-competitive awards and by total contracts by department. The following table is as summary for the year 2006.¹³²

government policy and demonstrate efficient and effective practices. They are assessed on their management performance annually through the Management Accountability Framework.

¹²⁶ It should be noted that these draft regulations were published in the Canada Gazette on December 22, 2007 for public comment, Canada Gazette, Vol. 141, No. 51,

<http://canadagazette.gc.ca/part1/2007/20071222/html/regle3-e.html>

¹²⁷ Code of Conduct for Procurement - Feedback from Consultations,

<http://www.pwgsc.gc.ca/acquisitions/text/cndt-cndct/rocc-ffc-e.html>

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Response to the Questionnaire, pg. 12 *supra* note 16.

¹³¹ See Note 1 to the 2006 Purchasing Activity Report,

http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/con_data/par-06-rpa_e.asp

¹³² Canada, in its Response, provides a summary for 2005, pgs. 13 –14, *supra* note 16.

Contract Type	Solicitation Procedure	Number	% of Total Number	Value \$ 000	% of Total Value
Goods	Contracts below \$25,000, including amendments	204 224		465 835	
	<i>Electronic bidding</i>	3 219		1 253 420	
	<i>Traditional competitive</i>	903		258 304	
	<i>Advance Contract Award Notice</i>	756		252 729	
	Competitive awards	4 878		1 764 453	
	<i>Net amendments</i>	-		754 086	
	Competitive including amendments	4 878	71,4%	2 518 539	66,8%
	Non-competitive awards	1 952		1 181 507	
	<i>Net amendments</i>	-		68 948	
	Non-Competitive including amendments	1 952	28,6%	1 250 455	33,2%
	Subtotal Contracts \$25,000 and above	6 830	100,0%	3 768 994	100,0%
	Total of All Goods Contracts	211 054		4 234 829	
	Proportion of All Contracts		54,3%		34,8%
Services	Contracts below \$25,000, including amendments	142 988		669 049	
	<i>Electronic bidding</i>	4 729		3 122 812	
	<i>Traditional competitive</i>	5 353		691 305	
	<i>Advance Contract Award Notice</i>	819		243 527	
	Competitive awards	10 901		4 057 644	
	<i>Net amendments</i>	-		1 791 736	
	Competitive including amendments	10 901	81,2%	5 849 380	92,0%
	Non-competitive awards	2 519		326 726	
	<i>Net amendments</i>	-		179 460	
	Non-Competitive including amendments	2 519	18,8%	506 186	8,0%
	Subtotal Contracts \$25,000 and above	13 420	100,0%	6 355 566	100,0%
	Total of All Service Contracts	156 408		7 024 615	
	Proportion of All Contracts		40,2%		57,8%

Construction	Contracts below \$25,000, including amendments	19 465		73 807	
	<i>Electronic bidding</i>	896		607 396	
	<i>Traditional competitive</i>	669		86 382	
	<i>Advance Contract Award Notice</i>	6		506	
	Competitive awards	1 571		694 284	
	<i>Net amendments</i>	-		99 843	
	Competitive including amendments	1 571	89,5%	794 127	96,9%
	Non-competitive awards	185		25 554	
	<i>Net amendments</i>	-		80	
	Non-Competitive including amendments	185	10,5%	25 634	3,1%
	Subtotal Contracts \$25,000 and above	1 756	100,0%	819 761	100,0%
	Total of All Construction Contracts	21 221		893 568	
	Proportion of All Contracts		5,5%		7,4%
All Contracts	Contracts below \$25,000, including amendments	366 677		1 208 691	
	<i>Electronic bidding</i>	8 844		4 983 628	
	<i>Traditional competitive</i>	6 925		1 035 991	
	<i>Advance Contract Award Notice</i>	1 581		496 762	
	Competitive awards	17 350		6 516 381	
	<i>Net amendments</i>	-		2 645 665	
	Competitive including amendments	17 350	78,8%	9 162 046	83,7%
	Non-competitive awards	4 656		1 533 787	
	<i>Net amendments</i>	-		248 488	
	Non-Competitive including amendments	4 656	21,2%	1 782 275	16,3%
	Subtotal Contracts \$25,000 and above	22 006		10 944 321	
	Total Contract Awards including Net Amendments	388 683		12 153 012	

The Committee would also like to note that the Canadian International Trade Tribunal issues an annual report regarding its activities. As part of this report, the Tribunal issues statistics on its activities regarding procurement complaints. These reports contain a summary of activities, a list of cases that were sent for judicial review to the Federal Court of Appeal and a disposition of procurement complaints. The following summary is taken from the 2006 – 2007 Canadian International Trade Tribunal Annual Report:¹³³

	2005-2006	2006-2007
Number of Complaints		
Carried over from previous fiscal year	8	7
Received in fiscal year	58	53
Remanded	1	1
Total	67	61
Cases Resolved		
Withdrawn or resolved by the parties	4	3
Abandoned while filing	2	-
Subtotal	6	3
Inquiries Not Initiated		
Lack of jurisdiction	3	6
Late or improper filing	14	7
No valid basis/no reasonable indication of a breach/premature	20	14
Subtotal	37	27
Inquiry Results		
Complaints dismissed	3	3
Complaints not valid	4	6
Complaints valid or valid in part	10	12
Remand decisions	-	1
Subtotal	17	22
Outstanding at End of Fiscal Year	7	9

Moreover, the Tribunal’s website publishes all Tribunal notices, decisions and publications, as well as other information relating to the Tribunal’s current activities.¹³⁴ It also offers a subscriber alert service that notifies subscribers of each new posting on the Tribunal’s website, which is free of charge.¹³⁵ The Tribunal’s notices and decisions are also published in the Canada Gazette and those relating to procurement complaints are also published on MERX.

The Committee notes that the table regarding the summary of procurements carried out by the country under review demonstrates that, by a great majority, competitive bidding is the norm. In

¹³³ 2006 – 2007 Canadian International Trade Tribunal Annual Report, pg. 26,

http://www.citt-tcce.gc.ca/doc/english/Publicat/ar2h_e.pdf. In addition, the Tribunal states the following:

“In 2006-2007, PWGSC alone issued approximately 20,900 contracts valued at between \$25,000 and \$300 million, for a total value of \$10.3 billion. The 53 complaints received in the fiscal year pertained to 51 different contracts, representing less than 1 percent of the total number of contracts issued by PWGSC in 2006-2007.”

¹³⁴ Canadian International Trade Tribunal, Procurement, http://www.citt-tcce.gc.ca/procure/index_e.asp. See also 2006 – 2007 Canadian International Trade Tribunal Annual Report, pg. 2, *ibid*.

¹³⁵ Canadian International Trade Tribunal, Distribution, http://www.citt-tcce.gc.ca/lists/index_e.asp

addition, Canada has taken significant steps in publicizing the outcomes of the decisions of the Canadian International Trade Tribunal, thereby establishing a significant body of law from which suppliers can rely on to better understand their rights as well as assist them in potential complaints. Taking into this account, the Committee believes that the statistics maintained by the country under review are relevant for promoting the purposes of the Convention.

2. SYSTEMS FOR PROTECTING PUBLIC SERVANTS AND PRIVATE CITIZENS WHO, IN GOOD FAITH, REPORT ACTS OF CORRUPTION (ARTICLE III (8) OF THE CONVENTION)

2.1. Existence of provisions in the legal framework and/or other measures

Canada has a set of measures and provisions related to the above-mentioned systems, among which the following should be noted:

- The Public Servants Disclosure Protection Act,¹³⁶ which establishes a procedure for the disclosure of wrongdoings in the public sector,¹³⁷ including the protection of persons who disclose wrongdoings. The preamble states that confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants¹³⁸ who disclose wrongdoings. The following provisions of the Act should be noted:

- Section 4, which states that the Minister¹³⁹ must promote ethical practices in the public sector as well as a positive environment for disclosing wrongdoing;
- Section 8, which states that the Act applies to the following wrongdoings in relation to the public sector: a) contravention of any Act of Parliament or of the legislature of any province or the regulations of those Acts; b) misuse of public funds or a public asset; c) gross mismanagement; d) act or omission that creates as substantial and specific danger to the life, health or safety of persons or the environment; e) a serious breach of the code of conduct applicable to the public sector; and f) knowingly directing or counseling a person to commit the aforementioned wrongdoings;
- Section 10, which states that the chief executive¹⁴⁰ must establish internal disclosure procedures to manage disclosures by public servants in the public sector. In addition, the

¹³⁶ Public Servants Disclosure Protection Act, <http://laws.justice.gc.ca/en/showtdm/cs/P-31.9>

¹³⁷ Public sector, under section 2, is defined as:

“(a) the departments named in Schedule I to the Financial Administration Act and the other portions of the federal public administration named in Schedules I.1 to V to that Act; and

(b) the Crown corporations and the other public bodies set out in Schedule 1.

However, subject to sections 52 and 53, “public sector” does not include the Canadian Forces, the Canadian Security Intelligence Service or the Communications Security Establishment.” See the Financial Administration Act, *supra* note 5.

¹³⁸ Public servants, under section 2, is defined as “every person employed in the public sector, every member of the Royal Canadian Mounted Police and every chief executive.” Chief executive is further defined as the “deputy head or chief executive officer of any portion of the public sector, or the person who occupies any other similar position, however called in the public sector.”

¹³⁹ Minister, under section 2, is defined as the Minister responsible for the Public Service Human Resources Management Agency of Canada.

¹⁴⁰ For the definition of chief executive, see footnote 138. Canada also reports that administrative sanctions are available if a chief executive does not establish these procedures. In addition, the Criminal Code provides a general legislative sanction related to any failure to implement a requirement of an Act of Parliament. Section 126 provides:

chief executive must designate a senior officer to be responsible for receiving and dealing with disclosures of wrongdoing;¹⁴¹

- Section 11, which provides that the chief executive must protect identity of persons involved in the disclosure process, including that of the person making the disclosure, witnesses and persons alleged to be responsible for wrongdoings. They are also to establish procedures for the confidentiality of the information collected and if a wrongdoing is found, promptly provide public access to information that describes the wrongdoing, including any that could identify the wrongdoer, as well as the recommendations set out in a report regarding the wrongdoing, including any corrective action taken or the reasons as to why no corrective action was taken;
- Section 12, which states that a public servant may disclose to his or her supervisor or the senior executive designated by the chief executive for that purpose, any information on wrongdoing, whether committed or about to be committed, or one that the public servant has been asked to commit;
- Section 13, which states that a public servant may disclose the information referred to in section 12 to the Public Sector Integrity Commissioner (the Commissioner). Section 14 further provides that if the wrongdoing concerns the Office of the Public Sector Integrity Commissioner, then the disclosure may be made to the Auditor General of Canada;
- Section 19, which states that no person can take any reprisals¹⁴² against any public servant or direct that one be taken against a public servant;
- Section 19.1, which provides that a public servant or former public servant may file a complaint with the Commissioner if there is a reasonable ground for believing that a reprisal has been taken;

“126. (1) Every one who, without lawful excuse, contravenes an Act of Parliament by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Any proceedings in respect of a contravention of or conspiracy to contravene an Act mentioned in subsection (1), other than this Act, may be instituted at the instance of the Government of Canada and conducted by or on behalf of that Government.”

¹⁴¹ Canada reports that the Public Service Agency has held training programs for Senior Officers about their roles and responsibilities under the Public Servants Disclosure Protection Act and continues to provide presentations about the Act to functional groups as well as producing communication materials (guides, questions and answers, etc.) about the Act.

¹⁴² Reprisal, under section 2, is defined as: “any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:

- (a) a disciplinary measure;
- (b) the demotion of the public servant;
- (c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
- (d) any measure that adversely affects the employment or working conditions of the public servant; and
- (e) a threat to take any of the measures referred to in any of paragraphs (a) to (d).”

In addition, ‘protected disclosure’ means “a disclosure that is made in good faith and that is made by a public servant

- (a) in accordance with this Act;
- (b) in the course of a parliamentary proceeding;
- (c) in the course of a procedure established under any other Act of Parliament; or
- (d) when lawfully required to do so.”

- Section 20.4, which states that the Commissioner may present an application to the Public Servants Disclosure Protection Tribunal for a determination of whether or not a reprisal was taken. The Tribunal may order a remedy in favor of the complainant and an order respecting the disciplinary action to be taken against any person or persons who took the reprisal;¹⁴³
- Section 20.7, which establishes the Public Servants Disclosure Protection Tribunal;
- Section 22, which provides for the duties of the Commissioner, which include: provide information and advice regarding the making of disclosures and the conduct of investigations; receive, record and review disclosures of wrongdoing; conduct investigations; ensure that procedural fairness and natural justice of all persons involved in the investigations is respected; protect, to the extent possible under law, the identity of the persons making the disclosure, witnesses and persons alleged for the wrongdoing; establish procedures for processing disclosures and ensure the confidentiality of the information collected; review the results of the investigations into disclosures; make recommendations to chief executives concerning measures to correct the wrongdoing; and receive, review, investigate and deal with complaints made in respect of reprisals;
- Section 25.1, which provides that the Commissioner may provide access to legal advice to any public servant who is considering making or made a disclosure of a wrongdoing; any person who is not a public servant who is considering providing information regarding a wrongdoing; any person who has or is involved in any investigation conducted by a senior officer; any public servant considering making a complaint regarding an alleged reprisal taken against him or her; or any person who is or has been involved in a proceeding regarding an alleged reprisal;
- Section 40, which states that no person shall knowingly make a false or misleading statement in a disclosure of a wrongdoing;
- Section 41, which states that no person shall wilfully obstruct the duties of the senior officer or the Commissioner;
- Section 42, which states that no person shall destroy, mutilate or alter a document; falsify a document or make a false document; conceal a document or thing; or direct anyone else to do the aforementioned, when that document or thing is likely to be relevant to an investigation;
- Section 42.1, which states that no employer¹⁴⁴ shall take or threaten to take any of the following measures against an employee if that employee has, in good faith, reported a wrongdoing: a) a disciplinary action; b) demotion; c) termination of employment; or d) a measure that adversely affects the employment or working conditions of the employee;
- Section 42.2, which states that no public servant can terminate a contract or withhold payment to a contractor if the contractor, in good faith, provided information concerning an alleged wrongdoing in the public sector. In addition, in the awarding of a contract, no account can be taken that a person or the person's employees has, in the past, in good faith

¹⁴³ Section 21.7 and 21.8 provide the remedies available to the complainant and the factors to be taken into account in applying a disciplinary action against the person or persons who took the reprisal measures.

¹⁴⁴ Section 42.1 of the Public Servants Disclosure Protection Act applies only to employers in the private sector.

and on the basis of a reasonable belief, provided information concerning an alleged wrongdoing to the Commissioner;

- Section 51.1, which provides that a chief executive may temporarily assign other duties to a public servant who is involved in a disclosure or a complaint in respect of a reprisal if the chief executive believes that the public servant's involvement has become known in the workplace or if it is necessary to maintain the effective operation of the workplace;
- Section 52, which states that as soon as possible, the persons responsible for those organizations excluded from the purview of the Public Servants Disclosure Protection Act must establish procedures for the disclosure of wrongdoings, including the protection for those disclosures and that they must be similar to those set out in the Act.

- The Witness Protection Program Act,¹⁴⁵ which, according to its preamble, establishes and puts into operation a program to enable certain persons to receive protection in relation to certain inquiries, investigations or prosecutions. The following provisions of the Act should be noted:

- Section 3, which states that the purpose of the Act is to promote law enforcement by protecting persons who are involved in providing assistance in law enforcement matters in relation to activities conducted by the Royal Canadian Mounted Police or activities conducted by any law enforcement agency or international criminal court or tribunal;
- Section 4, which establishes the Witness Protection Program to be administered by the Commissioner of the Force;
- Section 5, which provides that the Commissioner determines whether a witness¹⁴⁶ should be admitted to the Program and the type of protection to be afforded;
- Section 6, which provides that a witness shall not be admitted to the Program unless a recommendation has been made by a law enforcement agency or an international criminal court or tribunal;
- Section 7, which provides the following factors to be considered: a) the nature of the risk to the witness; b) the danger to the community if the witness is admitted to the Program; c) the nature of the inquiry, investigation or prosecution involving the witness; d) the value of the information or evidence given or agreed to be given; e) the capability of the witness to adjust to the Program; f) the cost of maintaining the Program; g) the alternate methods of protecting the witness; and h) the other factors deemed relevant;
- Section 11, which states that no person shall knowingly disclose, directly or indirectly, information about a location or a change of identity of a protectee or former protectee;¹⁴⁷

¹⁴⁵ Witness Protection Program Act, <http://laws.justice.gc.ca/en/W-11.2/index.html>

¹⁴⁶ Witness is defined as "(a) a person who has given or has agreed to give information or evidence, or participates or has agreed to participate in a matter, relating to an inquiry or the investigation or prosecution of an offence and who may require protection because of risk to the security of the person arising in relation to the inquiry, investigation or prosecution, or (b) a person who, because of their relationship to or association with a person referred to in paragraph (a), may also require protection for the reasons referred to in that paragraph."

- Section 14, which states that the Commissioner may enter into an agreement with a law enforcement agency or the Attorney General of a province in order to enable a witness to be admitted to the Program; with a provincial authority to obtain documents and other information required for protection of the protectee; reciprocal agreements with the government of a foreign jurisdiction; and with an international criminal court or tribunal;

- The Criminal Code,¹⁴⁸ which under section 425.1 provides that: “No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so, (a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or (b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.” Section 425.1 refers to employers in both the public and private sector.

2.2. Adequacy of the legal framework and/or other measures.

With respect to the legal provisions for protecting public servants and private citizens who in good faith report acts of corruption, the Committee notes that, on the basis of the information available to it, they may be said to constitute a set of measures that are pertinent for promoting the purposes of the Convention.

The Committee nevertheless deems it advisable for Canada to analyze the possibility of supplementing, developing or adapting the provisions in place through the appropriate legal and administrative procedures, in accordance with its Constitution and the basic principles of its domestic legal system, on the protection of public servants and private citizens who in good faith report acts of corruption. In this respect, the country under review should consider the following:

- The Committee observes that the Public Servants Disclosure Protection Act is applicable to the public sector working in the Crown Corporations and other public bodies set out in Schedule I of that Act and in the departments and other public institutions listed in Schedules I and I.1 to V of the Financial Administration Act.¹⁴⁹ However, not all public bodies are covered by the Act and it specifically excludes those in the public sector that work for the Canadian Forces, the Canadian Security Intelligence Service or the Communications Security Establishment. In order to address those public servants working in those public bodies, section 52 states that these excluded bodies are, as soon as possible, to establish procedures

¹⁴⁷ Section 21 of the Witness Protection Program Act makes it an offence to disclose such information and provides a punishment for those who contravene section 11: “21. Every person who contravenes subsection 11(1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction, to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding two years, or to both.”

¹⁴⁸ Criminal Code, *supra* note 62.

¹⁴⁹ See footnote 5.

for the disclosure of wrongdoings, including the protection for those disclosures and that they must be similar to those set out in the Act. This provision demonstrates the importance to the country under review of providing a system for protecting public servants and private citizens who, in good faith, report acts of corruption.

The Committee takes note that while the scope of coverage is comprehensive, and provisions are in place to ensure that certain excluded public bodies from the Act have in place procedures for disclosing wrongdoings and protecting those who do, there are still other important public officials who are not covered. As noted by the Submission by Transparency International Canada, the Act does not cover Ministers, members of Minister's staffs, members of boards of directors of Crown corporations, Parliament and its institutions and federally appointed judges.¹⁵⁰ The Committee believes that the country under review should consider establishing similar protection measures as found in the Public Servants Disclosure Protection Act for these public officials. Bearing this in mind, the Committee will make a recommendation (see Recommendation 2 in Chapter III of this Report).

2.3. Results of the legal framework and/or other measures

Canada states in its Response that since the Public Servants Disclosure Protection Act came into force on April 15, 2007, initial results and assessments are pending¹⁵¹ Therefore, the Committee is unable to properly evaluate this area. The Committee does note that section 38.1 of the Act requires each chief executive to prepare and submit to the Public Service Human Resources Management Agency of Canada a report respecting disclosures made, within 60 days after the end of each financial year. Moreover, within six months after the end of each financial year, the President of the Agency must submit a report that provides an overview of the activities throughout the public sector respecting disclosures, and the report must contain: a) the number of general inquiries under the Act; b) the number of disclosures received, number acted on and number not acted on; c) the number of investigations; d) the existence of systemic problems that give rise to wrongdoings; and e) any other matters the President of the Agency considers necessary.¹⁵²

The Committee also observes that in regards to the Witness Protection Program in place in the country under review, the Commissioner of the Force is to issue an annual report on the operation of the Program.¹⁵³ The latest report is the Witness Protection Program Act – Annual Report: 2005 – 2006.¹⁵⁴ The following table is provided from the Annual Report:

Number of	2005 - 2006	2004 - 2005
Total Number of Cases	53	86
Secure identity changes	54	35
Relocation outside province of origin	22	25
Relocation within province of origin	9	15
Voluntary Terminations	21	16
Involuntary Terminations	7	8
Refusal of protection by witnesses	15	11

¹⁵⁰ Response from Transparency International Canada, pg. 11, *supra* note 3

¹⁵¹ Response to the Questionnaire, pg. 15, *supra* note 16.

¹⁵² Canada reports that the data required by the Public Servants Disclosure Protection Act is now being collected.

¹⁵³ Witness Protection Program Act, section 16, *supra* note 145.

¹⁵⁴ Witness Protection Program Act – Annual Report: 2005 – 2006,

<http://www.publicsafety.gc.ca/abt/dpr/le/wppa2005-6-eng.aspx>

Instance of failure of protection caused by RCMP	0	0
Lawsuits filed in court or complaints with the Commission for public Complaints against the RCMP in relation to the program	3	3

Considering that the Committee does not have additional information other than that referred above that might enable it to make a comprehensive evaluation of the results of this topic, it will make a recommendation in this regard. (See Recommendation 4.2 in Chapter III of this Report)

3. ACTS OF CORRUPTION (ARTICLE VI OF THE CONVENTION)

3.1. Existence of provisions in the legal framework and/or other measures

Canada has a set of provisions related to the criminalization of the acts of corruption provided for in Article VI(1) of the Convention, among which the following should be noted:

- With regard to paragraph (a) of Article VI(1):

- Section 121(1)(a) of the Criminal Code,¹⁵⁵ which provides: “Every one commits an offence who

(a) directly or indirectly...

(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,¹⁵⁶ 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...

(3) 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.”

Under Section 118 of the Criminal Code, an ‘official’ includes a person who holds an office, or is appointed or elected to discharge a public duty.¹⁵⁷

¹⁵⁵ Criminal Code, *supra* note 62.

¹⁵⁶ Section 118 states that ‘government’ means the Government of Canada, the government of a province, or Her Majesty in right of Canada or a province.

¹⁵⁷ Section 118 states that an ‘office’ includes: “an office or appointment under the government, a civil or military commission, and a position or an employment in a public department.” In addition, the country under review states that the courts have had an opportunity to address the scope of this definition. For example, as been described by Mr. Justice Berger in *R. v. Yellow Old Woman (D.)* (2003), 339 A.R. 302 (C.A.):

“In my opinion, the decision of the Supreme Court of Canada in *R. v. Sheets* [1971] S.C.R. 614, is dispositive of the issue. The definition of ‘office’ in s. 118 is not a closed list confined to people who hold office with the federal or provincial

- Section 119(1)(a) of the Criminal Code, which provides: “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 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;”

- Section 120(a) of the Criminal Code, which provides: “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;”

- Section 123 of the Criminal Code, which provides: “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.”

government. The Court held that the use of the term ‘office’ in what is now s. 118 of the *Criminal Code* ought to be interpreted to include ‘a position of duty, trust or authority, esp. in the public service or in some corporation, society or the like’ (cf. *The New Century Dictionary*) or a ‘position to which certain duties are attached, esp. a place of trust, authority or service under constituted authority’ (cf. *The Shorter Oxford Dictionary*).”

Moreover, the definition of ‘official’ in section 118 applies to sections 121 and 122 of the Criminal Code. Other offences in the Criminal Code address criminal conduct under the Convention, such as section 426 (secret commissions), which applies to active and passive bribery in both the public and private sectors and sections 322 (theft, which includes embezzlement), section 380 (fraud) and section 346 (extortion).

Under Section 123(3) of the Criminal Code, a ‘municipal official’ means a member of a municipal council or a person who holds an office under a municipal government.¹⁵⁸

- Section 426(1) of the Criminal Code, which provides: “(1) Every one commits an offence who

(a) directly or indirectly, corruptly gives, offers or agrees to give or offer to an agent or to anyone for the benefit of the agent — or, being an agent, directly or indirectly, corruptly demands, accepts or offers or agrees to accept from any person, for themselves or another person — any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent’s principal, or for showing or not showing favour or disfavour to any person with relation to the affairs or business of the agent’s principal; or

(b) with intent to deceive a principal, gives to an agent of that principal, or, being an agent, uses with intent to deceive his principal, a receipt, an account or other writing

(i) in which the principal has an interest,

(ii) that contains any statement that is false or erroneous or defective in any material particular, and

(iii) that is intended to mislead the principal...

(3) A person who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.”

Under Section 426(4) of the Criminal Code, an ‘agent’ includes an employee and ‘principal’ includes an employer.

▪ With regard to paragraph (b) of Article VI(1):

- Section 121(1)(a) of the Criminal Code, which provides: “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

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...

¹⁵⁸ Although Section 123 of the Criminal Code applies only to members of a municipal council and municipal employees, they are also subject to other Criminal Code offences, such as sections 122 and 426. Provisions other than section 123 apply to other officials, such as sections 119, 120, 121, 122 and 426.

(3) 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.”

- Section 119(1)(b) of the Criminal Code, which provides: “Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years who

(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.”¹⁵⁹

- Section 120(b) of the Criminal Code, which provides: “Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years who

(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).”¹⁶⁰

The aforementioned Sections 123 and 426 of the Criminal Code.

- With regard to paragraph (c) of Article VI(1):

- Section 122 of the Criminal Code, which provides: “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.”¹⁶¹

- With regard to paragraph (d) of Article VI(1):

- Section 462.31(1) of the Criminal Code, which provides: “Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or

¹⁵⁹ As discussed with regard to the aforementioned Section 119(1)(a), the persons are the holder of a judicial office, or being a member of Parliament or of the legislature of a province.

¹⁶⁰ As discussed with regard to the aforementioned Section 120(a), the persons are a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law. The acts mentioned under subparagraph (a)(i), (ii) or (iii) are the interference with the administration of justice; the procurement or facilitation the commission of an offence; or the protection from detection or punishment a person who has committed or who intends to commit an offence.

¹⁶¹ The country under review states that the Supreme Court of Canada has held that the offence is committed when an official, acting in connection with the duties of his or her office, breaches the standard of responsibility and conduct demanded by the nature of the office, in a manner that constitutes a serious and marked departure of the standards expected from a person in his or her position, and acted with the intention of using the office for a purpose other than the public good. (R. v. Boulanger, [2006] 2 S.C.R. 49) <http://scc.lexum.umontreal.ca/en/2006/2006scc32/2006scc32.html>, Response to the Questionnaire, pg. 19, *supra* note 15. Canada further states that this definition includes the case where an official discharges his or her duties in a manner intended to obtain a benefit illicitly, or accepts a benefit in order to act or refrain to act in relation to official duties. In addition, the breach of trust in section 122 constitutes an offence even in cases where the action would *not* constitute a breach of trust between private persons. The effect of this expression is to make irrelevant the standard of trust between private persons in assessing whether an official has committed a breach of trust. This ensures that the higher standard of conduct required from officials is applied in deciding whether the official has committed a breach of trust.

believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of a designated offence;¹⁶² or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

(2) Every one who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.”

- With regard to paragraph (e) of Article VI(1):

- Section 21 of the Criminal Code, which provides: “(1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.”

- Section 22 of the Criminal Code, which provides: “(1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.”

- Section 23 of the Criminal Code, which provides: “An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.”¹⁶³

¹⁶² Section 462.3 states that a ‘designated offence’ means: “(a) any offence that may be prosecuted as an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a).”

¹⁶³ Canada reports that the meaning of the word “comfort” can be clarified by the French version of the law, which has equal legal value. The French equivalent of the English “receives, comforts or assists” is “reçoit, aide ou assiste”. The French word “aide” can be translated in English as “help”.

- Section 24(1) of the Criminal Code, which provides: “(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.”¹⁶⁴

- Section 463 of the Criminal Code, which provides: “Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences:

(a) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to be sentenced to imprisonment for life is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years;

(b) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to imprisonment for fourteen years or less is guilty of an indictable offence and liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable;

(c) every one who attempts to commit or is an accessory after the fact to the commission of an offence punishable on summary conviction is guilty of an offence punishable on summary conviction; and

(d) every one who attempts to commit or is an accessory after the fact to the commission of an offence for which the offender may be prosecuted by indictment or for which he is punishable on summary conviction

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding a term that is one-half of the longest term to which a person who is guilty of that offence is liable, or

(ii) is guilty of an offence punishable on summary conviction.”

- Section 464 of the Criminal Code, which provides: “Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

¹⁶⁴ Canada reports that Section 24 of the *Criminal Code* criminalizes attempts, not preparatory acts. This point is reinforced by subsection 24(2), which indicates that mere preparation is *not* criminalized. The distinction between an attempt and preparation is a qualitative one, with consideration given to the proximity between the act and the completed offence in terms of time, location, and acts under the control of the accused remaining to be accomplished. The courts have said that there is no general criterion that can be applied to draw the line between preparation and attempt; it should be left to common-sense judgment: *R. v. Deutsch*, [1986] 2 S.C.R. 2, <http://scc.lexum.umontreal.ca/en/1986/1986rcs2-2/1986rcs2-2.html>

(a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and

(b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.”

- Section 465 of the Criminal Code, which provides: “(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

(a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;

(b) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and liable

(i) to imprisonment for a term not exceeding ten years, if the alleged offence is one for which, on conviction, that person would be liable to be sentenced to imprisonment for life or for a term not exceeding fourteen years, or

(ii) to imprisonment for a term not exceeding five years, if the alleged offence is one for which, on conviction, that person would be liable to imprisonment for less than fourteen years;

(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable; and

(d) every one who conspires with any one to commit an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.”

3.2. Adequacy of the legal framework and/or other measures.

With respect to provisions related to the criminalization of the acts of corruption provided for in Article VI(1) of the Convention that have been examined by the Committee, based on the information made available to it, they constitute, as a whole, a set of provisions appropriate for promoting the purposes of the Convention.

3.3. Results of the legal framework and/or other measures

Canada includes in its response to the Questionnaire statistics from the Adult Criminal Court Survey which show the number of convictions for the main corruption offences and resulting sentences from 1999-00 to 2003-04, the latest year for which they were available at the time of the deadline to submit the Response to the Questionnaire.¹⁶⁵

¹⁶⁵ Response to the Questionnaire, pg. 21 – 24, *supra* note 16.

The country under review states that these statistics represent approximately 90 percent of national provincial criminal court coverage, as one province (Manitoba) and two territories (Northwest Territories and Nunavut) are not included in the survey.

CONVICTIONS									
Section 119 - Charges									
Year	Total	Conviction		Acquitted		Stay / Withdrawn		Other Decision	
		Rate	Guilty						
		%	#	%	#	%	#	%	#
1999/00	0	...	0	...	0	...	0	...	0
2000/01	1	100%	1	0%	0	0%	0	0%	0
2001/02	2	0%	0	0%	0	100%	2	0%	0
2002/03	2	0%	0	0%	0	50%	1	50%	1
2003/04	0	...	0	...	0	...	0	...	0

SENTENCES													
Section 119 - Charges													
Year	Total Convicted	Custody		Conditional Sentence		Probation		Fine		Other Sentence		Unknown	
		%	#	%	#	%	#	%	#	%	#	%	#
		1999/00	0	...	0	...	0	...	0	...	0	...	0
2000/01	1	0%	0	0%	0	100%	1	0%	0	0%	0	0%	0
2001/02	0	...	0	...	0	...	0	...	0	...	0	...	0
2002/03	0	...	0	...	0	...	0	...	0	...	0	...	0
2003/04	0	...	0	...	0	...	0	...	0	...	0	...	0

CONVICTIONS									
Section 120 - Charges									
Year	Total	Conviction		Acquitted		Stay / Withdrawn		Other Decision	
		Rate	Guilty						
		%	#	%	#	%	#	%	#
1999/00	60	8%	5	0%	0	63%	38	28%	17
2000/01	33	27%	9	3%	1	36%	12	33%	11
2001/02	23	35%	8	0%	0	57%	13	9%	2
2002/03	31	19%	6	6%	2	68%	21	6%	2
2003/04	15	27%	4	7%	1	60%	9	7%	1

SENTENCES													
Section 120 - Charges													
Year	Total Convicted	Custody		Conditional Sentence		Probation		Fine		Other Sentence		Unknown	
		%	#	%	#	%	#	%	#	%	#	%	#
1999/00	5	20%	1	0%	0	0%	0	40%	2	40%	2	0%	0
2000/01	9	33%	3	0%	0	44%	4	22%	2	0%	0	0%	0
2001/02	8	63%	5	0%	0	25%	2	13%	1	0%	0	0%	0
2002/03	6	33%	2	0%	0	33%	2	33%	2	0%	0	0%	0
2003/04	4	75%	3	0%	0	25%	1	0%	0	0%	0	0%	0

CONVICTIONS									
Section 121- Charges									
Year	Total	Conviction		Acquitted		Stay / Withdrawn		Other Decision	
		Rate	Guilty	%	#	%	#	%	#
1999/00	34	21%	7	18%	6	62%	21	0%	0
2000/01	17	29%	5	0%	0	71%	12	0%	0
2001/02	36	53%	19	0%	0	36%	13	11%	4
2002/03	21	57%	12	14%	3	19%	4	10%	2
2003/04	29	17%	5	0%	0	66%	19	17%	5

SENTENCES													
Section 121- Charges													
Year	Total Convicted	Custody		Conditional Sentence		Probation		Fine		Other Sentence		Unknown	
		%	#	%	#	%	#	%	#	%	#	%	#
1999/00	7	43%	3	0%	0	29%	2	29%	2	0%	0	0%	0
2000/01	5	20%	1	20%	1	40%	2	0%	0	20%	1	0%	0
2001/02	19	16%	3	16%	3	32%	6	16%	3	11%	2	11%	2
2002/03	12	8%	1	17%	2	75%	9	0%	0	0%	0	0%	0
2003/04	5	20%	1	20%	1	40%	2	0%	0	20%	1	0%	0

CONVICTIONS									
Section 122 - Charges									
Year	Total	Conviction		Acquitted		Stay / Withdrawn		Other Decision	
		Rate	Guilty	%	#	%	#	%	#
1999/00	127	36%	46	31%	40	24%	31	8%	10
2000/01	146	8%	12	1%	2	69%	101	21%	31
2001/02	189	18%	34	2%	4	66%	124	14%	27
2002/03	63	21%	13	6%	4	54%	34	19%	12

2003/04	174	8%	14	1%	2	87%	152	3%	6
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SENTENCES													
Section 122 - Charges													
Year	Total Convicted	Custody		Conditional Sentence		Probation		Fine		Other Sentence		Unknown	
		%	#	%	#	%	#	%	#	%	#	%	#
1999/00	46	52%	24	13%	6	20%	9	11%	5	4%	2	0%	0
2000/01	12	42%	5	25%	3	25%	3	0%	0	8%	1	0%	0
2001/02	34	74%	25	6%	2	15%	5	0%	0	6%	2	0%	0
2002/03	13	15%	2	38%	5	31%	4	15%	2	0%	0	0%	0
2003/04	14	14%	2	43%	6	29%	4	0%	0	14%	2	0%	0

CONVICTIONS										
Section 123 - Charges										
Year	Total	Conviction		Acquitted		Stay / Withdrawn		Other Decision		
		Rate	Guilty							
		%	#	%	#	%	#	%	#	
1999/00	0	...	0	...	0	...	0	...	0	
2000/01	2	50%	1	0%	0	0%	0	50%	1	
2001/02	0	...	0	...	0	...	0	...	0	
2002/03	5	0%	0	0%	0	40%	2	60%	3	
2003/04	2	100%	2	0%	0	0%	0	0%	0	

SENTENCES													
Section 123 - Charges													
Year	Total Convicted	Custody		Conditional Sentence		Probation		Fine		Other Sentence		Unknown	
		%	#	%	#	%	#	%	#	%	#	%	#
1999/00	0	...	0	...	0	...	0	...	0	...	0	...	0
2000/01	1	0%	0	0%	0	0%	0	100%	1	0%	0	0%	0
2001/02	0	...	0	...	0	...	0	...	0	...	0	...	0
2002/03	0	...	0	...	0	...	0	...	0	...	0	...	0
2003/04	2	0%	0	0%	0	100%	2	0%	0	0%	0	0%	0

CONVICTIONS										
Section 426 - Charges										
Year	Total	Conviction		Acquitted		Stay / Withdrawn		Other Decision		
		Rate	Guilty							
		%	#	%	#	%	#	%	#	
1999/00	43	16%	7	0%	0	74%	32	9%	4	
2000/01	44	23%	10	0%	0	61%	27	16%	7	
2001/02	30	33%	10	7%	2	53%	16	7%	2	

2002/03	35	20%	7	0%	0	66%	23	14%	5
2003/04	28	4%	1	4%	1	54%	15	39%	11

SENTENCES													
Section 426 - Charges													
Year	Total Convicted	Custody		Conditional Sentence		Probation		Fine		Other Sentence		Unknown	
		%	#	%	#	%	#	%	#	%	#	%	#
1999/00	7	14%	1	57%	4	29%	2	0%	0	0%	0	0%	0
2000/01	10	100%	10	0%	0	0%	0	0%	0	0%	0	0%	0
2001/02	10	10%	1	20%	2	10%	1	20%	2	40%	4	0%	0
2002/03	7	43%	3	14%	1	14%	1	14%	1	14%	1	0%	0
2003/04	1	0%	0	0%	0	0%	0	0%	0	100%	1	0%	0

The Committee takes note of the statistical data compiled by the Adult Criminal Court Survey on the main corruption offences and resulting sentences. However, the Committee observes that it is not easy to find this information online, particularly broken down the way it appears here. When visiting the website of Statistics Canada, where the Adult Criminal Court Surveys are posted, this information is not easily available to the general public and was not found. In that regard, the Committee considers that the country under review would benefit from making this information more easily available and user friendly to the general public. In this regard, the Committee will formulate a recommendation. (see Recommendation 3 in Section 3 of Chapter III of this Report)

III. CONCLUSIONS AND RECOMMENDATIONS IN RELATION TO THE IMPLEMENTATION OF THE PROVISIONS SELECTED IN THE FRAMEWORK OF THE SECOND ROUND

Based on the review conducted in Chapter II of this Report, the Committee offers the following conclusions and recommendations regarding implementation by Canada of the provisions contained in Article III(5) (systems of government hiring and for the procurement of goods and services); Article III(8) (systems for protecting public servants and private citizens who, in good faith, report acts of corruption); and Article VI (acts of corruption) of the Convention, which were selected for review within the framework of the second round.

A. COOPERATION WITH THE PROVINCIAL AND TERRITORIAL GOVERNMENTS

In accordance with what is provided at Section A of Chapter II of this report, the Committee recommends that Canada continue promoting the purposes of the Convention in the different levels of government and continue providing information on the progress thereof. In addition, the Committee recommends Canada to continue strengthening the cooperation and coordination between the Federal Government and the provinces and territories for that purpose.

B. CONCLUSIONS AND RECOMMENDATIONS AT THE FEDERAL LEVEL

1. SYSTEMS OF GOVERNMENT HIRING AND PROCUREMENT OF GOODS AND SERVICES (ARTICLE III (5) OF THE CONVENTION)

1.1. Systems of Government Hiring

Canada has considered and adopted measures intended to establish, maintain and strengthen the systems of government hiring, as discussed in Section 1.1 of Chapter II of this Report.

In light of the comments made in the above-noted section, the Committee suggests that Canada consider the following recommendation:

- Continue strengthening the systems of government hiring of public servants, when applicable, that assure the openness, equity and efficiency of such systems.

In meeting this recommendation, Canada could take into account the following measures:

- a) Promote the adoption of the relevant measures that ensure that all departments, organizations and separate employers that do not fall under the purview of the PSEA conduct its recruitment based on the principles of merit and non-partisanship. (See Section 1.1.2. of Chapter II of this Report)
- b) Encourage the Office of the Senate Ethics Officer and the Office of the Conflict of Interest and Ethics Commissioner to continue to adopt appropriate hiring practices based on merit, and allowing for adequate advertisement opportunities and recourse mechanisms. (See Section 1.1.2. of Chapter II of this Report)¹⁶⁶
- c) Maintain statistics regarding investigations conducted by the Public Service Commission on external appointment processes and their results. (See Section 1.1.2. of Chapter II of this Report)

1.2. Government Systems for the Procurement of Goods and Services

Canada has considered and adopted measures intended to establish, maintain and strengthen the systems for government procurement of goods and services, as discussed in Section 1.2 of Chapter II of this Report.

In light of the comments made in the above-noted section, the Committee suggests that Canada consider the following recommendation:

- Continue strengthening systems for the procurement of goods and services by the government. In meeting this recommendation, Canada could take into account the following measures:
 - a) Support the Office of the Procurement Ombudsman so that, once established, it has the necessary trained personnel and resources to carry out its functions properly as well as

¹⁶⁶ Canada reports that the Office of the Conflict of Interest and Ethics Commissioner has already adopted such hiring practices.

establishing mechanisms that permit ongoing evaluation and follow-up of said activities. (See Section 1.2.2. of Chapter II of this Report)¹⁶⁷

- b) Continue building awareness among industry stakeholders of their obligations and rights under the Code of Conduct for Procurement. (See Section 1.2.2 of Chapter II of this Report)¹⁶⁸

2. SYSTEMS FOR PROTECTING PUBLIC SERVANTS AND PRIVATE CITIZENS WHO IN GOOD FAITH REPORT ACTS OF CORRUPTION (ARTICLE III (8) OF THE CONVENTION)

Canada has considered and adopted measures intended to establish, maintain and strengthen systems for protecting public servants and private citizens who in good faith report acts of corruption, as discussed in Section 3 of Chapter II of this Report.

In light of the comments made in the above-noted section, the Committee suggests that Canada consider the following recommendation:

- Ensure that those public bodies that do not fall under the purview of the Public Servants Disclosure Protection Act have adopted measures that protect persons who disclose wrongdoings. (see Section 2.2. of Chapter II of this Report)

3. ACTS OF CORRUPTION (ARTICLE VI(1) OF THE CONVENTION)

Canada has adopted measures that criminalize the acts of corruption provided for by Article VI(1) of the Convention, as discussed in Section 3 of Chapter II of this Report.

In light of the comments made in the above-noted section, the Committee suggests that Canada consider the following recommendation:

- Making its statistical information on offences related to acts of corruption, in a manner that is more readily available and user-friendly to the general public. (See Section 3.3 in Chapter II of this Report).

¹⁶⁷ Canada reports that the appointment of the Procurement Ombudsman came into effect on May 5, 2008. The regulations were published in the Canada Gazette on May 14, 2008. The office is already well-staffed with 15 individuals who are experienced in procurement among other areas.

¹⁶⁸ Canada reports that in February 2007, the Government of Canada conducted an on-line consultation on the Code of Conduct for Procurement seeking input from key stakeholders – including suppliers, industry associations and key procurement officers across government. A draft version of the Code was made available on the Public Works and Government Services Canada website and on MERX, the government's electronic tendering system, from February 9 to March 14, 2007, to obtain feedback from interested parties. The final Code of Conduct was adopted in September 2007. Public Works and Government Services Canada (PWGSC) launched the Code following the integration of feedback received from the on-line consultations with the federal government, suppliers and members of the general public. The Code of Conduct for Procurement is available on the PWGSC website. With respect to promotion of the Code, feedback indicated that respondents would support inclusion of the Code in training sessions available through the Materiel Management Institute. As a result, a presentation of the Code was given at the 19th Annual National Workshop of the Materiel Management Institute on May 13, 2008.

<http://www.mmi-igm.ca/download/mmnw/program/2008MMNW-PROGRAM-E.pdf>

In addition, the Office of Small and Medium Enterprises has committed to address the *Code* in its outreach materials to suppliers, and what is included in the materials will be reflected on the Business Access Canada website.

4. GENERAL RECOMMENDATIONS

Based on the review and contributions made throughout this Report, the Committee suggests that Canada consider the following recommendations:

- 4.1 Continue to design and implement, when appropriate, training programs for public servants responsible for implementing the systems, standards, measures and mechanisms considered in this Report, for the purpose of guaranteeing that they are adequately understood, managed and implemented.
- 4.2. Continue to select and develop procedures and indicators, when appropriate and where they do not yet exist, to analyze the results of the systems, standards, measures and mechanisms considered in this Report, and to verify follow-up on the recommendations made herein. (see Section 2.3 of Chapter II of this Report)

5. FOLLOW-UP

The Committee will consider the periodic update Reports submitted by Canada concerning progress in implementing previous recommendations, within the framework of the plenary meetings of the Committee and in accordance with the provisions of Article 31 of the Rules of Procedure and Other Provisions.

Similarly, the Committee will review the progress in implementing the recommendations made in this Report, in accordance with the provisions of Article 29 of the Rules of Procedure.

IV. OBSERVATIONS REGARDING THE PROGRESS MADE WITH IMPLEMENTING THE RECOMMENDATIONS ISSUED IN THE FIRST ROUND

The Committee observes, in relation with the implementation of the recommendations formulated for Canada in the Report in the First Round of review, based on the information at its disposal, the following:

A. IMPLEMENTATION OF THE CONVENTION AT THE PROVINCIAL AND TERRITORIAL LEVEL

Recommendation:

In accordance with what is provided at Section A of Chapter II of this report, the Committee recommends that Canada continue promoting the purposes of the Convention in the different levels of government and continue providing information on the progress thereof. In addition, the Committee recommends Canada encourage the strengthening of the mechanisms for consultation with civil society and nongovernmental organizations at the provincial and territorial levels with regards to the drafting of public policy and in the development of draft laws or regulations. Further, the Committee recommends that Canada continue strengthening cooperation and coordination between the Federal Government and the provinces and territories for that purpose.

In its Response, the country under review presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- Federal, provincial and territorial governments are engaged in an ongoing dialogue and various federal-provincial-territorial forums exist at different levels within which to exchange information and share experiences, such as the Coordinating Committee of Senior Officials (Criminal Justice), the Federal-Provincial Heads of Prosecution, as well as meetings of federal-provincial-territorial conflict of interest commissioners.¹⁶⁹

- Provincial and territorial conflict of interest commissioners were consulted in the preparation of the responses by Canada to the questionnaires for the first and second round of review. As well, the First Round report adopted by the Committee of Experts was shared with these officials.¹⁷⁰

- While Canada considers that it would not be appropriate for the federal government to interfere in provincial and territorial consultation processes for drafting public policy and legislation, it is Canada's understanding that the provinces and territories have a broad range of mechanisms for consultations with civil society and states that the Federal Government will continue to keep the provinces and territories informed of the work of the Committee of Experts.¹⁷¹

The Committee takes note of the satisfactory consideration of the foregoing recommendation, notwithstanding the fact that it is continuous in nature.¹⁷²

B. CONCLUSIONS AND RECOMMENDATIONS AT THE FEDERAL LEVEL

1. STANDARDS OF CONDUCT AND MECHANISMS TO ENFORCE COMPLIANCE (ARTICLE III, PARAGRAPHS 1 AND 2 OF THE CONVENTION)

1.1. Standards of conduct intended to prevent conflicts of interest and enforcement mechanisms

Recommendation:

Continue strengthening the provisions and measures on conflicts of interest and mechanisms to enforce compliance.

Measures suggested by the Committee:

- a. *Strongly encourage those public service institutions, as well as Parliament, whose officers and employees are not covered by a code of conduct outlined in Chapter II, Part B section 1.1.1 of the Report to adopt codes of conduct for those officers and employees.*
- b. *Adopt measures to ensure that the post-employment restrictions for public servants can be enforced.*
- c. *Canada should continue to improve evaluation mechanisms to analyze the results of enforcement of conflict of interest provisions.*
- d. *Canada should continue to promote the importance of the Values and Ethics Code for the Public Service in decision-making in the management of human and financial resources.*

¹⁶⁹ Response to the Questionnaire, pg. 25, *supra* note 16.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The Public Servants Disclosure Protection Act, which came into force on April 15, 2007, requires that a new Code of Conduct be developed for the whole public sector, including the core public administration, parent Crown corporations and separate agencies. This Code is expected to come into force in 2008. Each individual public sector organization is also required to develop its own code of conduct that is consistent with the Federal Public Sector Code of Conduct. In addition, those public servants who are not considered part of the public sector, such as employees of Parliament are covered by their own codes of conduct, such as the 2006 Policy on Conflicts of Interest applies to the employees of the House of Commons, and the 2007 Statement of Values and Ethics applies to the employees of the Senate.¹⁷³ (Measure (a))

- A Code of Conduct for Procurement came into force September 19, 2007 as part of the implementation of the Federal Accountability Act. The Code of Conduct for Procurement applies to both public servants and suppliers and as a result, a public servant who accepts employment in conflict with the post-retirement rules and the vendor who employs this public servant are both in breach of the Code.¹⁷⁴ (Measure (b))

- The Office of Public Service Values and Ethics has undertaken a governance model study for values and ethics in the public service and that it is assessing a sample of departments on their structure, processes and practices in managing values and ethics in the federal public service on an annual basis. The study is intended to guide departments in their implementation of values and ethics principles and it is available at http://www.pagency-agencefp.gc.ca/veo-bve/publications/rgs-rsg_e.asp.¹⁷⁵ (Measure (c))

- The Public Service of Canada is working with the Canada School of Public Service, to make values and ethics a core element woven into required training programs for human and financial management. The required training programs are for supervisors, managers and executives as well as functional specialists. It is also developing training courses for conflict of interest practitioners as well as incorporating conflict of interest training programs for human resource professionals. The Canada School of Public Service will also offer through its on-line course catalogue courses, e-learning training in values and ethics for employees, managers and executives.¹⁷⁶ (Measure (d))

The Committee takes note of the satisfactory consideration by the country under review of measures (a) and (d) of the foregoing recommendation, notwithstanding the fact that they are continuous in nature.

The Committee also takes note of the steps taken by Canada to proceed with the implementation of measures (b) and (c) of the foregoing recommendation and of the need to continue giving attention thereto.

¹⁷³ *Ibid*, pg. 26.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid.*, pg. 27.

¹⁷⁶ *Ibid*.

1.2. Standards of conduct to ensure the proper conservation and use of resources entrusted to government officials in the performance of their functions and enforcement mechanisms

Recommendation:

Continue strengthening the implementation of the standards of conduct that ensure the conservation and proper use of resources entrusted to public officials in the performance of their functions.

Measure suggested by the Committee:

Establish a mechanism to assess the effectiveness of the Policy on Losses of Money and Offences and Other Illegal Acts against the Crown.

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- A major assessment exercise, known as the Policy Suite Renew, is underway and the effectiveness of the Policy on Losses of Money and Offences and Other Illegal Acts against the Crown will be considered as part of this renewal process. Another mechanism to assess the effectiveness of this Policy is the government's Management Accountability Framework initiative. Through this initiative, the effectiveness of policies, including the aforementioned Policy, may be called into review if it is determined that their application is inappropriate or problematic. The Office of the Comptroller General's input to this initiative process is derived, in part, from reviewing both external and internal audit reports.¹⁷⁷

The Committee takes note of the satisfactory consideration of the foregoing recommendation, notwithstanding the fact that it is continuous in nature.

1.3. Standards of conduct and mechanisms concerning measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions of which they are aware

Recommendation:

Continue strengthening the norms and mechanisms with respect to the existing systems and measures requiring public officials to report to appropriate authorities acts of corruption in the performance of public functions of which they are aware.

Measures suggested by the Committee:

- a. *Adopt provisions to establish the obligation to disclose wrongdoings, including presumed acts of corruption, as well as provide reprisal protection mechanisms to those individuals working in the federal public sector who are not currently required to disclose, or who are not afforded protection for such disclosure.*
- b. *Strengthen the training and awareness building programs to ensure that individuals working in the federal public sector are aware of their duties, responsibilities, and protections for reporting*

¹⁷⁷ *Ibid.*, pg. 28.

acts of corruption and wrong-doing in the workplace.

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The Public Servants Disclosure Protection Act, which came into force on April 15, 2007, encourages, but does not require, employees in the public sector to come forward if they have reason to believe that serious wrongdoing has taken place and contains measures that prohibit reprisals. It also contains reporting provisions as well as empower the Public Service Integrity Commissioner to conduct independent reviews of disclosures of wrongdoing, issue reports to enable organizations to take appropriate remedial action and establishes an independent Tribunal to adjudicate complaints of reprisals and order appropriate remedies.¹⁷⁸ (Measure (a))
- The Office of Public Service Values and Ethics provides training for public servants through the Canada School for Public Service, in order to ensure that they have a broad awareness of anti-corruption measures. This type of awareness promotion is also built into basic orientation for new employees and existing courses are being reviewed to ensure that they include up-to-date information about the Public Servants Disclosure Protection Act. In addition, the country under review is developing new e-learning courses on values and ethics for public servants are currently being developed, which will include the content of the Act, and which are expected to be available before April 1st, 2008¹⁷⁹ (Measure (b))

The Committee takes note of the steps taken by Canada to proceed with the implementation of measure (a) of the foregoing recommendation and of the need to continue giving attention thereto.

The Committee also takes note of the satisfactory consideration by the country under review of measure (b) of the foregoing recommendation, notwithstanding the fact that it is continuous in nature.

2. SYSTEMS FOR REGISTERING INCOME, ASSETS AND LIABILITIES (ARTICLE III, PARAGRAPH 4 OF THE CONVENTION)

Recommendation:

Continue strengthening the systems for registration of income, assets, and liabilities.

Measures suggested by the Committee:

- a. *Adopt provisions where they do not currently exist on the systems for registering sources of income, assets and liabilities of family members of appropriate individuals in the federal public sector that potentially could conflict with the official duties of the individual.*
- b. *Adopt provisions on the systems for registering, where appropriate, sources of income, assets and liabilities that potentially could conflict with the official duties of those employees in the federal public sector who currently are not required to meet such registration procedures, in order to contribute to the promotion of the purposes of the Convention.*

¹⁷⁸ *Ibid.*, pgs. 28 – 29. See also the discussion of this Act under Section 2 of this Report.

¹⁷⁹ *Ibid.*, pg. 29.

- c. *Adopt measures so that the Confidential Reports submitted in accordance with the Values and Ethics Code of the Public Service and of Defence and Administrative Orders and Directives, 7021-1, are reviewed on a timely basis and appropriate steps taken to address conflicts of interest and other possible violations of law and to consider publication of such reports, where appropriate.*

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The Public Service Disclosure Protection Act requires the establishment of a Code of Conduct for the public sector, which will address the reporting of income, assets and liabilities of family members. Initial consultations have been held and drafting is in process, with further consultations with departments and bargaining agents on specific measures being held in 2007-2008. This Code is expected to be issued in 2008.¹⁸⁰ (Measure (a))

- The Code of Conduct that is being developed for the broader public sector requires that a review be conducted of the chapters that address the issues of conflicts of interest and post-employment, of the existing Values and Ethics Code. In the context of this review, the issue of the registration of income, assets and liabilities will be considered.¹⁸¹ (Measure (b))

- The development of the Code of Conduct, as required by the Public Service Disclosure Protection Act, is still in progress. Conflicts of interest that have been identified via confidential reports will be addressed. Confidential Reports made to Department of National Defence and the Canadian Forces pursuant to Administrative Orders and Directive are usually reviewed and where a conflict of interest may represent breaches of financial rules or legislation, the Directorate Special Enquiries and Investigations investigates and makes recommendations for corrective measures. The Department of National Defence will ensure that its internal policies and regulations are in line with the new Code of Conduct and will adjust them if necessary.¹⁸² (Measure (c))

The Committee takes note of the steps taken by Canada to proceed with the implementation of measures (a), (b) and (c) of the foregoing recommendation and of the need to continue giving attention thereto.

3. OVERSIGHT BODIES FOR THE SELECTED PROVISIONS (ARTICLE III, PARAGRAPHS 1, 2, 4 AND 11 OF THE CONVENTION)

Recommendation:

Continue strengthening the oversight bodies for effective compliance with the provisions selected for analysis in the first round (Article III, paragraphs 1, 2, 4 and 11).

Measures suggested by the Committee:

- a. *Adopt the relevant measures to ensure that there are oversight bodies for effective administration of new systems developed as a result of Recommendations in Part B (1) and (2).*

¹⁸⁰ *Ibid.*, pgs. 29 – 30.

¹⁸¹ *Ibid.*, pg. 30.

¹⁸² *Ibid.*

b. *Continue to consider improvements to the performance reports of departments and agencies with oversight responsibilities for paragraphs 1, 2, 4 and 11 of Article III of the Convention*

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The country under review states that in regards to measure (a), they do not require the creation of new oversight bodies. Nevertheless, a new Policy on Internal Audit, in force since April 2006, strengthens and professionalizes the internal audit function across government in a number of substantial ways. It increases the independence of the internal audit function by creating a new position of Chief Audit Executive separate from other departmental operations, and by including in the audit committees a number of professionals drawn from outside the public service. This Policy enhances the oversight, monitoring and reporting role of the internal audit function by requiring the Chief Audit Executive to provide annual opinions on the adequacy of controls and the Comptroller General to report annually to Treasury Board on the overall state of controls across the federal government.¹⁸³ (Measure (a))

- The Government of Canada recognizes the importance of effective public reporting for accountability and transparency and works continually to improve the departmental performance reports. The Treasury Board Secretariat has provided practical tools to departments in the preparation of these Reports and published a document, "Performance Reporting: Good Practices Handbook," which illustrates with concrete examples of what it means to put into practice the Government of Canada reporting principles. In addition, systematic changes to the infrastructure supporting reports to Parliament will also benefit the quality of these Reports, such as the new Management, Resources, and Results Structure Policy. Also, the Treasury Board Secretariat is working to ensure that departments and agencies have the capacity and tools to improve the quality and coverage of program evaluations. Also, for those organizations that do not produce these Reports, the Government of Canada states that the Treasury Board Secretariat works with these organizations to improve the quality of the corporate plans and annual reports that are required by legislation.¹⁸⁴ (Measure (b))

The Committee takes note of the satisfactory consideration of the foregoing recommendation, notwithstanding the fact that it is continuous in nature.

4. MECHANISMS TO PROMOTE THE PARTICIPATION BY CIVIL SOCIETY AND NONGOVERNMENTAL ORGANIZATIONS IN EFFORTS TO PREVENT CORRUPTION (ARTICLE III, PARAGRAPH 11 OF THE CONVENTION)

4.2. Mechanisms for access to information

Recommendation:

Continue strengthening the mechanisms for access to information.

Measure suggested by the Committee:

Continue to assess the reasons for the delays referred to in the Information Commissioner's Annual

¹⁸³ *Ibid.*, pg. 31. See the Policy on Internal Audit, http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ia-vi/siglist_e.asp

¹⁸⁴ *Ibid.*, pgs. 31 – 32.

Report and the concerns of the Information Commissioner on the availability of limited resources, and take the measures deemed relevant on these matters.

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The Government of Canada has increased the budget of the Office of the Information Commissioner by \$2.8 million for fiscal year 2006-07, \$2.26 million for 2007-08, \$2.26 million for 2008-09, and \$1.5 million for 2009-10 and future years. The Budget for the fiscal year 2006-07 is \$8.3 million. This Office has indicated that the additional financial resources will help to clear the backlog. In addition, the Federal Accountability Act, which came into force on December 12, 2006, further strengthened the mechanisms for access to information by bringing forward significant reforms to the Access to Information Act by extending the Act's coverage to a number of Officers and Agents of Parliament, parent Crown corporations and their wholly-owned subsidiaries, among other entities, and adds related exemption/exclusions for these entities, where necessary. The Act also calls for administrative reforms, such as a new duty to assist requesters without regard to their identities.¹⁸⁵

The Committee takes note of the satisfactory consideration of the foregoing recommendation, notwithstanding the fact that it is continuous in nature.

4.3. Mechanisms for consultation

Recommendation:

Continue strengthening the mechanisms for consultation.

Measure suggested by the Committee:

Encourage federal government departments and agencies to continue to make full use of the Consulting with Canadians website.

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- Pursuant to the Government of Canada Communications Policy, institutions are required to post their public consultation activities on the Consulting with Canadians website and federal public servants are widely advised, via the government's Publiservice website, of this requirement. Moreover, Canada's Privy Council Office communicates directly and in writing with the Communications and Consultations sections of federal departments and agencies to remind them to ensure that current public consultation information is posted on this website. The Privy Council Office also works with the Treasury Board Secretariat to help ensure that appropriate importance is given to the consultation function, as part of the overall communications function within government departments and agencies.¹⁸⁶

¹⁸⁵ *Ibid.*, pg. 33.

¹⁸⁶ *Ibid.*, pgs. 33 – 34. See also the Publiservice website at <http://publiservice.pco-bcp.gc.ca/comcon/default.asp?Language=E&Page=cons>

The Committee takes note of the satisfactory consideration of the foregoing recommendation, notwithstanding the fact that it is continuous in nature.

5. ASSISTANCE AND COOPERATION (ARTICLE XIV)

The Committee did not make any recommendations to Canada on this matter.

6. CENTRAL AUTHORITIES (ARTICLE XVIII)

The Committee did not make any recommendations to Canada on this matter.

7. GENERAL RECOMMENDATIONS

Recommendation 7.1

Design and implement, when appropriate, programs to train public officials responsible for implementing the systems, standards, measures and mechanisms considered in this report, for the purpose of guaranteeing that they are adequately understood, managed and implemented.

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The Canada School of the Public Service helps ensure that all public service employees have the knowledge and skills they need to deliver results for Canadians. The Office of the Comptroller General works in close collaboration with the School to ensure that the necessary financial management knowledge elements are integrated in required training courses, programs and knowledge assessment instruments, which are updated yearly or as significant financial policy changes occur. In addition, the Office of Public Service Values and Ethics is working with the Canada School of Public Service to incorporate conflict of interest training programs for human resources professionals. This Office is also developing e-learning courses in values and ethics for employees, managers and executives and developed materials and run workshops to assist in the implementation of the Public Service Disclosure Protection Act.¹⁸⁷

The Committee takes note of the satisfactory consideration of the foregoing recommendation, notwithstanding the fact that it is continuous in nature.

Recommendation 7.2

Select and develop procedures and indicators, when appropriate, that make it possible to verify the follow-up to the recommendations contained in this report, and report back to the Committee through the Technical Secretariat in this regard. For the purposes indicated, Canada could consider taking into account the list of the most widely used indicators, applicable in the Inter-American system that were available for the selection indicated by the country under analysis, which has been published on the OAS website by the Technical Secretariat of the Committee, as well as information derived from the analysis of the mechanisms developed in accordance with recommendation 7.3, which follows.

¹⁸⁷ *Ibid.*, pgs. 34 – 35.

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- The country under review states that it already has in place indicators which make it possible to identify objective results. For example, all departments and agencies of the federal government, including the agents of Parliament, must report annually on their activities. Reports of particular relevance to the follow-up of the Recommendations of the first round of review would include the reports of the Treasury Board, the Public Service Commission, the Public Sector Integrity Commissioner of Canada, the Office of Public Service Values and Ethics, the report of the Senate Ethics Officer made to the Senate and the Report of the Conflict of Interest and Ethics Commissioner to the House of Commons.¹⁸⁸

The Committee takes note of the steps taken by Canada to proceed with the implementation of the foregoing recommendation and of the need to continue giving attention thereto.

Recommendation 7.3

Develop, when appropriate and where they do not yet exist, procedures designed to analyze the mechanisms mentioned in this report, and the recommendations contained therein.

In its Response, Canada presents information with respect to the above recommendation. In this regard, the Committee notes, as steps which contribute to progress in implementation of the recommendation, the measures taken with respect to:

- There are procedures in place to analyse the performance of the various mechanisms mentioned in the country report for Canada from the first round of review. Federal departments, agencies, tribunals, review boards and agents of Parliament must produce report annually on their activities, including information that allows for the analysis of these mechanisms.¹⁸⁹

The Committee takes note of the steps taken by Canada to proceed with the implementation of the foregoing recommendation and of the need to continue giving attention thereto.

¹⁸⁸ *Ibid.*, pg. 35.

¹⁸⁹ *Ibid.*, pg. 35.