



# **PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN CANADA**

**March 2011**

This Phase 3 Report on Canada by the OECD Working Group on Bribery evaluates and makes recommendations on Canada's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 18 March 2011.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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## EXECUTIVE SUMMARY

The Phase 3 Report on Canada by the OECD Working Group on Bribery evaluates and makes recommendations on Canada's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) and related instruments. It focuses on progress made by Canada since its Phase 2 evaluation in March 2004, taking into account progress already noted in Canada's written follow-up report in June 2006. It also addresses cross-cutting horizontal issues that are routinely covered in each country's Phase 3 evaluation. The Working Group welcomes Canada's recent enforcement efforts, including one conviction, one ongoing prosecution and over 20 active investigations. This activity can be largely attributed to the diligent efforts of the new RCMP Anti-Corruption Unit. However, the Working Group considers that the future of these cases and enforcement more generally of the Corruption of Foreign Public Officials Act (CFPOA) may be uncertain, due to significant concerns that remain about Canada's framework for implementing the Convention.

The RCMP International Anti-Corruption Unit, established in January 2008, is comprised of two International Anti-Corruption Teams strategically located in Ottawa, Canada's capital, and Calgary, a major nucleus for industry, trade and finance, and a hub for Canada's extractive industries. It has complemented its enforcement efforts with substantial awareness raising and training. Other new features of Canada's law enforcement framework are also notable. The legal framework that established the Public Prosecution Service Canada (PPSC) in 2006 should further enhance prosecutorial discretion in Canada. The PPSC created a position in Ottawa for the purpose of advising the two RCMP teams on ongoing investigations. Since Phase 2, Canada has also codified the liability for legal persons ('corporate liability') in the Criminal Code, which appears much broader than the previous common law approach. Canada has also made important progress encouraging the reporting of CFPOA violations in the public and private sectors. Agencies in the public administration have adopted guidelines on reporting CFPOA violations to law enforcement authorities. Several reports have already been made pursuant to these mechanisms. Canada has also enacted a Criminal Code offence of threatening or retaliating against whistleblowers in the public and private sectors.

Despite these important positive developments, Canada's legislative and institutional framework remains problematic in four major respects. First, the offence of bribing a foreign public official in the CFPOA only applies to bribes for the purpose of obtaining or retaining an advantage of business carried out in Canada or elsewhere "for profit". The interpretation of this requirement in Canada is unclear, and the Convention does not differentiate between business for profit and not for profit. The Working Group therefore recommends that Canada amend the foreign bribery offence so that it is clear it applies to bribery in the conduct of all international business, not just business "for profit". Second, while statutory maximum penalties prescribed for violations of the CFPOA appear appropriate, sanctions applied in practice in the only CFPOA case to date were too low to be "effective, proportionate and dissuasive". The Working Group will therefore monitor sanctions applied as the body of cases grows. Third, extraterritorial jurisdiction in Canada for offences under the CFPOA requires a "real and substantial" link to the territory of Canada. The Working Group therefore recommends that Canada urgently take such measures as may be necessary to prosecute its nationals for the bribery of foreign public officials committed abroad. Fourth, Canada has indicated that it interprets Article 5 of the Convention as prohibiting consideration in

investigations and prosecutions of “improper” considerations of “national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”. The Working Group recommends that Canada clarify that consideration of the Article 5 factors can never be “proper.”

The Working Group is also concerned that Canada has not yet committed resources for coping with the substantial body of cases that is expected to proceed to the prosecution stage in the near future. The Working Group therefore recommends that Canada urgently dedicate resources to prosecute these cases. In addition, significant institutional features, including for coordinating CFPOA investigations involving various agencies, cannot be properly assessed by the Working Group until more cases have been prosecuted.

The Report and its recommendations, which reflect findings of experts from Austria and the United States, were adopted by the OECD Working Group on Bribery. Due to the significant issues raised in this report on Canada’s implementation of the Convention, the Working Group recommends that Canada report back to it on progress on the recommendations in this report in October 2011. This will be followed by an oral follow-up report by Canada within one year of the adoption of the Report (March 2012), and a written follow-up report on all recommendations and follow-up issues within two years of adoption of the Report (March 2013). The Report is based on the laws, regulations and other materials supplied by Canada, and information obtained by the evaluation team during an on-site visit to Canada from 19 to 22 October 2010, during which the team met with representatives from Canada’s public administration, private sector and civil society.

## A. INTRODUCTION

### 1. The on-site visit

1. On 19 to 22 October 2010, a team from the OECD Working Group on Bribery in International Business Transactions (the Working Group on Bribery) visited Ottawa and Toronto as part of the Phase 3 peer evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation) and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Tax Recommendation). The purpose of the visit was to evaluate the implementation and enforcement by Canada of the Convention and the 2009 Recommendations.

2. The evaluation team was composed of lead examiners from Austria and the United States of America as well as members of the OECD Secretariat.<sup>1</sup> Prior to the visit, Canada responded to the Phase 3 Questionnaire and supplementary questions. During the visit, the evaluation team met representatives of the Canadian public and private sectors and civil society.<sup>2</sup> Most of the visits were held in-person, but due to Canada's geographical size, two panels – the ones on the extractive industry and securities regulation -- were held by teleconference. The representatives of Foreign Affairs and International Trade Canada (DFAIT) and the Department of Justice (DOJ), who accompanied the evaluation team during the first segment of the on-site visit in Ottawa, did not attend the meetings in Toronto, which focused on the private sector and civil society.

3. The on-site visit was generally well-attended by Canadian federal government officials as well as the private sector and members of civil society.<sup>3</sup>

4. The on-site visit also involved provincial and municipal authorities. During the on-site visit, the examination team met with the Ottawa Police Service and held a teleconference with six provincial securities regulators – Manitoba, New Brunswick, Newfoundland and Labrador, Nova

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<sup>1</sup> Austria was represented by: Christian Manquet, Department for Criminal Law, Ministry of Justice; and Christoph Schlager, Tax Law Unit, Ministry of Finance. The United States of America was represented by: John Kelley, Office of Monetary Affairs, Department of State; Kathleen Hamann, Fraud Section, Criminal Division, Department of Justice; and Thierry Olivier Desmet, Enforcement Division, Securities & Exchange Commission. The OECD Secretariat was represented by: Christine Uriarte, Senior Legal Analyst, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs; Alex Conte, Senior Legal Analyst, Anti-Corruption Division; and Hyowon Kang, Legal Analyst, Anti-Corruption Division. Leah Ambler, Legal Analyst, Anti-Corruption Division, also represented the OECD Secretariat during the evaluation in the Plenary.

<sup>2</sup> See Annex 2 for a list of participants.

<sup>3</sup> The evaluation team noted the absence of media representatives.

Scotia, Ontario, and Quebec. Following the on-site visit, Canadian authorities facilitated a teleconference to allow the evaluation team to speak with the Toronto Police Service as well as representatives of the Alberta and Ontario Attorneys General and the Alberta Securities Commission. The post on-site telephone conference confirmed that the provincial and municipal law enforcement authorities, at least in certain provinces and cities, have the potential to play a useful role in CFPOA enforcement and in some cases already play a useful role.

5. The evaluation team is grateful to all the participants at the on-site visit for their cooperation and openness during the discussions.

## **2. Outline of the report**

6. This report is structured as follows: Part B examines Canada's efforts to implement and enforce the Convention and the 2009 Recommendations having regard to Group-wide (horizontal) issues for evaluation in Phase 3, with particular attention on enforcement efforts and results, as well as "country specific" (vertical) issues arising from progress made by Canada on weaknesses identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of Canada; and Part C sets out the Working Group's recommendations and issues for follow-up.

## **3. Brief Overview of Canada's Economy and Corruption Perceptions in Canada**

7. In 2009, Canada's GDP was USD 1 280 billion, ranking 10th within the OECD.<sup>4</sup> Exports of goods and services by Canadian businesses amounted to 41% of Canada's GDP.<sup>5</sup> In 2009, the US accounted for 75% of the regional share of exports, followed by the UK (3.4%) and China (3.1%).<sup>6</sup> At end-2009 Canada's outward foreign direct investment stocks represented 37% (or 10th position) within the OECD area. This volume represented a 66% increase from outward investment stocks of Canada at end-2000, slightly below the overall growth of outward FDI stocks of OECD. The relative share of outward FDI to GDP was almost the same for Canada in 2009 (44% of GDP) as compared to the OECD area (40% of GDP). The extractive (mining, oil and gas) industry ranked the third largest in Canada in terms of outward FDI.<sup>7</sup> Having regard to the strength of the Canadian extractive industry, it is notable that representatives from that sector, and from civil society, explained during the on-site visit that high risks of bribe solicitation are present in a number of countries where the extractive industry operates.

8. Perhaps the most notable change in Canada's international commercial performance since the 2008 global financial crisis is a general shift in trade and investment focus to the

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<sup>4</sup> OECD.StatExtracts, Gross Domestic Product.

<sup>5</sup> Foreign Affairs and International Trade Canada, Canada's State of Trade: Trade and Investment Update – 2009, available at [http://www.international.gc.ca/economist-economiste/performance/state-point/state\\_2009\\_point/2009\\_4.aspx](http://www.international.gc.ca/economist-economiste/performance/state-point/state_2009_point/2009_4.aspx).

<sup>6</sup> Foreign Affairs and International Trade Canada, Canada (quarterly trade and economic indicators) - 2nd quarter 2010, available at [http://www.international.gc.ca/economist-economiste/assets/pdfs/Quarterly\\_Ec\\_Indicators-ENG.pdf](http://www.international.gc.ca/economist-economiste/assets/pdfs/Quarterly_Ec_Indicators-ENG.pdf)

<sup>7</sup> Foreign Affairs and International Trade Canada, Canada's State of Trade: Trade and Investment Update – 2009. Available at [http://www.international.gc.ca/economist-economiste/performance/state-point/state\\_2009\\_point/2009\\_4.aspx](http://www.international.gc.ca/economist-economiste/performance/state-point/state_2009_point/2009_4.aspx).



emerging economies. For instance, according to Foreign Affairs and International Trade Canada,<sup>8</sup> in 2009 merchandise exports fell by 25.6 percent, in part due to a decline in exports to the United States. On the other hand, merchandise exports to China increased by 0.9 percent. Imports of technical and scientific equipment from the United States declined by CAD 0.4 billion and from Germany by CAD 91.8 million, while those from China increased by CAD 68.9 million. Foreign direct investment (FDI) inflows in Canada in 2009 decreased by 38.7 percent, and the stock of inward FDI grew only marginally, due largely to weak growth in investment from the United States. On the other hand, Canada's stock of inward FDI from China increased by more than two thirds in 2009, mainly due to Chinese investment in Canada's resource sector. Regarding outward FDI, it is notable that, whereas in 2009 Canadian FDI stock fell in the United States and Europe, FDI stock was up in Brazil by 16 percent.

9. A representative from one of Canada's most well-known and respected companies globally was of the view that Canadians think of Canada as a very honest society, but that they need to recognise that when Canadian companies conduct business abroad, they face the same pressures as companies from other countries to engage in corrupt practices. The risk of such pressures is greatest in certain high risk sectors, such as mining and extraction – an industry of significant importance in Canada, according to information published in 2009 by Foreign Affairs and International Trade Canada<sup>9</sup>:

“Canadian financial markets in Toronto and Vancouver are the world's largest source of equity capital for mining companies undertaking exploration and development. Mining and exploration companies based in Canada account for 43 percent of global exploration expenditures. In 2008, over 75 percent of the world's exploration and mining companies were headquartered in Canada. These 1293 companies had an interest in some 7809 properties in Canada and in over 100 countries around the world”.

“Extractive companies are increasingly searching for new resources in developing countries. Canadian mining companies have invested over \$60 billion in developing countries, including about \$41 billion in Latin America (including Mexico) and almost \$15 billion in Africa.”

#### **4. Cases involving the bribery of foreign public officials**

10. Thus far Canada has completed the prosecution of one case of bribery of a foreign public official. At the time of the Phase 2 on-site visit to Canada in 2003, proceedings were ongoing in respect of charges against Hydro Kleen Group Inc., an Alberta-based company, and two individuals, concerning the bribes of approximately CAD 30 000 paid to a US Immigration official contrary to subparagraph 426(1)(a)(i) of the Criminal Code (secret commissions) and paragraph 3(1)(a) of the Corruption of Foreign Public Officials Act (CFPOA). In January 2005, Hydro Kleen admitted guilt to one count under the CFPOA as part of a plea agreement. The

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<sup>8</sup> See Canada's State of Trade: Trade and Investment Update – 2010 (Foreign Affairs and International Trade Canada): [http://www.international.gc.ca/economist-economiste/assets/pdfs/SoT\\_2010\\_AR\\_ENG.pdf](http://www.international.gc.ca/economist-economiste/assets/pdfs/SoT_2010_AR_ENG.pdf)

<sup>9</sup> See “Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector (March 2009, Foreign Affairs and International Trade Canada”): <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-strategie.aspx>

company was fined CAD 25 000. The two other charges, against a director and an officer of the company, were stayed as part of the plea agreement.

11. In May 2010, charges under paragraph 3(1)(b) of the CFPOA were laid against Nazir Karigar for allegedly making a payment to an Indian government official in order to facilitate the execution of a multi-million dollar contract for the supply of a security system.<sup>10</sup> The matter is currently before the Ontario Provincial Court in Ottawa and, as such, Canadian authorities were not at liberty to discuss the case in detail.

12. During the on-site visit, the evaluation team was informed that the Royal Canadian Mounted Police (RCMP) International Anti-Corruption teams in Ottawa and Calgary have more than 20 active investigations under the CFPOA. Consistent with longstanding Canadian practice, due to legal constraints, officials did not discuss details of these ongoing cases that were not in the public domain.

13. This report limits references to cases under investigation and prosecution to information that is publicly available. In January 2009, Niko Resources Ltd. announced that the Calgary team was investigating allegations that Niko, or one of its subsidiaries, may have made improper payments to government officials in Bangladesh.<sup>11</sup>

## **B. IMPLEMENTATION AND APPLICATION BY CANADA OF THE CONVENTION AND THE 2009 RECOMMENDATIONS**

14. This part of the report considers the approach of Canada in respect of key Group-wide (horizontal) issues. Where applicable, consideration is also given to country-specific (vertical) issues arising from progress made by Canada on weaknesses identified in Phase 2, or issues raised, for instance, by changes in the domestic legislation or institutional framework of Canada. Concerning weaknesses identified in Phase 2, the Phase 2 evaluation report of Canada was adopted by the Working Group in March 2004. The Phase 2 recommendations and issues for follow-up are set out as Annex 1 to this report. Canada's written follow-up report to Phase 2 was considered by the Working Group on Bribery in June 2006. The Group at that time concluded that Recommendations 1, 3(c), 3(d) and 4(a) had been implemented satisfactorily; that Recommendations 2, 3(a), 4(b), 4(d), 5(d), 5(e) and 5(f) had been partially implemented; and that Recommendations 3(b), 4(c) and 5(c) had not been implemented.<sup>12</sup>

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<sup>10</sup> RCMP-GRC Press Release, 'Canadian citizen arrested and charged under the Corruption of Foreign Public Officials Act', available online at <http://www.rcmp-grc.gc.ca/ottawa/documents/IACU-eng.pdf>.

<sup>11</sup> Cyndee Cherniak, 'Canada's Anti-Corruption Investigation – Niko Resources', *Trade Lawyers Blog*, available at [http://tradelawyersblog.com/blog/archive/2009/january/article/canadas-anti-corruption-investigation-niko-resources/?tx\\_ttnews%5Bday%5D=18&cHash=74f3115aea](http://tradelawyersblog.com/blog/archive/2009/january/article/canadas-anti-corruption-investigation-niko-resources/?tx_ttnews%5Bday%5D=18&cHash=74f3115aea).

<sup>12</sup> When setting out the Recommendations in Phase 2, Annex 1 includes a notation of the conclusions of the Working Group following Canada's written follow-up report.

## 1. Foreign bribery offence

### (a) *'Business for profit' requirement in the CFPOA*

15. In Phase 2, the Working Group was concerned that the foreign bribery offence under the CFPOA only applies to bribes for the purpose of obtaining or retaining an advantage in the course of “business”, which is defined in the CFPOA as “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit”. Canada is the only Party to the Convention to have included such a requirement in its foreign bribery offence.

16. Due to the Working Group’s uncertainty about the scope of the “business for profit” requirement, the Working Group recommended that Canada “consider amending” this aspect of the definition of “business” in the CFPOA. The Working Group determined that it was unclear whether the “for profit” requirement applied to the transaction in a particular case, or the nature of the entity that bribed a foreign public official. For instance, it was not clear whether the CFPOA would apply if a profit was not obtained as a result of the foreign bribery transaction in question and/or if a non-profit or government controlled entity did the bribing.

17. In the Phase 2 written follow-up stage, Canada informed the Working Group that it carefully considered whether the definition of “business” in the CFPOA was consistent with the Convention, and concluded that the title of the Convention, which refers to “International Business Transactions” implies that the Convention applies to transactions that are carried out to generate some form of profit. As a result, Canada did not amend the definition of “business” in the CFPOA. The Working Group noted that the Convention does not distinguish between “for profit” and “not for profit” business transactions. It also considered that the “business for profit” requirement could be an obstacle to the effective enforcement of the CFPOA. The Working Group therefore recommended that Canada “further” consider amending the definition of “business” in the CFPOA. However, in the responses to the Phase 3 questionnaires, Canada essentially reiterates the arguments put forward in the Phase 2 written follow-up report.

18. According to the Corruption of Foreign Public Officials Act: A Guide, published by the Department of Justice Canada (DOJ)<sup>13</sup>, the CFPOA targets the bribery by any person of a foreign public official when “the transaction is for profit”. During the on-site visit, the lead examiners queried Canada about several hypothetical examples of international transactions, such as public contracting in the course of disaster relief in a foreign country, or a transaction that does not result in a profit, among others. However, Canada declined to provide any answers to these hypothetical situations on the ground that “the law speaks for itself.” In addition, the DOJ stated that “we will have to wait to see” how the courts interpret the requirement.

19. At the on-site visit, the lead examiners heard essentially two points of view on this issue. First, the transactional approach described in the DOJ Guide. Second, other views that the “for profit” requirement depends on whether an entity is set up for the purpose of making a profit, and that it is irrelevant whether a specific transaction makes a profit. A representative from the Canada Revenue Agency (CRA) stated that, in the context of the Income Tax Act, there is relevant case

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<sup>13</sup> The Corruption of Foreign Public Officials Act: A Guide, Department of Justice Canada, available at <http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcape/index.html>

law on the interpretation of “business for profit”, according to which an entity must have a “reasonable expectation of profit” – i.e. an expectation that the entity will eventually make a profit. Representatives from the auditing and accounting profession considered that, as a result of the “business for profit” requirement, the CFPOA probably covers all entities except government and not-for-profit organisations.

20. A representative of one of the RCMP International Anti-Corruption teams stated that the RCMP will investigate allegations of foreign bribery without considering the impact of the “business for profit” requirement, unless the courts determine what consequences, if any, the requirement has on the scope of the CFPOA.

21. The lead examiners consider that the existence of more than one interpretation, including amongst key government bodies, demonstrates that the requirement, at the very least, creates a high degree of uncertainty regarding the application of the CFPOA. Regarding the first interpretation (‘transactional approach’), Article 1 of the Convention applies to bribery of a foreign public official “in order to retain business *or other improper advantage*”. (Emphasis added.) The Convention does not limit its scope to transactions that are profitable, and specifically includes benefits to the briber other than pecuniary gain.<sup>14</sup> Regarding the second interpretation (‘organisational approach’), the Convention applies to bribery by “any person” under Article 1, and “legal persons” under Article 2, without any qualification that the business carried out by the person or nature of the legal person is or is not for profit. The ‘organisational approach’ would leave out numerous organisations that, while not set up to make a profit for themselves, might still bribe in order to secure business, including state owned and controlled enterprises.

22. The “for profit” requirement has been the subject of debate since the Corruption of Foreign Public Officials Bill was debated in Parliament in 1998. During the Second Reading there was considerable debate about its inclusion in the Bill, including whether it should be amended.<sup>15</sup> One senator questioned why the foreign bribery offence in the Bill was “limited to any kind of business carried out in Canada or elsewhere for profit”. In response, the Minister of Foreign Affairs stated that the purpose of the OECD Anti-Bribery Convention is “to deal with business transactions in this area”, and cited the title of the Convention as proof. Second, another Senator asked if the Bill focuses on “whether the transaction itself was carried on by a for-profit company or not-for-profit company, or whether the transaction was carried on for the purpose of creating a profit”, and the Minister of Foreign Affairs responded that the offence applies to a person or other vehicle “if they are in the business of making a profit”. Following this assertion, a third senator stated that “you look at the facts to see whether the transaction is in the nature of a for-profit transaction”. The lead examiners consider that, even if the CFPOA applies to both profit and non-profit entities and transactions, the present confusion regarding interpretation may pose challenges to enforcement and may reduce the deterrent impact of the law.

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<sup>14</sup> Examples of benefits other than pecuniary gain include the waiver of legal requirements such as environmental studies, favourable zoning determinations, or transactions operating at a loss in order to secure a market share.

<sup>15</sup> See Debates of the Senate (Hansard), 1st Session, 36th Parliament, Vol. 137, Issue 100 (Thursday, December 3, 1998), page 27 ([http://www.parl.gc.ca/36/1/parlbus/chambus/senate/deb-e/100db\\_1998-12-03-E.htm?Language=E&Parl=36&Ses=1](http://www.parl.gc.ca/36/1/parlbus/chambus/senate/deb-e/100db_1998-12-03-E.htm?Language=E&Parl=36&Ses=1)).

23. The Canadian authorities maintain that the offence of bribing a foreign public official in the CFPOA is fully compliant with Article 1 of the Convention, because a profit motive is implicit in the reference to “in international business transactions” in the title of the Convention.

24. Following the on-site visit, the Canadian authorities explained that they will apply the business for profit requirement to either the entity or the transaction as the case may be, depending on the circumstances. This was reinforced by comments made by representatives of the RCMP and the PPSC during the on-site visit that a narrow approach is not taken, nor is one preferred over the other. Canada notes that this issue has never been before the courts and Canadian courts have not yet addressed this issue. Canada accepts that there may be some uncertainty and has agreed to consider amending the CFPOA to provide further clarity.

**(b) Reasonable expenses incurred in good faith**

25. Paragraph 3(3)(b) of the CFPOA provides the “reasonable expenses” defence to the offence of foreign bribery. It provides that no person is guilty of an offence if the loan, reward, advantage or benefit was made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to (i) the promotion, demonstration or explanation of the person’s products and services, or (ii) the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions. The prosecution bears the burden of proving beyond a reasonable doubt that the defence does not apply.

26. How the Government of Canada would apply the “reasonable expenses” defence has been one of the follow-up issues since the Phase 2 evaluation (Phase 2 Follow-up 6(b)). This defence was not an issue in the Hydro Kleen case, the only completed CFPOA prosecution to date, which was decided by the Court of Queen’s Bench in Red Deer, Alberta, in January 2005.

27. During the on-site visit, the lead examiners observed a certain amount of confusion within the private sector (including the extractive and other industry sectors) regarding the purpose and scope of the defence for “reasonable expenses” and some felt that payments that would clearly be improper fell within the reasonable expenses exception if not tied to a specific transaction, but rather to foster a positive business relationship in the long-term. The Canadian authorities explain that such payments are not “reasonable expenses” as defined in the CFPOA, as they do not satisfy the requisite criteria.<sup>16</sup>

28. Canada has considered issuing guidance on the operation of the “reasonable expenses” defence but consistent with its longstanding practice of not issuing advisory opinions on criminal matters, as stated by Canada in Phase 1 and Phase 2, it has determined that it will not do so in this case.

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<sup>16</sup> I.e. The Canadian authorities do not see how the payments described are *directly* linked to the Canadian company for (i) the promotion, demonstration or explanation of the person’s products and services, or (ii) the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.

*(c) Facilitation payments*

29. Subsection 3(4) of the CFPOA provides a defence for ‘facilitation payments’. It states that a “loan, reward, advantage or benefit ... made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions” does not constitute a violation of the CFPOA.<sup>17</sup> Subsection 3(5) of the CFPOA clarifies that an “act of a routine nature” does not include a decision to award new business or to continue business with a particular party.

30. In Phase 2, representatives of the legal profession in Canada expressed a high level of concern about the defence for ‘facilitation payments’, believing that it would create a “large area of uncertainty”; and some felt that it should be repealed. The Working Group concluded that the defence might “affect the implementation of the Convention”, and thus recommended that Canada “consider issuing some form of guidance in the interpretation” of the defence.

31. In Canada’s written Phase 2 follow-up report, it stated that the CFPOA clearly delineates what constitutes a “facilitation payment”. Canada added that it is the longstanding practice of the Canadian government to not issue guidelines on the interpretation of criminal law provisions; the law speaks for itself, and the courts alone are responsible for interpreting the application of the law to individual cases. Moreover, the Canadian authorities undertook to monitor the interpretation of the defence by the courts, and confirmed that the defence had not yet been used in court. The Working Group has also identified the issue of ‘facilitation payments’ as a horizontal cross-cutting issue for Parties to the Convention.

32. In the responses to the Phase 3 questionnaires, the Canadian authorities reiterate the points made in the Phase 2 written follow-up report. Following the Phase 3 on-site visit, the Canadian authorities commented that one would expect that providing a statutory defence for ‘facilitation payments’ would create more certainty in the application of the CFPOA than relying on the exercise of prosecutorial discretion in this regard. They also stated that the CFPOA itself provides guidance as to what constitutes a “facilitation payment”. Moreover, it is up to companies’ lawyers and accountants to give advice on particular fact situations, and additional guidance would be expected to be provided by way of jurisprudence.

33. Representatives from the business sector, including two business associations and two extractive resource companies, who participated in the on-site visit, believe it is not uncommon for companies to make a payment to expedite or secure the performance of some act by a foreign public official, and that ‘facilitation payments’ are rarely recorded in corporate books and records. Representatives from the accounting and auditing profession believe that some companies simply choose not to record ‘facilitation payments’ regardless of whether those payments fall under the defence within the meaning of CFPOA, because they are concerned about potential criminal liability. Auditors also stated they do not pay close attention to ‘facilitation payments’ when auditing a corporation because those payments usually do not materially affect the corporation’s financial statements.

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<sup>17</sup> The inclusive list in subsection 3(4) of what constitutes an act of a routine nature by a foreign public official covers: (a) the issuance of a permit, licence or other document to qualify a person to do business; (b) the processing of official documents, such as visas and work permits; (c) the provision of services normally offered to the public; and (d) the provision of services normally provided as required.

34. Commentary 9 on the Convention states that “small facilitation payments” do not constitute an offence under Article 1 of the Convention, and provides information regarding what comprises such a payment. Paragraph VI i) of the 2009 Recommendation recommends that member countries periodically review their policies and approach on small facilitation payments. The Canadian authorities explain that Canada continues to monitor interpretations by the courts of the relevant provision in the CFPOA. Canada adds that, as previously indicated to the Working Group, Canada will consider amending the CFPOA if the courts interpret the defence in a manner that is not consistent with the spirit of the Convention. Canada therefore considers itself in full compliance with Paragraph VI i) of the 2009 Recommendation.

35. In addition, Paragraph VI ii) of the 2009 Recommendation recommends that member countries encourage companies to prohibit or discourage the use of “small facilitation payments” in internal company controls, ethics and compliance programmes or measures. Representatives from the business sector (two corporate lawyers, an extractive company and a financial services company) indicated that the Government of Canada has not encouraged them to prohibit or discourage the use of ‘facilitation payments’ in internal company controls, ethics and compliance programmes or measures. The Canadian authorities are of the view that CFPOA-related knowledge need not necessarily be acquired through government intervention. They state further that Canadian companies generally rely on legal counsel in the private sector to provide general information about relevant legal developments, as well as to advise on the application of Canadian law to their particular transactions.

36. During the on-site visit, companies from the extractive industry demonstrated a good understanding of the scope of the defence for ‘facilitation payments’, providing examples of small payments to obtain routine tasks, such as a visa to enter a country, or the renewal of a permit or concession where the renewal does not involve discretionary decision-making. To some extent, this level of understanding was due to a high level of knowledge within the industry regarding a similar provision in the United States Foreign Corrupt Practices Act (FCPA). Since many of the companies that participated in the on-site visit are listed on a US stock exchange, they are also subject to the FCPA, which has been in force since 1977.

37. Some representatives from the private sector (a financial services and a major processing company) stated during the on-site visit that they believe SMEs are unlikely to understand the meaning and parameters of the defence for “facilitation payments”. A representative from the legal profession was concerned that unless specific guidance is provided, employees, in particular sales persons who wish to improve their work performance, are at risk of misusing the defence.

38. A representative from the extractive industry stated that the compliance programme of his company is being reviewed to abolish all types of facilitation payments. He commented that the review was in response to the approach to ‘facilitation payments’ taken in the UK Bribery Act. A compliance officer from another company stated that she is considering adopting a ‘zero-tolerance’ policy against ‘facilitation payments’ within her company. Another lawyer suggested that the facilitation payments defence should remain in the CFPOA, because abolishing it would disrupt the real purpose of the Convention. He added that it is not necessarily clear what falls within and outside the exception, and that the solution is robust compliance that helps companies navigate the exception. An academic stated that making ‘facilitation payments’ may lead to a future risk of bribing in contravention of the CFPOA.

39. The CRA administers the Canada Income Tax Act, including section 67.5, which prohibits the tax deductibility of bribes. At the on-site visit, CRA representatives stated that guidance has not been published by the CRA on the definition of ‘facilitation payments’, and that if they had a question about whether a particular payment were a ‘facilitation payment’, they would consult with the legal services unit at the CRA. If the legal services unit were not able to answer their question, they would consult with the Policy Sector at Justice Canada Headquarters. The Canadian authorities stated that tax auditors at the CRA would apply standard tests to determine if the amount of the payment were reasonable, incurred for the purpose of producing income, and whether it constituted a bribe.

### *Commentary*

*The lead examiners note that Canada considers the ‘business for profit’ requirement in the CFPOA consistent with Article 1 of the Convention. Canada considers that the language “in international business transactions” in the title of the Convention – Convention on Combating Bribery of Foreign Public Officials in International Business Transactions -- “implies a profit motive”. The lead examiners underline that the Convention does not draw a distinction between ‘for profit’ and ‘not for profit’ business transactions or entities, and includes the concept of “other improper advantage”. They also consider that the on-site visit demonstrated a high level of uncertainty among Canadian law enforcement and other relevant authorities and stakeholders on the interpretation of the ‘business for profit’ requirement, and that the debate on this issue goes back to 1998 when the Corruption of Foreign Public Officials Bill was debated before Parliament. The lead examiners also note that no other Party to the Convention has established such a requirement. They therefore consider that the Phase 2 recommendation on this issue to further consider amending the CFPOA has not been implemented. The lead examiners welcome that Canada is “open to considering a legislative amendment for greater clarity”, and recommend that Canada amend the CFPOA so that it is clear that it applies to all international business transactions, regardless of the issue of profit.*

*Due to confusion in the private sector about what kinds of payments are permissible under the CFPOA, the lead examiners recommend that Canada find an appropriate and effective means for making companies aware of the CFPOA, including the defence for “reasonable expenses incurred in good faith”. They also recommend that the Working Group continue to follow up on how the defence is applied in practice.*

*The lead examiners do not consider that simply monitoring interpretations by the courts of the defence for ‘facilitation payments’ in the CFPOA effectively implements Paragraph VI i) of the 2009 Recommendation, which recommends that member countries undertake to periodically review their policies and approach on small facilitation payments. The lead examiners therefore recommend that, as soon as possible, Canada take steps to implement Paragraph VI i) of the 2009 Recommendation.*

*The lead examiners also recommend that Canada find an appropriate and effective means for making companies aware of the operation of the facilitation payments*



*defence and encourage companies to prohibit or discourage the use of ‘facilitation payments’ in internal company controls, ethics and compliance programmes, as recommended by Paragraph VI ii) of the 2009 Recommendation. In carrying out this recommendation, the Canadian authorities should ensure that their efforts effectively reach SMEs.*

## **2. Responsibility of legal persons**

### ***(a) Introduction***

40. At the time of the Phase 2 evaluation of Canada in March 2004, Canada relied on principles that had developed through the common law for the liability of legal persons. In summary, the approach that had evolved was known widely as the ‘identification theory’, which crystallised in the decision of the Supreme Court of Canada in *Canadian Dredge and Dock Co. v. The Queen* [1985] 1 S.C.R. 662. Essentially, according to this theory, liability can be attributed to a company when an offence is committed by a ‘directing mind’ or ‘ego’ of the corporation. At the time of Phase 2, the Government of Canada was in the process of reforming the law on corporate liability by clarifying and expanding its scope through codification in the Criminal Code. At that time, Bill C-45 [An Act to amend the Criminal Code (Organizations)] had been tabled in Parliament. As a result, the Working Group decided to follow-up application of the new law to CFPOA cases, after it came into force.

41. In Canada’s Phase 2 written Follow-Up Report, approved and adopted by the Working Group on June 2006, Canada reported that Bill C-45 had been passed in November 2003, and came into force in March 2004.

### ***(b) New Provision in Criminal Code***

42. In summary, pursuant to section 22.2 of the Criminal Code, an organisation is a “party” to an offence that requires the prosecution to prove fault, other than negligence, if, “with the intent at least in part to benefit the organisation, one of its senior officers”:<sup>18</sup> 1. Acting within the scope of his or her authority, is a party to the offence; 2. Having the mental state required to be a party to the offence, and acting within the scope of his or her authority, directs the work of other representatives of the organisation so that they commit the act or omission that is specified in the offence; or 3. Knowing that a representative of the organisation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.<sup>18</sup>

43. Paragraph B) of the Good Practice Guidance on Implementing Specific Articles of the Convention (Annex I of the 2009 Recommendation for Further Combating Foreign Bribery) provides guidance on how Parties to the Convention should effectively implement Article 2 of the Convention on the liability of legal persons.<sup>19</sup> Section 22.2 of the Criminal Code conforms very

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<sup>18</sup> Section 22.2 applies to offences, including section 3 of the CFPOA, that require the prosecution to prove fault other than criminal negligence.

<sup>19</sup> In summary, Paragraph B)(b) of the Good Practice Guidance on Implementing Specific Articles of the Convention states that Member countries’ liability of legal persons for the foreign bribery offence should cover the following three situations: 1) A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official; 2) A person with the highest level managerial

closely to Paragraph B)(b) of the Good Practice Guidance, which sets out the situations that should be covered when an organisation is a party to a foreign bribery transaction. The task for the lead examiners at the on-site visit was therefore to determine whether section 22.2 also conforms with Paragraph B)(a) of the Good Practice Guidance, which provides that “member countries’ systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted”.

44. In addition, to assess how section 22.2 is applied in practice in Canada, the lead examiners considered the following issues: 1. Whether section 22.2 has been successfully applied in practice, including in commercial crime cases in general; 2. Whether the requirement in the CFPOA that the foreign bribery offence be for the purpose of obtaining “business” “for profit” limits the scope of legal persons to which the CFPOA applies;<sup>20</sup> and 3. Whether non-Canadian companies are liable pursuant to section 22.2 for violations of the CFPOA.

45. The Canadian authorities state that under Canadian law there is no obligation to prosecute an individual and an organisation jointly; they can be prosecuted separately, or one can be prosecuted and not the other. They confirm that section 22.2 of the Criminal Code did not change the law in this regard and provided examples of corporate prosecutions in relation to fraud, and violations of the environment and competition laws.<sup>21</sup>

46. The liability of legal persons was applied successfully to a company in the Hydro Kleen case in January 2005 on the basis of the common law “identification theory”, as the facts of the case took place before section 22.2 of the Criminal Code came into force. In Hydro Kleen, the company was convicted and the charges against the officials who had been charged were stayed.

47. In response to the Phase 3 Questionnaire, and following the on-site visit, the Canadian authorities stated that there have not been any prosecutions to date recorded under section 22.2 of the Criminal Code. During the on-site visit, the PPSC informed the lead examiners that section 22.2 of the Criminal Code has been applied to companies in cases other than foreign bribery, but that the PPSC could not give a precise number because it does not track provincial cases. The provincial authorities prosecute the majority of Criminal Code offences and the Canadian Centre

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authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and 3) A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

<sup>20</sup> The offence of bribing a foreign public official under subsection 3(1) of the CFPOA applies to persons who bribe “in order to obtain or retain an advantage in the course of business”, and section 2 defines “business” as “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit”.

<sup>21</sup> Regina v. R.J. Reynolds Tobacco Co. (Delaware), Northern Brands International, Inc., and R.J. Reynolds Tobacco International, Inc., 230 C.C.C. (3d) 72, 2007 CLB 13744, 2007 ONCA 749, 77 W.C.B. (2d) 138, 230 O.A.C. 92 (corporate fraud); R. v. Syncrude Canada Ltd, 53 C.E.L.R. (3d) 194, 2010 ABPC 229 (Alta Prov Ct) -- (environment); REGINA v. CANADIAN GENERAL ELECTRIC COMPANY LTD. et al. 34 C.C.C. (2d) 489, 1976 CLB 23, 1 W.C.B. 101, 15 O.R. (2d) 360, 75 D.L.R. (3d) 664, 29 C.P.R. (2d) 1 -- (competition); and see also the competition litigation status report at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02037.html>.

for Justice Statistics (CCJS) reports statistics on the basis of the most serious charge in the case, and not on the basis of section 22.2 of the Criminal Code, which is treated as a procedural section. (Data are collected by the CCJS for chargeable sections, punishment sections and, in some cases, definitional sections of the Criminal Code.)

*Whether the 'business for profit' requirement in the CFPOA limits the scope of corporate liability*

48. The impact of the requirement in the CFPOA that the foreign bribery offence be for the purpose of obtaining 'business for profit' is discussed in detail in Part B(1)(a) (above) of this report. The Canadian authorities point out that the "for profit" requirement in the CFPOA has no bearing on section 22.2 of the Criminal Code. Nevertheless, the lead examiners are concerned that the practical effect of the 'business for profit' requirement in the CFPOA could be to limit its application to entities that have been established for the purpose of realising a profit. This was reinforced by information from the Canada Revenue Agency that "under normal circumstances, not-for-profit organizations would not be caught within the ambit of a Convention regarding international business transactions".<sup>22</sup>

*Commentary*

*The lead examiners assess section 22.2 of the Canadian Criminal Code, which came into force in March 2004 for the purpose of codifying the law on the liability of legal persons in Canada for criminal offences, in compliance with Article 2 of the Convention, and specifically Paragraph B)b of the Good Practice Guidance on Implementing Specific Articles of the Convention in Annex I of the 2009 Recommendation for Further Combating Foreign Bribery.*

*However, given the newness of the provision and thus the absence of practice to date, the lead examiners recommend following-up the effectiveness in practice of the new Criminal Code provision, including in the following cases:*

- 1. The natural perpetrator(s) is (are) not prosecuted and/or convicted; and*
- 2. The relevant legal person was not created with an expectation of profit, including non-profit and government-controlled organisations.*

*In addition, the lead examiners recommend that for the purpose of this follow-up exercise, the Canadian authorities compile relevant statistical information on the application of section 22.2 of the Criminal Code to CFPOA cases.*

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<sup>22</sup> This information was provided in response to a comment in the draft Phase 3 report that there is some scope for the tax authorities to detect foreign bribery through tax audits of not-for profit organisations required to file NPO Information Returns.

### 3. Sanctions

#### *(a) Introduction*

49. A violation of the foreign bribery offence in the CFPOA is an indictable offence with a maximum term of imprisonment of five years. In addition, pursuant to section 734 of the Criminal Code, natural persons may be subject to a fine with no upper limit. Bribery of a domestic public official in violation of section 121 of the Criminal Code ('Frauds on Government') provides for the same criminal penalties. Pursuant to paragraph 735(1)(a) of the Criminal Code, an "organisation" that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to a fine with no upper limit for the bribery of a domestic public official under section 121 of the Criminal Code and the bribery of a foreign public official under the CFPOA. In addition, pursuant to section 462.37 of the Criminal Code, upon conviction of a "designated offence", an offender may be ordered to forfeit the proceeds of crime obtained from that offence. Subsection 462.3(1) of the Criminal Code defines a "designated offence" as "any offence that may be prosecuted as an indictable offence under [the Criminal Code] or any other Act of Parliament" – it thus covers a violation of the CFPOA as well as domestic bribery.

50. The Canadian Criminal Code does not directly address the use of plea agreements or provide sentencing guidelines. However, in sentencing natural persons, a court is required to take into account a number of principles in section 718.2 of the Criminal Code, the most important of which is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 606 of the Criminal Code states that a court may accept a plea of guilty only if it is satisfied that the accused made the plea voluntarily, and understands the nature and consequences of the guilty plea, including that the court is not bound by any agreement made between the accused and the prosecutor. Section 726.2 of the Criminal Code requires that courts provide the terms and reasons for their sentences.

51. At the time of Phase 2, the Hydro Kleen case was under prosecution, and the conviction was not imposed until 2005. As a result, the effectiveness of the sanction in the Hydro Kleen case has not yet been considered by the Working Group, and is therefore discussed in this part of the Report, under the sub-headings "Criminal Sanctions for Natural Persons" and "Criminal Sanctions for Legal Persons" as concerns natural and legal persons respectively. In addition, in Phase 2 the Working Group recommended following-up the application of sanctions to natural and legal persons for offences under the CFPOA.

52. This part of the Report also assesses progress by Canada in implementing one of the recommendations of the Working Group in Phase 2 – i.e. that Canada compile statistical information on the sanctions for the foreign bribery offence (as well as for related fraudulent accounting),<sup>23</sup> including information about forfeiture, and that identifies what sanctions were obtained through the plea-bargaining process. In the follow-up reporting to Phase 2, this recommendation was assessed as "partially implemented", because it was too early to determine

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<sup>23</sup> The quality of statistical information on sanctions for fraudulent accounting is assessed in another part of the Report (see Part B.7.(b)).

whether the system developed by Canada to collect information on CFPOA sanctions was adequate to enable an evaluation of the appropriateness of sanctions imposed.

53. Article 3.4 of the Convention provides that a party shall consider the imposition of additional civil and administrative sanctions. This is the final issue reviewed in this part of the report.

***(b) Statistics on foreign bribery sanctions***

54. In the responses to the Phase 3 Questionnaires and during the on-site visit, the Canadian authorities provided the lead examiners with information on the sanction applied in the Hydro Kleen case (*R. v. Watts* [2005] A.J. No. 568), in which Hydro Kleen Systems pleaded guilty to bribery of a foreign public official in violation of the CFPOA. The Court, on the basis of a joint statement of facts agreed to by the prosecution authorities and the defence, found the corporation (organisation) guilty of the one offence in respect of which the indictment was read and, at the request of the prosecution, stayed the proceedings against all other accused on the other counts in the indictment. Consistent with section 726.2 of the Criminal Code, which requires courts to provide the terms and reasons for their sentences, the Court in the Hydro Kleen case gave its rationale for agreeing to the joint submission by the prosecution and the defence recommending a CAD 25 000 fine. The fine imposed was less than the bribe payment, which was approximately CAD 30 000.

55. Canada states that it has an effective system in place to collect information on CFPOA sanctions, and confirms that it compiles statistical information on the sanctions for CFPOA offences in a way that differentiates between sanctions for legal and natural persons and on the basis of whether a conviction is the result of a plea bargain. Canada also confirms that information on plea-bargaining is not made public. Canada explains that in the Hydro Kleen case, the Court set out its reasons for accepting the joint recommendation by the prosecution and defence on the sentence consistent with section 606 of the Criminal Code.

***(c) Criminal Sanctions for Natural Persons***

56. In the Hydro Kleen case, pursuant to a plea agreement which was accepted by the Court, the company pled guilty and was sanctioned, whereas the charges against the president of the company and an employee (the “operating minds”) were stayed. The Court accepted the stay of charges against the natural persons as reflected in the following statement in the judgement:

“It bothers the Court that these people are able to plea from a corporation to protect the operating minds of the company from the stigma attached to a criminal record. However, the court does take into consideration that the operating minds of this corporation do not escape with their integrity intact.”

***(d) Criminal Sanctions for Legal Persons***

57. In the Hydro Kleen case, the Court imposed a fine of CAD 25 000, which was the amount proposed in the joint submission by the prosecution and defence. Under Canadian law the

court was not obliged to consider other penalties (such as corporate probation or forfeiture) which were not contained in the joint submission. Corporate probation was not imposed; nor was forfeiture of the proceeds of the offence. In accepting the proposed fine, the Court stated as follows:

“Mr. Sullivan has suggested, as has the Crown, that deterrence of individuals is of the utmost importance in these types of cases. Whether a CAD 25 000 fine is significant or not, I can only determine that Mr. Beattie must have canvassed the significance and the amount of the fine and what effect it might have on Hydro Kleen as being a significant amount.”

Then later, the Court continued as follows:

“In this case, I take into consideration Mr. Wilson’s statements that a guilty plea has been entered. In these types of charges, especially the *mens rea* elements are difficult for the Crown to prove. A guilty plea means that a three-week trial was avoided, that the individual has accepted responsibility. A significant fine has been agreed to, and on those factors, I am not able to determine that the sentence is unfit and would thus justify my interference with the penalty arrangements that counsel have worked out amongst themselves.”

58. However, given that the fine imposed in Hydro Kleen amounted to less than the bribe given to the foreign public official, which was around CAD 30 000, no proceeds obtained from the bribery act were forfeited, no restitution appears to have been paid to the victim company,<sup>24</sup> and the Court did not consider whether measures were taken by the company to prevent further foreign bribery acts, the lead examiners find it difficult to see how the penalty imposed in Hydro Kleen could be an effective general or specific deterrent. Moreover, it is difficult to see how the penalty imposed takes into account the main factors that the PPSC told the lead examiners are to be considered on a case-by-case basis, according to the jurisprudence – i.e. the size of the bribe and the proceeds of the bribery, as well as the circumstances of the offence.

59. More generally, information provided in the Phase 3 responses on sanctions applied in Canada for commercial crimes since Phase 2 (i.e. forgery and fraud) indicates that fines were not imposed for such crimes in virtually any cases during that period. The reason for this is not clear. The lead examiners posited that courts might consider the securities commissions are imposing penalties in parallel for the same behaviour, due to the following statement on fines for legal persons on page 8 of the DOJ publication, ‘Criminal Liability of Organizations: A Plain Language Guide to Bill C-45’<sup>25</sup>: “Similarly, a court would consider whether the public interest is served by adding a large fine to the penalties that may have already been imposed by a body such as a securities commission”. However, no securities commission has imposed a penalty for securities violations triggered by CFPOA violations or related accounting offences.

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<sup>24</sup> During the sentencing hearing in the Hydro Kleen case, the president of the victim of the foreign bribery offence – the competitor company that lost contracts due to the bribery – read to the court a ‘victim impact statement’.

<sup>25</sup> See the Guide at the following webpage: <http://www.justice.gc.ca/eng/dept-min/pub/c45/c45.pdf>

60. The lead examiners note that a penalty that was available, but not applied by the Court in the Hydro Kleen case is ‘corporate probation’. Pursuant to subsection 732.1(3.1) of the Criminal Code, the Court may prescribe probation in respect of an organisation, which includes conditions such as one or more of the following: 1) Restitution to a person for any loss or damage caused by the offence; 2) Establish policies, standards and procedures to prevent subsequent offences; 3) Report to the court on the implementation of these policies, standards and procedures; and 4) Make a public announcement regarding the conviction, sentence, and any measures being taken to prevent further offences. The Canadian authorities point out that, because the Court in the Hydro Kleen case deemed that the sentence agreed to by the prosecution and the defence was fit, other sanctions, such as those outlined in subsection 732.1(3.1) of the Criminal Code, were therefore not considered by it.

61. In addition, information provided in the Phase 3 responses on sanctions applied in Canada for commercial crimes since Phase 2 (i.e. forgery and fraud) does not indicate that probation or corporate monitoring was imposed on an organisation during that period. Following the on-site visit the Canadian authorities identified the following case, in which probation was imposed on an organisation since Phase 2: R v. Hub Oil Co. [2005] A.J. No. 1455 (involving charges related to an explosion and fire that killed two people and injured several others).

62. The DOJ publication, ‘Criminal Liability of Organizations: A Plain Language Guide to Bill C-45’<sup>26</sup> may provide some insight on why the lead examiners could not identify cases since Phase 2 when probation was imposed in commercial crime cases. On page 9, it says: “Courts are not necessarily well equipped to supervise corporate activities and the organization may already be subject to extensive regulation by government bodies...Therefore, this paragraph requires the court to consider whether another body would be more suitable to supervise the organisation”. However, during the on-site visit, the lead examiners did not receive any input from relevant bodies, such as the provincial securities commissions, that they are taking on this task, or that they have been contacted by provincial or federal prosecution authorities regarding such a role generally or in specific cases.

#### *(e) Administrative Sanctions*

63. The CFPOA does not provide for civil or administration sanctions upon conviction for the bribery of a foreign public official, such as the denial of public advantages in appropriate cases, including public procurement contracts, contracts funded by official development assistance, and officially supported export credits.

64. Persons convicted under section 121 of the Criminal Code of bribing an official of the Government of Canada, government of a province, or Her Majesty in right of Canada or a province (‘Frauds on the Government’), have no capacity to contract with Her Majesty or receive any benefit under a contract with Her Majesty, pursuant to subsection 750(3) of the Criminal Code, under Part XXIII, entitled “Sentencing”. The “disabilities” upon conviction in subsection 750(3) do not apply in the case of convictions under the CFPOA. The lead examiners note that Article 3.1 of the Convention requires that the range of criminal penalties shall be “comparable to that applicable to the bribery of a Party’s own public officials”.

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<sup>26</sup> See the Guide at the following webpage: <http://www.justice.gc.ca/eng/dept-min/pub/c45/c45.pdf>

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

66. The lead examiners point out that Commentary 24 on the Convention states that the kinds of civil or administrative sanctions, other than non-criminal fines, that might be imposed on legal persons for foreign bribery are: “entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order”. Furthermore the 2009 Recommendation recommends in Paragraph XI i) that “...to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials”.

67. Contracting agencies, such as the Canadian International Development Agency (CIDA), the Canadian Commercial Corporation, and the Export Development Corporation (EDC) have protocols and principles for dealing with applicants found guilty of corruption, which may result in debarment in certain circumstances. Debarment in these circumstances does not amount to a sanction on conviction as envisaged by Article 3.4 of the Convention, Commentary 24 on the Convention, or Paragraph III of the 2009 Recommendation.<sup>27</sup> The court of conviction does not convey information about convictions for foreign bribery to the contracting agencies.

### *Commentary*

***The lead examiners assess that Canada has made further progress on implementing the part of the Phase 2 recommendation on compiling statistics on convictions for the foreign bribery offence. Information on CFPOA cases is now compiled in a way that differentiates between legal and natural persons and on the basis of whether sanctions***

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<sup>27</sup> Article 3.4 of the Convention states: “Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official”. Commentary 24 on the Convention states: “Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order”. Paragraph III vii) of the 2009 Recommendation recommends that “each Member country take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine...public subsidies, licenses, public procurement contracts, contracts funded by official development assistance, officially supported export credits, or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with sections XI and XII of this Recommendation”.



*were obtained through plea-bargaining. Statistics compiled on commercial crime more generally indicate if probation and restitution have been ordered, but do not identify whether sanctions were obtained through plea-bargaining. In summary, this recommendation has been fully implemented, but the lead examiners believe that following-up whether in practice the statistics compiled on foreign bribery offences are adequate would be the preferable approach at this stage, given the large number of expected prosecutions in the near future to test their effectiveness.*

*The lead examiners also recommend continued follow-up of the sanctions applied in practice to natural and legal persons in CFPOA cases, since there has only been one case to date, and the sanction applied in that case was not sufficiently “effective, proportionate and dissuasive” as prescribed by Article 3.1 of the Convention.*

*In addition, the lead examiners recommend that Canada take appropriate actions to automatically apply on conviction for a CFPOA violation the same measures that apply for the bribery of a domestic public official – i.e. removal of the capacity to contract with Her Majesty or receive any benefit under a contract with Her Majesty, to ensure compliance with Article 3 of the Convention, which requires a range of penalties for foreign bribery comparable to that applicable to the bribery of the Party’s own public officials, and XI i) of the 2009 Recommendation, which recommends that “...to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public official, such sanctions should be applied equally in case of bribery of foreign public officials...”.*

#### **4. Confiscation of the bribe and the proceeds of bribery**

68. Under section 462.37 of the Criminal Code, a judge may order the proceeds of crime (including the proceeds of crimes under the CFPOA) to be forfeited to the federal or provincial Crown that prosecuted the offence. In the context of a bribe in an international business transaction, the Canadian authorities explained that the “proceeds” of crime will be calculated on the basis of the “benefit received” from the unlawful activity, rather than the “net profit” from the transaction. The forfeiture of the “instrument” of an offence (such as a bribe, for present purposes), is provided for under section 490.1 of the Criminal Code (“forfeiture of offence-related property”). The Canadian authorities explained that in such cases the bribe that had been seized as evidence could subsequently be forfeited to the Crown in the course of sentencing upon conviction. Canada is not aware of any reported cases where this has occurred in the context of bribery investigations and convictions.

69. On asset recovery, Canada would need to rely on the execution by an overseas authority of a judgment in Canada, in reliance upon the Mutual Legal Assistance in Criminal Matters Act (MLACMA). As it affects the recovery by foreign States of assets confiscated by and/or forfeited to Canada, authorities explained that section 462.41 of the Criminal Code allows a court to order the return of property to an innocent third party (which could include a State in cases of corruption involving public funds) if that party has a valid and lawful interest in the property. Furthermore, property forfeited to the federal Crown might be capable of return to a foreign State where that State is a party to a reciprocal sharing agreement with Canada. There have been no reported cases of this kind in Canada.

70. Canada reported having engaged in bilateral and multilateral discussions with a number of international partners concerning identifying, freezing, seizing, confiscating and recovering the proceeds of bribes to foreign public officials. This has included leading a project within the Organization of American States (OAS) to develop best practices in the area, and involvement in G-8 efforts to develop a handbook on the subject.

### *Commentary*

*In the absence of actual cases on the subject, the lead examiners do not consider it possible to properly assess application of Canada's framework for the confiscation of bribes and the proceeds of bribery. They recommend that the Working Group monitor this issue, within the broader context of the use of sanctions, as foreign bribery and related cases emerge in Canada.*

## **5. Investigation and prosecution of the foreign bribery offence**

71. Since the Phase 2 evaluation of Canada in March 2004, one case – the Hydro Kleen case -- was prosecuted and a conviction obtained. The company pleaded guilty in the Court of Queen's Bench in Red Deer, Alberta, in January 2005, and the charges against the company officials were stayed.<sup>28</sup> This is the only completed prosecution in Canada since the CFPOA came into force in February 1999. Currently, over 20 cases are under investigation and a PPSC-led prosecution is ongoing under the CFPOA, in which charges were laid by the RCMP in May 2010 for the alleged bribery of an Indian government official by a Canadian individual in relation to a multi-million dollar public procurement contract for a security system.<sup>29</sup>

72. At the outset of the Canadian on-site visit, a senior Canadian official acknowledged that Canada has been criticised for “little” CFPOA enforcement. He stated that this criticism is no longer relevant because Canada now has the infrastructure in place to investigate and prosecute CFPOA cases, and that Canada “stands by to vigorously enforce the CFPOA”.

73. In summary, this part of the Report assesses developments since Phase 2 concerning the institutional framework for investigations and prosecutions. It begins with a review of changes in the law enforcement institutional framework since Phase 2. This part also reviews two outstanding recommendations from Phase 2 – one that Canada consider establishing a coordinating role for one of the principal agencies responsible for CFPOA implementation, and the other regarding guidelines in the Federal Prosecution Service (FPS) Deskbook on prosecutorial discretion. Finally, this part assesses the level of resources available for CFPOA investigations and prosecutions.

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<sup>28</sup> More information about this case is provided throughout this Part of the Report, as well as in discussions on the “Responsibility of Legal Persons” (see Part B.2)), “Sanctions” (see Part B.3) and “Cases” (see Part A.4).

<sup>29</sup> More information about this case is provided under “Cases” (see Part A.4 of the Report).

*(a) Changes in institutional framework since Phase 2*

*RCMP International Anti-Corruption Unit*

74. In January 2008, the RCMP's Commercial Crime Program established the International Anti-Corruption Unit, which is comprised of a commissioned officer in Ottawa and two International Anti-Corruption Teams. The role of the Ottawa position, which is staffed with an Inspector, is to manage the Royal Canadian Mounted Police anti-corruption program and provide support to the two investigative teams. The support includes policy framework, human and financial resource monitoring, legal environment monitoring, departmental reporting, ensuring there is coordination of investigations, information gathering and intelligence processing. The two International Anti-Corruption Teams are strategically located in Ottawa and Calgary. Ottawa is the Capital of Canada; it is also in the province of Ontario, which is a major nucleus for industry, trade and finance in Canada. Calgary is the largest city in the province of Alberta, and one of the largest in Canada. It is a major centre for international business; most notably the extractive industries. According to business representatives who participated in the on-site visit, Alberta's stock exchange lists more companies from these industries than any other stock exchange in the world. The Ottawa Team is responsible for the provinces from Manitoba eastward to the Atlantic, and the Calgary Team is responsible for those provinces west of Manitoba. Both teams share responsibility for the territories in the northern part of Canada. Each RCMP International Anti-Corruption Team is staffed with six regular RCMP members and a civilian member or public servant. They are commanded by a staff sergeant who reports to the officer in charge of the Commercial Crime Section in their locations. In addition to their investigative role, they have engaged in substantial education and awareness-raising efforts throughout Canada, including over 30 presentations to representatives of the private sector on the CFPOA and the RCMP enforcement programme.

75. The RCMP International Anti-Corruption Teams have the following investigative responsibilities for allegations of the following offences: 1. Bribery of a foreign public official in contravention of the CFPOA; 2. Bribery of a domestic public official contrary to the Criminal Code, in cases with an international dimension; and 3. Laundering the proceeds of crime in or through Canada. The Teams also deal with requests for mutual legal assistance, and the design and delivery of prevention programs in conjunction with the Department of Justice Canada (DOJ) and DFAIT.

76. During the on-site visit, the representatives of the two RCMP International Anti-Corruption Teams informed the lead examiners that they are currently investigating over 20 cases under the CFPOA. The RCMP at least partly attributed this substantial increase in the CFPOA investigation case-load to the creation of the International Anti-Corruption Teams.

77. Canadian authorities informed the evaluation team about other RCMP investigative bodies – Integrated Market Enforcement Teams (IMETs) – which are part of the RCMP Financial Crime Directorate (the same part of the RCMP of which the IACU is part). The IMETs have over 150 investigators mandated to investigate serious fraud offences. The IMET investigative pool consists of RCMP investigators, PPSC legal advisors, securities regulators, law enforcement agencies of local jurisdictions, forensic accountants and support staff. The lead examiners were

unable to assess what role, if any, they play or could play in detecting and investigating the bribery of foreign public officials.

### *Public Prosecution Service Canada*

78. The PPSC was created in December 2006, pursuant to Part 3 of the Federal Accountability Act (Director of Public Prosecutions Act). It replaces the Federal Prosecution Service (FPS) within the DOJ, and, with some variations between the provinces and territories, is essentially responsible for prosecuting offences in federal statutes, including the CFPOA, Proceeds of Crime Act, Income Tax Act, Controlled Drugs and Substances Act, Crimes against Humanity and War Crimes Act, Financial Administration Act, and Canada Elections Act. The PPSC is also responsible for prosecuting certain crimes in the Canadian Criminal Code, including organised crime and terrorism. The Director of Public Prosecutions is appointed by the Governor in Council on the recommendation of the Attorney General of Canada (who is also the Minister of Justice). The principal role of the DPP is to conduct prosecutions on behalf of the Crown. The PPSC has 500 to 600 prosecutors across the country.

79. According to information published on the PPSC website<sup>30</sup>, the creation of the PPSC “reflects the decision to make transparent the principle of prosecutorial independence, free from any improper influence”. The website further states that “unlike the FPS, which was part of the Department of Justice, the PPSC is an independent organization, reporting to Parliament through the Attorney General of Canada”.

80. To date, specific resources in the PPSC have not been dedicated to CFPOA prosecutions. So far costs in relation to the CFPOA have been absorbed by the overall PPSC budget. The PPSC recently created a “subject-matter expert position” on the CFPOA in Ottawa, whose duties include working with and advising the two RCMP anti-corruption teams on ongoing investigations. However, according to PPSC representatives, additional funding and personnel will be needed for CFPOA prosecutions that are expected to arise from the substantial body of ongoing investigations by the RCMP International Anti-Corruption Teams. Discussions on funding for these anticipated prosecutions are ongoing. In addition, the PPSC is studying options on how to be ready for these cases.

81. Under Canadian law, the starting point for determining enforcement jurisdiction with respect to federal statutes other than the Criminal Code (and including the CFPOA) is that the RCMP polices and federal prosecutors undertake the prosecutions. In practice, there may be exceptions, as contemplated by section 2 of the Criminal Code which defines "Attorney General" for prosecution purposes and provides that "...with respect to proceedings... commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of ... any Act of Parliament other than [the Criminal Code] ... means the Attorney General of Canada [i.e. the PPSC]." In practical terms, if an information is laid by or on behalf of the Government of Canada (i.e. by the RCMP), then the PPSC will have jurisdiction over the prosecution. It is possible that the Attorney General of a province could have jurisdiction over CFPOA cases - i.e. where the information is laid by a municipal or provincial police force

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<sup>30</sup> See: [http://www.google.fr/search?hl=fr&q=PPSC+Canada&btnG=Rechercher&aq=f&aqi=&aql=&oq=&gs\\_rfai=](http://www.google.fr/search?hl=fr&q=PPSC+Canada&btnG=Rechercher&aq=f&aqi=&aql=&oq=&gs_rfai=)

(and not the RCMP) or where it is laid by the RCMP but the prosecution is subsequently conducted by provincial counsel by virtue of a waiver of jurisdiction by the PPSC.

82. According to the Canadian authorities, the first situation (laying of the information by provincial or municipal police) is likely to happen only rarely, as municipal and provincial police will generally refer cases to the RCMP for practical reasons (including lack of resources and specialized knowledge). The second situation (prosecutions conducted by provincial counsel) is possible where PPSC waives its jurisdiction over a CFPOA prosecution in favour of a provincial prosecution authority (as happened in the Hydro Kleen case). Such decisions are made in consultation between the PPSC and the provincial prosecution authority on a case by case basis in circumstances where, for example, the case includes more serious charges that are within provincial prosecutorial jurisdiction, there is a conflict of interest or the respective workload volumes of the two offices at the time would so dictate.

83. The PPSC has not so far completed a prosecution under the CFPOA; although as mentioned already, it is currently prosecuting a case. As explained above, while the PPSC is the primary prosecuting authority, there may be cases where it waives its jurisdiction in favour of a provincial prosecution service that agrees to assume responsibility, as occurred in the Hydro Kleen case, where arrangements were made for the Alberta Attorney General to step in due to a conflict of interest on the particular facts of the case. During the follow-up to the on-site visit, a representative of the Office of the Ontario Attorney General indicated that discussions had been held with the PPSC in which his office indicated a willingness to collaborate on CFPOA cases.

### ***(b) Outstanding Phase 2 Recommendations***

#### *Coordinating role for principal agency*

84. In Phase 2 the Working Group on Bribery made several observations on unique challenges to the effective coordination of CFPOA investigations and prosecutions due to the shared role of the federal government and the provinces in the enforcement and prosecution of criminal law. The DOJ website clarifies the division of functions as follows<sup>31</sup>:

“The provincial governments carry out most Criminal Code prosecutions and property law transactions. Prosecutions under all other federal laws, including drug offences, are conducted by the Public Prosecution Service of Canada (PPSC), which acts for the Attorney General but is independent of the Department of Justice. In the territories, the PPSC conducts all criminal prosecutions, including those under the Criminal Code”.

85. The Canadian authorities explain that criminal law enforcement jurisdiction, as explained above, is generally understood by both levels of government.

86. The Working Group assessed that in addressing offences under the CFPOA, the system could be reinforced by increasing coordination between the provincial and federal levels of enforcement, and recommended that Canada “consider establishing a coordinating role for one of the principal agencies responsible for CFPOA enforcement, for purposes including the following:

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<sup>31</sup> The DOJ document, entitled “Canada’s Department of Justice” is found at: [www.justice.gc.ca/eng/dept-min/pub/about-aprop/](http://www.justice.gc.ca/eng/dept-min/pub/about-aprop/)

1. Collecting information from the police and prosecutorial authorities at the federal and provincial levels about investigations and prosecutions to ensure that, for instance, resources are not duplicated where more than one authority has jurisdiction; and 2. Maintaining specialized knowledge on the CFPOA to be available to the provincial (and where applicable, municipal) authorities involved in the enforcement of the offence”. The Canadian authorities state that they have “considered establishing a coordinating role” and have taken numerous steps towards enhancing coordination.

87. In Canada’s Phase 2 written Follow-Up Report, approved and adopted by the Working Group in June 2006, Canada reported certain efforts at increasing coordination between the different levels of law enforcement authorities. The most important initiative reported was a formal information gathering and sharing mechanism put in place in 2004 that enables the exchange of information at least once a year between the federal and provincial authorities on CFPOA cases. However, Canada had not established a central coordinating role for one of the principal agencies responsible for CFPOA enforcement. As a result, the Working Group concluded that this particular Phase 2 recommendation was “partially implemented”.

88. During the Phase 3 on-site visit, the lead examiners therefore paid special attention to the issue of coordination, and assessed that the need for a centralized coordinating agency remained. The examiners observed that this need resulted from overlapping jurisdiction over CFPOA cases at the provincial and federal levels, as was found in Phase 2. In addition, the examiners found that coordination between police and prosecutors, and police and provincial securities regulators, could be improved.

89. Canada explained that the PPSC, DOJ’s International Assistance Group (IAG), and the RCMP’s Legal Services Unit, have all designated individuals to liaise with the International Anti-Corruption Teams. They maintain specialised knowledge on CFPOA investigations and prosecutions and have established links with their provincial counterparts. Canada believes this fully implements the Working Group’s recommendations. The lead examiners were not able to determine, at the time of the Phase 3 on-site visit, how this system works in practice.

#### *Jurisdiction of federal and provincial law enforcement authorities*

90. The federal authorities – the RCMP and the PPSC – have primary responsibility for CFPOA investigations and prosecutions respectively. The provincial authorities can and do get involved in CFPOA enforcement. The extent of involvement differs between the provinces. It also differs between the police and prosecutorial authorities. However, as described above in the case of prosecutions, the PPSC would need to waive its primary jurisdiction for this to happen.

#### *Police*

91. At the police level, it is widely accepted that CFPOA cases are investigated by the RCMP, which is generally determinative of PPSC having prosecutorial jurisdiction. All the provincial and municipal police authorities involved in the evaluation agreed that the RCMP is best placed to investigate CFPOA cases, and therefore they would refer such cases routinely to the RCMP. The one slight exception was the Toronto Police Service (TPS), which has fifty dedicated officers for fraud investigations. The representative of the TPS told the lead examiners that CFPOA allegations would normally be referred to the RCMP, due to their cross-border nature

necessitating international travel. On the other hand, a case that took place entirely in Toronto ‘may or may not’ be investigated by the TPS, ‘in discussion with the RCMP’.

92. Given that CFPOA cases are almost certain to be referred to the RCMP by provincial and municipal police forces, the main issue is therefore whether the local police forces have sufficient awareness of the CFPOA to recognize a CFPOA violation so that it is referred in practice. Awareness by the local police of the CFPOA is discussed in another part of this report (see Part B(10)(a)). For the purpose of this part of the Report, the main point is that awareness is not necessarily high across the board, particularly at the municipal police level. For instance, the representative of the Calgary RCMP International Anti-Corruption Team stated that there are six or seven major city police forces in western Canada that probably would not identify that a CFPOA offence has occurred. However, Canadian law enforcement authorities stated consistently that once the international dimension becomes apparent, officers would in any case refer the case to the RCMP.

93. For a CFPOA investigation to be effective, it is also important that the RCMP consult with the municipal and/or provincial police force where the individual or company under investigation is located, to find out if it is also investigating the company or individual for a related offence, such as fraud or money laundering. The local police force might possess evidence relevant to the CFPOA investigation. The Canadian authorities pointed out that consulting with local police authorities is a basic investigative step, and given that there are over 69 000 police officers and 100 police forces in Canada, it is likely that such consultations have occurred in ongoing CFPOA matters. However, the lead examiners were unable to assess such consultations in practice.

#### *Prosecutorial authorities*

94. The FPS Deskbook states that “offences under federal statutes other than the Criminal Code may also be prosecuted by provincial Attorneys General”. In discussions with various provincial prosecution authorities from across Canada, it emerged that some provincial prosecution authorities would probably not prosecute a CFPOA case, due to the need for extensive resources for complicated cases involving cross-border transactions.

95. However, representatives from the two provincial Attorneys General involved in the evaluation (Alberta and Ontario) stated that they might choose to prosecute CFPOA cases. The PPSC clarified that the Attorneys-General would only be in a position to prosecute CFPOA cases where jurisdiction had been waived by the PPSC.

96. In practice, in addition to the Hydro Kleen case, the Alberta Attorney General has helped on one CFPOA investigation, and has been consulted on a number of other CFPOA investigations. The representative of the Alberta AG who participated in the panel discussion believes that Alberta is in a better position than the PPSC to prosecute CFPOA cases because of his Office’s resources and expertise. There are five economic crime prosecutors in Calgary who are well equipped and interested in handling CFPOA matters. In addition, the Special Prosecutions Branch of the Alberta AG has designated a specific person as the first point of contact on CFPOA cases. The Alberta AG’s representative stated that Alberta and the PPSC have a good relationship on matters of concurrent jurisdiction. The Canadian authorities remark that the

PPSC is taking steps to be in a better position to assert its jurisdiction, as discussed in more detail above (see under see B.5.(a), “Public Prosecution Service Canada”).

97. The representative of the Ontario Attorney General stated that the Ontario AG would have no difficulty taking the lead on a CFPOA prosecution. It has concurrent jurisdiction with the PPSC in a number of areas, in which it has led prosecutions, in consultation with the PPSC, including money laundering and asset forfeiture. The Ontario AG would be very interested in prosecuting CFPOA cases. It has 1000 prosecutors, including a number who have been set aside for major commercial crime cases and who regularly prosecute complicated fraud cases. The Ontario AG has a very good relationship with the PPSC on matters of concurrent jurisdiction, and recently jointly prosecuted a major terrorism case with the PPSC.

98. The Canadian authorities state that the potential for federal or provincial prosecution authorities or both to be involved is not unique to CFPOA prosecutions, but is also the case for more than 200 other offences contained in federal statutes other than the Criminal Code. Canada adds that this situation is dealt with regularly, and believes that discussions with the provincial authorities in the context of the Phase 3 evaluation show that the system works well.

#### *Coordination between police and prosecutors*

99. At the on-site visit, the lead examiners observed a good spirit of cooperation between the RCMP and the PPSC, including at the regional level, and are satisfied that cases under investigation by the RCMP would probably come to the attention of the PPSC at an early enough stage to ensure effective coordination. Nevertheless, specific training at the regional PPSC level does not appear to have taken place on the CFPOA, and such training would definitely improve cooperation further (see the discussion on this issue under Part B(10)(a) of this Report).

100. Coordination between the provincial and local police on the one hand and the federal authorities on the other might not be as effective. For instance, as mentioned above, the International Anti-Corruption Team in Calgary is not sure that six or seven of the municipal police forces in western Canada would identify a CFPOA violation. However, the International Anti-Corruption Team in Ottawa believes that local police would “likely” identify a CFPOA violation as a federal offence and pass it on to the Commercial Crime Centre in the RCMP.

101. The Ottawa Police Service is not specifically familiar with the CFPOA; although its representative at the on-site visit believes that it would “more than likely” refer a bribery case with international dimensions to the RCMP. The representative of the Toronto Police Service (TPS) was only aware due to his own independent research before participating in the panel discussion, and informed the lead examiners that the TPS has not yet detected a foreign bribery case. He also was not aware that several CFPOA cases are under investigation by the RCMP International Anti-Corruption Teams, and did not believe there have been any requests from the RCMP about whether the TPS is investigating any of the same companies under investigation by the RCMP for alleged CFPOA violations.

102. As it would have been physically impossible for the evaluation team to meet with all front line officers in Canada located in major business or financial centres (e.g. Halifax, Montreal, Vancouver and Winnipeg), it is not known whether they would recognize a foreign bribery case or whether they would refer such cases to the RCMP. The potential for municipal police forces to



receive a CFPOA allegation is underlined by the statement of a representative of a large listed company in Ontario that his company would probably report a CFPOA violation to the TPS. However, the Canadian authorities state that municipal police forces would generally refer such cases to the RCMP, for policy reasons, including that municipal forces would likely not have specialised knowledge or significant resources to pursue such investigations, due to their international dimension.

103. As described above, coordination appears good between the federal authorities and the two provincial prosecution authorities with whom the lead examiners met – the Alberta Attorney General and the Ontario Attorney General. However, the level of coordination and cooperation between the federal authorities and other provincial prosecution authorities is not known, including in provinces with major business or financial centres, such as Nova Scotia (City of Halifax), Québec (City of Montreal), British Columbia (City of Vancouver) and Manitoba (City of Winnipeg). A PPSC representative from Headquarters in Ottawa did not know whether provincial prosecutors are aware of the CFPOA, since they focus mostly on offences in the Criminal Code.

*Coordination between securities regulators and other law enforcement bodies*

104. In Canada, securities regulation is carried out at the provincial and territorial level, and all the provinces and territories have a securities commission. The lead examiners were able to talk to seven such commissions for the purpose of this evaluation<sup>32</sup>

105. All the provincial securities commissions confirmed that they have the authority to share information on potential criminal matters with the various levels of police. The Canadian authorities explain that this authority is subject to legal constraints that may apply to the ongoing subsequent use, in criminal proceedings, of information collected for regulatory purposes. Four commissions confirmed that they have done so in practice regarding fraud, and two of those confirmed that they have conducted joint fraud investigations with the police. One commission is not having much success with joint investigations with the RCMP, because the RCMP cannot move as quickly on investigations due to its much heavier case-load. None of the seven commissions has referred a potential CFPOA violation to the police. Similarly none has been asked for information regarding any ongoing CFPOA investigations. In addition, none of the commissions was aware of the numerous ongoing investigations by the RCMP.

106. The lead examiners got the impression that all the commissions would be prepared to share relevant information with the RCMP if asked to do so, subject to legal constraints referred to in the preceding paragraph, and one commission remarked that it “cannot force” the RCMP to come to it for help. The Canadian authorities point out that it is entirely within the discretion of the RCMP to consult with the securities commissions in particular cases.

107. The Canadian authorities informed the evaluation team that the RCMP Financial Crime Directorate, of which the IACU is a part, also has Integrated Market Enforcement Teams

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<sup>32</sup> Alberta Securities Commission; Ontario Securities Commission; Manitoba Securities Commission; New Brunswick Securities Commission; Nova Scotia Securities Commission; Autorité des marchés financiers, gouvernement du Québec; and Financial Services Regulation Division, Department of Government Services, Government of Newfoundland and Labrador.

(IMETs),<sup>33</sup> which have over 150 investigators mandated to investigate serious fraud offences. However, The IMET investigate pool consists of RCMP investigators, PPSC legal advisors, securities regulators, law enforcement agencies of local jurisdictions, forensic accountants and support staff. The Canadian authorities state that the IACU will utilise this resource if required. The IMETs, and their significance in law enforcement efforts under the CFPOA, are discussed further in this Report (see B.5.(a), “RCMP International Anti-Corruption Unit”). The Canadian authorities stated that securities commissions share information with the criminal authorities in the serious fraud context through their participation in Integrated Market Enforcement Teams (IMETs) (also see above). However, while this mechanism exists, given that there has been no consultation in IMETs on CFPOA matters to date, the lead examiners were unable to assess to what extent information has, or could be, shared relating to the bribery of foreign public officials and what the IMETs would do with this information once received. Given the close connection between serious fraud and corruption, the lead examiners believe that there is an important potential for such information to be transferred by the securities commission through this mechanism.

### *Commentary*

*The lead examiners believe that the establishment in 2008 of RCMP International Anti-Corruption Unit, including its two International Anti-Corruption Teams – one in Calgary and the other in Ottawa --is a very positive development, and indicates that enforcement of the CFPOA in Canada is now a significantly higher priority than at the time of the Phase 2 evaluation in 2004. They also believe that more than 20 investigations and one ongoing prosecution can be directly attributed to this institutional enhancement, as well as to a lesser extent the creation of a “subject-matter expert position” on the CFPOA at PPSC headquarters in Ottawa, and the following three relevant institutional features:*

- 1. The RCMP International Anti-Corruption Unit includes an officer located in Ottawa who manages the RCMP anti-corruption programme and provides support to the two International Anti-Corruption Teams.*
- 2. The establishment of RCMP Integrated Market Enforcement Teams (IMETs) – which are part of the RCMP Financial Crime Directorate (the same part of the RCMP of which the IACU is part – which have extensive resources for investigating serious fraud offences and are multi-disciplinary, including local law enforcement authorities, securities regulators, PPSC legal advisors and forensic accountants.*
- 3. The PPSC, DOJ’s International Assistance Group (IAG), and the RCMP’s Legal Services Unit, have all designated individuals to liaise with the RCMP International Anti-Corruption Teams. They maintain specialised knowledge on CFPOA investigations and prosecutions and have established links with their provincial counterparts.*

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More information on the IMETs can be found at: <http://www.rcmp-grc.gc.ca/imet-eipmf/index-eng.htm>

***The lead examiners recommend following-up the effectiveness of these new institutional features once more cases have reached the prosecution stage.***

*Prosecutorial discretion*

108. In Phase 2 the Working Group on Bribery recommended that the Canadian authorities clarify that, in investigating and prosecuting CFPOA cases, “there are no proper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved, and establish guidance to prosecutors on how to proceed when they decline to prosecute a case that potentially involves one of the public interest factors in the FPS Deskbook”. This recommendation arose from two findings in Phase 2. First, the public interest factors listed in the FPS Deskbook that could be considered in making prosecution decisions included at least one that is prohibited by Article 5 of the Convention – i.e. “whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest”. Second, Canada included a statement in its letter accompanying the transmission of the Canadian Instrument of Ratification of the Convention regarding its interpretation of Article 5 of the Convention.<sup>34</sup>

109. In Canada’s Phase 2 written Follow-Up Report in June 2006, the Working Group found that this recommendation had been only “partially implemented”. Canada had amended the FPS Deskbook to specifically provide that in CFPOA cases, prosecutors are recommended to keep a record of reasons for not instituting proceedings. However, it had not clarified that, in investigating and prosecuting CFPOA cases, considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved, are never proper.

110. Since its Phase 2 written follow-up report, Canada has not clarified that the considerations in Article 5 can never be proper, essentially on the following grounds. First, the prosecutorial function is independent. In 2006 the Director of Public Prosecutions Act transferred responsibility for federal prosecutions, including under the CFPOA, from the Attorney General of Canada (AG) to the Director of Public Prosecutions (DPP), which further separates the federal prosecution authorities and the executive. As mentioned above, the PPSC is an independent organisation, reporting to Parliament through the Attorney General of Canada, whereas the FPS was part of the Department of Justice. The DPP is appointed by the Attorney General, and acts on his or her behalf. The DPP has the power to make binding and final decisions to prosecute offences under federal statutes. Final decisions of the DPP cannot be reviewed. The AG also continues to be able to take carriage of individual cases, and issue directions to the DPP or intervene in specific cases. However, directions by the Attorney General of Canada on specific cases must now be published.

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<sup>34</sup> The letter, which was sent to the Secretary General of the OECD by the Ambassador and Permanent Representative of the Permanent Delegation of Canada to the OECD on 17 December 1998, includes the following statement: “As noted during the negotiations, in accepting the language of Article 5 of this Convention as written, Canada does so on the clear understanding that the obligation contained in this article is to ensure that investigation and prosecution of the bribery of a foreign public official is not influenced by improper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved”.

111. Canada states that the letter was filed as an interpretive declaration to the effect that it considered the effect of Article 5 of the Convention as requiring, in investigating and prosecuting CFPOA offences, that its officials would not be influenced by “improper” considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal persons involved. Canada interprets Article 5 in the manner set out in the letter, because in its view such an approach is consistent with the spirit and intent of Article 5 of the Convention as further elucidated by Commentary 27, which provides that prosecutorial discretion is to be “exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature”. Furthermore, such an approach is mandated by Canada’s firm adherence to the principle of prosecutorial discretion, which has only been strengthened since ratification of the Convention by the establishment of the independent Office of the Director of Public Prosecutions. As the DPP has the power to make binding and final decisions regarding the prosecution of offences under federal statutes, it would be inappropriate for the Government to require particular factors to be taken into account or not to be taken into account in making such decisions.

112. The Secretary General did not consider the statement by Canada in the letter a reservation to the Convention, and considered that his view was shared by the other Members of the Working Group in the absence of their reaction to the notification. The statement in the letter from Canada was thus interpreted as a mere restatement of Article 5 of the Convention and of no legal effect. The lead examiners fully appreciate the importance of maintaining the independence of prosecution, but do not believe that this necessarily means that general rules on prosecuting cases cannot be issued, particularly if the purpose of those rules is to protect prosecutorial independence. Commentary 27 of the Convention confirms that Article 5 of the Convention “recognises the fundamental nature of national regimes of prosecutorial discretion”. It also “recognises” that, “in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature”. The lead examiners also note that subsection 10(2) of the Director of Public Prosecutions Act (S.C. 2006, c.9, s. 121) provides the Attorney General of Canada with the authority to, after consulting the Director (of Prosecutions), “issue directives respecting the initiation or conduct of prosecutions generally”, which must be published in the Canada Gazette.<sup>35</sup> Moreover, the Federal Prosecution Service Deskbook, which contains the relevant “public interest factor” (“whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest”), was prepared by the DOJ Federal Prosecution Service. In summary, the lead examiners believe there are several methods by which Canada can clarify that Article 5 factors are impermissible considerations in the exercise of prosecutorial discretion.

### *Commentary*

***The lead examiners note that the new legal framework which establishes the PPSC should further enhance the independence of prosecutorial decision making in Canada on CFPOA cases. However, Canada has not clarified that in investigating and***

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<sup>35</sup> The Canada Gazette is the “official newspaper of the Government of Canada”, and is “one of the vehicles that Canadians can use to access the laws and regulation that govern their daily lives”. For more information see: <http://canadagazette.gc.ca/cg-gc/about-sujet-eng.html>

*prosecuting CFPOA cases, “there are no proper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved”.*

*As a result, the lead examiners consider that Canada has still not fully implemented the outstanding recommendation from Phase 2. The lead examiners also consider that this casts a doubt on Canada’s full compliance with Article 5 of the Convention.*

*The lead examiners therefore recommend that without further delay Canada clarify that in CFPOA cases there are no proper considerations of the prohibited factors in Article 5 of the Convention.*

### *(c) Level of Resources for Investigations and Prosecutions*

113. At the on-site visit, the lead examiners heard that the level of resources in two RCMP International Anti-Corruption Teams might be a problem. According to an RCMP representative, national security investigations and issues have to take priority in the RCMP. As a result, one of the Anti-Corruption Teams “often” has to give resources for such investigations, and has lost “many” members. In the last two years he estimates that approximately 5000 person hours were spent on other activities outside of the Team’s mandate, and it is not certain that the Team was able to follow all leads or detect CFPOA cases due to this situation. The representative of the other Team agreed in general terms with these concerns, noting in addition that his resources are often depleted to provide officers for protection details. Following the on-site visit, the Inspector in the IACU at RCMP headquarters stated that response deployment is a two-way process: while it is true that IACU members may be assigned to national security detail, members from other units (including Identity, Major Case Management, Criminal Intelligence and National Economic Profiling teams) are likewise assigned to perform temporary duties for the IACU. He also pointed out that the examination team visited during an exceptional year for Canada, during which the RCMP was involved in providing security for the 2010 Winter Olympics, the G8/G20, and a Royal Visit. During non-exceptional years, the IACU is committed to spending 80% of its time on its mandate, as is consistent with the ebb and flow of staffing/personnel accounting. Nonetheless, the IAC Teams identified staffing as one of the greatest challenges to effective investigations.

114. The level of resources in the PPSC for CFPOA prosecutions seems very uncertain. No-one in the PPSC is specifically dedicated to prosecuting CFPOA cases. This may be problematic given that more than 20 cases are currently under investigation by the RCMP, and should be expected to proceed to the prosecution stage in the near future. The PPSC states that it is considering options, such as freeing-up resources by contracting prosecutions of a routine nature to private lawyers, or reaching out to provincial prosecution authorities to lead prosecutions. Given the level of expertise and resources available for these cases at the offices of the Alberta Attorney General and the Ontario Attorney General, this might be a feasible option. As mentioned earlier, the process for funding these cases is ongoing. The PPSC explained to the lead examiners that it has never turned away a case due to a lack of resources.

### *Commentary*

*The lead examiners are concerned that the level of resources for investigating CFPOA cases in the two RCMP International Anti-Corruption Teams may not be adequate, especially when they are deployed to address other national priorities. They therefore recommend that Canada ensure that the resources remain at least at their intended functional levels of six full-time regular RCMP members and a civilian member or public servant for each Team for CFPOA matters, when adjusted to account for resources lost due to other obligations.*

*The lead examiners are also concerned that the PPSC is considering options to handle the expected substantial case-load of CFPOA prosecutions at such a late stage, and recommend that a solution be found urgently.*

#### **(d) Jurisdiction**

115. Canada provides for territorial jurisdiction only over the foreign bribery offence. Throughout discussions concerning the absence in Canada of nationality jurisdiction (in Phases 1, 2 and 3), Canada has explained that: it has generally been Canada's policy to only apply extraterritorial jurisdiction where there is an express treaty obligation to do so; Article 4 of the Convention does not expressly require – in the view of Canada – the adoption of extraterritorial jurisdiction, but instead calls for Parties to review whether their basis for jurisdiction is effective to fight corruption; and Canadian courts use a broad application of territorial jurisdiction, such that Canada's basis for jurisdiction is effective to combat foreign bribery. In Phase 2, the Working Group concluded that jurisdiction in Canada is in fact much narrower than for most other Convention Parties that also provide for nationality jurisdiction over foreign bribery offences.<sup>36</sup> Various uncertainties about the effectiveness of territorial jurisdiction over the CFPOA were noted in Phase 2, and there does not appear to be any more clarity on this issue since that time.

116. There has been no Supreme Court case law in Canada since Phase 2 on the interpretation or application of extraterritorial jurisdiction in Canada. Having said that, it appears from discussions with the RCMP and PPSC during the on-site visit that police and prosecutors are willing to pursue a case of foreign bribery with a broad understanding in mind of what amounts to a “real and substantial link” to the territory of Canada and to do so until either the Canadian courts say this is going too far, or until nationality jurisdiction is introduced into law. While this is a positive approach towards the investigation and prosecution of the foreign bribery offence, the risk remains that – so long as nationality jurisdiction is absent in Canada – foreign bribery prosecutions may fail for lack of a sufficient jurisdictional link over the act(s) in question. This would have a very negative impact on the profile of the CFPOA and the ability of authorities to pursue such misconduct. The lead examiners heard from representatives of the RCMP, PPSC, a representative of the auditing profession, and civil society that nationality jurisdiction would greatly assist in ensuring successful prosecution of the offence of bribing a foreign public official.

117. The Working Group has already noted in Phase 2 that Canada has established nationality jurisdiction over other offences, including child sex tourism, piracy, terrorism, and war crimes. Canada has asserted that, in principle and except in exceptional cases, Canada does not provide for nationality jurisdiction unless there is an explicit treaty requirement to do so. Canada does not

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<sup>36</sup> *R v Libman* [1985] 2 SCR 178.

accept that there is any basis on which to conclude that Article 4(2) of the Convention<sup>37</sup> requires Canada to establish nationality jurisdiction over foreign bribery. Canada refers to the language in Article 4(2), which requires that parties that have jurisdiction to prosecute its nationals take measures to establish its jurisdiction to do so in respect of foreign bribery “according to the same principles”. Canada does not interpret this Article as requiring States Parties to exert their jurisdiction on the basis of the active or passive nationality principles. Instead, Canada believes that Article 4(2) should be interpreted as being applicable to states, such as civil law countries, that normally exert their jurisdiction to prosecute their nationals who commit crimes abroad, which is not the case in Canada.

118. Canada emphasises that, in the absence of a treaty requirement, it has not provided for nationality jurisdiction in the case of corruption, organized crime or drugs offences. Specifically, Canada further states that it has not provided for nationality jurisdiction in relation to the following conventions where nationality jurisdiction is not mandatory: the Inter-American Convention against Corruption, the United Nations Convention against Corruption, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the United Nations Convention on Transnational Organized Crime. . The lead examiners note that even though the provision on nationality jurisdiction in the Optional Protocol to the Convention on the Rights of the Child is optional, Canada has enacted nationality jurisdiction in relation to its offence of child sex tourism. In response to a request for information on other offences in relation to which Canada has provided for nationality jurisdiction, when it is optional under the corresponding Convention, Canada stated that it is not in a position to do so and furthermore this is not necessary as the instances cited in the report suffice to illustrate the principle Canada applies, namely that such decisions are made on a case-by-case basis **taking into account factors such as the nature of the crime**.

119. The lead examiners do not share Canada’s view and believe that the absence of nationality jurisdiction leaves a substantial loophole in the coverage of the CFPOA, and needlessly poses a substantial hurdle to investigation and prosecution in obliging authorities to prove a ‘real and substantial link’ to the territory of Canada.

120. The lead examiners consider that Canada is applying an overly restrictive interpretation to Article 4(2) of the Convention. Article 4(2) responds to the nature of the bribery of foreign public officials, which is a crime that normally takes place abroad in the foreign public official’s country. In fact, Canada states in its reasons for not establishing nationality jurisdiction that one of the factors to be considered in determining whether to establish nationality jurisdiction is the “nature of the crime”. Other crimes over which Canada has established nationality jurisdiction are those which by their very nature usually take place abroad – i.e. child sex tourism, piracy, terrorism and war crimes. Given that territorial jurisdiction in Canada requires a “real and substantial link” to Canadian territory, and that Canada has established nationality jurisdiction over other offences that take place abroad, the lead examiners believe that pursuant to Article 4(2) it is necessary for Canada to establish nationality jurisdiction in respect of the foreign bribery offence

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<sup>37</sup> Article 4(2) of the Convention provides that: “Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles”.

121. Amendments to the CFPOA, introducing nationality jurisdiction over the offence, were proposed in the 2009 Parliamentary session (15 May 2009) under clause 38 of Bill C-31. The Bill went through its second reading but was not passed before the end of the Parliamentary session in December 2009, which meant that the Bill required reintroduction in the future if it was to go any further. To date, the Bill has not been re-introduced. During the on-site visit, authorities were unable to comment on whether or not this might occur, and some representatives from civil society expressed doubt that the Bill would be introduced given the existence in Canada of a minority government. Following the on-site visit the Canadian authorities stated that “consideration will be given to the re-introduction of similar legislative proposals”.

### *Commentary*

*The lead examiners consider that the lack of nationality jurisdiction over the foreign bribery offence is a serious challenge to Canada’s ability to effectively prosecute foreign bribery cases, and also causes significant confusion within the private sector as to the scope of the CFPOA. As determined by the lead examiners in Phase 2, they too remain unconvinced that territorial jurisdiction under Canadian law is broad enough to enable the effective application of the offence under the CFPOA. The lead examiners also note that Canada takes a “case-by-case” approach to enacting extra-territorial jurisdiction, and has done so in relation to other transnational crimes, even when not mandatory under the corresponding Convention, and has provided for it in some such cases. They conclude that Canada should establish nationality jurisdiction over the offence of bribing a foreign public official as a matter of urgency.*

### *(e) Statute of limitations*

122. As Canadian law does not provide a statute of limitations for the offence of bribing a foreign public official, the lead examiners conclude that this framework should allow ample time for the investigation and prosecution of complex cases requiring, for example, the obtaining of legal assistance from other countries and the analysis of complex and considerable financial and accounting records.

## **6. Money laundering**

123. In Phase 2, the Working Group made no recommendations to Canada concerning anti-money laundering measures, nor identified any issues for follow-up in this regard. This was partly due to the then relatively recent adoption and implementation of such measures, although Canada has since undergone evaluation by the Financial Action Task Force, most recently in 2008 under the Third Round Evaluation. Since then, a number of new legislative and regulatory provisions have been brought into force to enhance Canada’s anti-money laundering regime. It is noted, however, that there have been no money laundering investigations or convictions in Canada based on the predicate offence of bribery (domestic or foreign). On the question of reporting suspicions of foreign bribery to law enforcement authorities by Canada’s financial intelligence unit, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), see the discussion later in this report [B.10.(b), “Duty to report suspicions of bribery”].

### *Commentary*



*In view of the lack of investigations and prosecutions in Canada of money laundering based on a predicate offence of bribery, the lead examiners recommend that the Working Group follow-up the application of the money laundering offence in such cases.*

## **7. Accounting requirements, external audit, and company compliance and ethics programmes**

### *(a) Accounting requirements*

124. The Canada Business Corporations Act (CBCA) requires federally incorporated companies to maintain accounting records (subsection 20(2)). Although the CBCA does not specify the way in which accounting records should be maintained, the preparation of companies' mandatory annual financial statements must follow the Generally Accepted Accounting Principles (GAAP) in the Handbook of the Canadian Institute of Chartered Accountants (the CICA Handbook) or, in certain circumstances, the GAAP established by the Financial Accounting Standards Board of the United States.<sup>38</sup> The Accounting Standards Board<sup>39</sup> adopted International Financial Reporting Standards (IFRS) as Canadian GAAP for publicly listed enterprises for fiscal years beginning on or after 1 January 2011. Private enterprises have the option to adopt IFRS or the new Canadian accounting standards for private enterprises in Part II of the CICA Handbook – "Accounting". A corporation that, without reasonable cause, fails to comply with subsection 20(2) of the CBCA is guilty of an offence and liable on summary conviction to a fine not exceeding CAD 5000.

### *(b) Sanctions for fraudulent accounting*

#### Statistical information

125. In Phase 2, the Working Group made a recommendation to Canada on one issue, and another issue was to be followed up, in relation to Article 8.2 of the Convention, which requires that each Party "provide effective, proportionate and dissuasive civil, administrative or criminal penalties" for omissions and falsifications of the books, records, accounts and financial statements of companies done "for the purpose of bribing foreign public officials or of hiding such bribery".

126. The relevant Phase 2 recommendation was to compile statistical information on sanctions for relevant omissions and falsifications in respect of books, records and accounts of companies, in a manner that differentiates between the sanctions for legal persons versus natural persons.<sup>40</sup> In

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<sup>38</sup> CBCA, section 155 and Canada Business Corporations Regulations 2001, regulations 70(1) and (2).

<sup>39</sup> The Accounting Standards Board (AcSB), an independent body that is overseen by the CICA-established Accounting Standards Oversight Council, is adopting International Financial Reporting Standards (IFRS) as Canadian GAAP for publicly accountable enterprises (PAEs). As a result, PAEs will begin reporting their financial results based on the IFRS from 2011. However, private enterprises have the option of adopting either IFRS or the new AcSB standards developed specifically to meet the needs of users of their financial statements. Representatives from the accounting and auditing profession anticipated that most private enterprises are likely to opt to report in accordance with the new AcSB accounting standards.

<sup>40</sup> The other part of this Phase 2 recommendation on compiling statistics related to sanctions for the foreign bribery offence under the CFPOA, and is discussed under Part B.3.(b).

addition, the Working Group decided to follow-up the application of such sanctions to natural and legal persons.<sup>41</sup> In the Phase 2 Written Follow-Up Report, the Working Group deemed the recommendation partially implemented, due to the need to verify whether the statistical information collected by Canada would be “adequate to...enable an evaluation on the appropriateness of sanctions”. Regarding the follow-up issue, in the Phase 2 Written Follow-Up Report, Canada did not provide any information on sanctions for fraudulent accounting offences.

127. In the responses to the Phase 3 questionnaires, the Canadian authorities provide a comprehensive compilation of sanctions that have been imposed for Criminal Code offences concerning omissions and falsifications of books, records and accounts of companies for the period of 2004 to 2009. Although these sanctions were not applied in cases related to the bribery of foreign public officials, the information is nonetheless useful for understanding the kinds of sanctions applied in Canada for such offences. The information is broken down in terms of the sections of the Criminal Code under which each case was prosecuted,<sup>42</sup> the exact nature of the sanction applied in each case (e.g. fine, imprisonment, conditional sentence, probation), and a summary of the facts in each case. Canada has also provided a statistical analysis of the prosecutions under each individual Criminal Code section for the period of 2004 to 2007, which shows the following information for decisions under each section: total number of decisions, number of decisions in which the defendant was found guilty, and the percentage of decisions in which the defendant was found guilty.

128. The Canadian Centre for Justice Statistics (CCJS) was created in 1981 as a division of Statistics Canada. The CCJS is the focal point of a federal-provincial-territorial partnership for the collection of information on the nature and extent of crime and the administration of civil and criminal justice in Canada. This partnership, known as the “National Justice Statistics Initiative”, has become the international model of success on how to develop, implement and manage an effective national justice statistics program.

129. The Adult Criminal Court Survey (ACCS) contains data on federal statute charges which are collected by the CCJS in collaboration with provincial and territorial government departments responsible for adult criminal courts. The surveys consist of census of Criminal Code and other federal statute charges dealt with in adult criminal courts. The individuals involved are persons 18 years or older at the time of the offence, companies, as well as youth who have been transferred to adult criminal court.

130. This data is not broken down in a manner that differentiates between sanctions for legal persons and natural persons, and Canada indicates that this further statistical breakdown is not possible.

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<sup>41</sup> This follow-up issue also applied to statistics on sanctions for the foreign bribery offence under the CFPOA, which is discussed under Part B(3)(b).

<sup>42</sup> The information about sanctions for omissions and falsifications of books, records, accounts of companies, etc, relates to prosecutions under the following sections of the Criminal Code: s. 361 on false pretence, s. 362 on false pretence or false statement, s. 366 on forgery, s. 368 on uttering forged documents, s. 380 on fraud, s. 397 on books and documents, and s. 400 on false prospectus.

131. The following table provides a summary of the statistical information provided by Canada in the responses to the Phase 3 questionnaires on sanctions for books and records offences under the relevant Criminal Code provisions for the period of 2004 to 2007:

Fiscal Year	2004/2005			2005/2006			2006/2007		
	# prosecution s	# Guilty	% Guilty	# prosecution s	# Guilty	% Guilty	# prosecution s	# Guilty	% Guilty
s. 361 (false pretence)	0	0	N/A	7	2	29%	0	0	N/A
s. 362 (false pretence or statement)	702	368	52%	617	316	51%	522	287	55%
ss. 366/367 (forgery –making of false document)	458	302	63/66 %	425	283	43/68 %	400	256	46/65 %
s. 368 (trafficking/possession of forged doc)	2119	1531	72%	1933	1413	73%	1868	1313	70%
s. 380 (fraud affecting public market)	8113	5151	63%	7336	4752	65%	7113	4622	65%
s. 397 (falsification of books & docs)	3	2	67%	12	4	33%	7	1	14%
s. 400 (false prospectus)	0	0	N/A	1	0	0%	2	0	0%

132. As the table indicates, most of the enforcement activity took place under section 380 ('Fraud affecting public market'). It is therefore informative to consider the kinds of sanctions that were imposed under section 380 in the years reported by the Canadian authorities. For instance, from 2004 to 2005, the sanctions under section 380 ranged from a conditional discharge, to 7 years and 4 months imprisonment, with the majority of sanctions between around 9 months and 2 years of imprisonment; from 2005 to 2006, they ranged from 10 months conditional, to 3 years of imprisonment; from 2006 to 2007 they ranged from a conditional discharge, to 5 years imprisonment, with the majority between around 14 months and 3 years; from 2007 to 2008 they ranged from a suspended sentence and 1 year of probation, to 8 years and a restitution order, with the majority between around 1 and 3 years; and from 2008 to 2009 they ranged from 5 months, to 3 years imprisonment. An important trend from 2007 to 2009 is a significant increase in restitution orders.

#### Legal issues

133. The Criminal Code prohibits forgery and the use of forged documents (sections 366-367), as well as the making of false books and documents (section 397). However, in the view of the lead examiners, these offences appear of limited relevance to Article 8 of the Convention,

which requires “effective proportionate and dissuasive civil, administrative or criminal penalties” for omissions and falsifications in respect of the books, records, accounts and financial statements of companies, “for the purpose of bribing foreign public officials or of hiding such bribery”. Sections 366 and 367 on forgery apply to the making of “a false document”, and thus would not apply to a false entry or omission in a document. Section 397, on the making of false books and documents, applies only where there is “intent to defraud” (subparagraph (1)) or “intent to defraud...creditors” (subsection (2)).

134. In addition, the Canadian authorities refer to subsection 239(1) of the Income Tax Act, which establishes the offence of tax evasion through several means, including making false or deceptive entries, or omissions in the records or books of a taxpayer, for the purpose of evading taxes. The offence is punishable on summary conviction, and on indictment under subsection (2), where the amount evaded exceeds certain limits, it is punishable on indictment, and subject to fines up to 200 percent and not less than 100 percent of the amount of tax evaded, and imprisonment up to 5 years. Pursuant to section 242, where a corporation commits the offence, any officer, director or agent of the corporation who directed or authorised, etc., the offence is a party to and guilty of the offence and liable to the same punishment provided for the offence regardless if the corporation has been prosecuted or convicted. However, in the view of the lead examiners, this offence also appears to be of limited relevance to Article 8 of the Convention.

135. In Phase 2, the Working Group recommended that Canada consider amending the CBCA – in order to expressly prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation – and to consult with the provinces to ensure that federal and provincial legislation meet these standards [Recommendation 3(a)]. Canada states that the Criminal Code offences on forgery and making false books and documents cover this conduct, and thus no changes have been made to Canadian legislation in this regard. One auditor stated during the on-site visit that provisions in the Criminal Code and CBCA may be ineffective because there are no explicit descriptions of what types of accounting and auditing records should be maintained. The Canadian authorities state that the criminal law does not provide what types of accounting and auditing records should be maintained because that it is not its purpose.

136. During the on-site visit, the provincial securities commissions confirmed that they could bring cases for books and records violations, either in the form of injunctive actions or cease-and-desist proceedings. They confirmed that they do bring such cases, and do so as violations of Canadian GAAP, and in such cases they can seek their own independent civil remedies, including fines and officer and director bars for individuals involved in bribery schemes. The commissions have powers of subpoena (production orders) and do not need to prove intent to deceive, manipulate or defraud to establish such violations. The commissions could loan experienced accountants, examiners, and attorneys to the RCMP IACU. One of the securities commissions stated that joint investigations of this kind would be in the public interest. The securities commissions reported no cross-reporting of CFPOA violations, parallel investigations with criminal authorities in CFPOA cases, or efforts to share expertise. However, as mentioned elsewhere in the report, representatives from securities commissions are part of the IMET pool. There may be legal limits on the ongoing subsequent use in criminal proceedings of evidence collected for regulatory purposes.

*(c) External auditing requirements*

137. Provincial securities legislation requires registrants to appoint an external auditor, who must be independent of the company. The auditor must make an examination of the annual financial statements in accordance with generally accepted auditing standards and prepare an audit report on the annual financial statements of the reporting issuers, which must be filed with the provincial securities commission. The auditor may also audit other regulatory filings. There is no requirement in provincial securities legislation that the auditor report potential non-compliance<sup>43</sup> to the provincial securities commission, though Canadian Auditing Standards require the auditor to report non-compliance to the audit committee and those charged with corporate governance. The discovery by an auditor of non-compliance could, in some circumstances, be a material fact required to be reported by the reporting issuer to the provincial securities commission. Reporting issuers can make an application to the securities commissions to have such material facts reported in a confidential manner in appropriate cases. Concerning the potential role of Securities Regulators in the detection and investigation of foreign bribery, see sections 122 to 125.

138. According to the CICA Handbook – “Assurance”, the auditor shall communicate with those charged with governance, matters involving non-compliance with laws and regulations that come to the auditor’s attention during the course of the audit, other than where matters are clearly inconsequential. Although the CICA Handbook – “Assurance”, does not explicitly provide that foreign bribery constitutes “non-compliance”, a representative from the auditing profession stated during the on-site visit that an auditor should consult with the appropriate corporate body or audit committee when foreign bribery is detected. The corporate body or audit committee, however, has no direct statutory obligation to forward suspicions of foreign bribery to law enforcement authorities.

139. Auditing standards direct auditors to determine whether the auditor has a responsibility to report to parties outside the client entity. However, the standards recognize the auditor’s professional duty to maintain the confidentiality of client information may preclude reporting identified or suspected non-compliance with laws and regulations to a party outside the entity absent a legal obligation to do so. The rules of professional conduct of the provincial institutes/order of chartered accountants set out the professional duty of client confidentiality for chartered accountants. These rules of professional conduct also recognize a duty of confidentiality that may be overridden by “order of lawful authority”. Representatives from the auditing and accounting profession confirmed that they were unaware of any laws that override their professional duty of confidentiality in this way.

140. Auditing standards are in transition. The Canadian Auditing and Assurance Standards Board (AASB) is an independent body established by the Canadian Institute of Chartered Accountants and operates under the public oversight of the Auditing and Assurance Standards Oversight Council. The AASB’s authority to develop and establish standards and guidance governing auditing and assurance in Canada is reflected in many federal and provincial business corporation acts, as well as securities legislation. The AASB is adopting International Standards

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<sup>43</sup> CAS 250 on “Consideration of laws and regulations in an audit of financial statements” defines the term non-compliance as “acts of omission or commission by the entity, either intentional or unintentional, which are contrary to the prevailing laws or regulations”.

on Auditing (ISAs) as Canadian Auditing Standards (CAS). CAS will come into effect for audits of financial statements for periods ending on or after 14 December 2010.

141. In Phase 2, the Working Group on Bribery questioned the adequacy of Canada's requirements for entities to submit to an independent external audit, in view of the rule that permits large private corporations to exempt themselves from the requirement [Recommendation 3(b)(1)]. These requirements have not changed since Phase 2, and a representative from the CICA observed that the number of companies that do not undergo an external audit is increasing, adding that financial institutions such as banks often do not request companies to undergo an audit to obtain credit.

142. In Phase 2, the Working Group also recommended Canada broaden the prohibitions for participating in audits contained in corporations legislation in order to improve auditor independence [Recommendation 3(b)(2)]. Canada notes that Rule 204 of the Rules of Professional Conduct, applicable to chartered accountants, provides detailed guidance to ensure the independence of auditors from their clients. Revisions to these Rules were proposed by the Independence Task Force of the Public Trust Committee in April 2010. If approved, these revisions would result in Canadian rules being more closely harmonized with the Code of Ethics for Professional Accountants, issued by the International Ethics Standards Board for Accountants of the International Federation of Accountants in July 2009.

***(d) Internal controls, ethics and compliance programmes***

143. Although the Canadian Government has been active in promoting corporate social responsibility (CSR), including through the holding of nationwide CSR Roundtables and through the subsequent appointment in 2009 of the first CSR Counsellor for the Extractive Industry,<sup>44</sup> little has been done since Phase 2 to specifically promote the implementation of internal controls and compliance programmes. While it is encouraging to note Canada's activities, the Working Group recalls that CSR is aspirational in nature, while mechanisms for compliance with the law should be more direct and proscriptive. A representative of the legal profession suggested that it would be helpful to have a requirement in Canadian law for companies to establish compliance programmes. Meanwhile, representatives from the CICA explained that the CICA has been reluctant to encourage the establishment of anti-bribery internal control, ethics and compliance programmes by the private sector, since this effort could be misunderstood to be self-serving. CICA does not have the authority to require implementation of programs specific to the prevention of bribery in the private sector, although it has developed non-authoritative guidance materials regarding internal controls and ethics at a general level.

144. In general, it was the perception of the Canadian private sector at the on-site visit that the Canadian Government was doing too little in this area. However, at least in part due to the application of the US Foreign Corrupt Practices Act (FCPA) to those companies also listed on a US Exchange, some parts of the Canadian private sector (three companies from the extractive industry, a processing company, and two financial services companies) are implementing certain internal controls, ethics and compliance programmes to prevent the bribery of foreign public

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<sup>44</sup> See: <http://www.international.gc.ca/canadexport/articles/91022c.aspx> for information regarding the CSR Counsellor, Marketa Evans.

officials in their business transactions. One compliance officer, for example, stated during the on-site visit that his company's compliance programme applies uniformly to all subsidiaries, regardless of their geographical location. The lead examiners heard that one of this company's subsidiaries in a foreign country was closed for one month after violating the compliance programme; and that a second company cut ties with a joint-venture partner after that partner refused to abide by the company's compliance programme.

### *Commentary*

*The lead examiners note with concern that while the provincial securities regulators acknowledge that CFPOA offences would often also involve parallel accounting violations, in practice they have not looked for such violations, or engaged with or assisted police authorities with such investigations. The lead examiners believe that this is a significant lost opportunity, and therefore recommend that the provincial securities regulators are urgently provided with training and information about the CFPOA and related accounting issues.*

*The lead examiners recommend that Canada engage the provincial securities commissions to raise awareness of the CFPOA and encourage the commissions to investigate and sanction books and records and other securities violations associated with CFPOA misconduct. Moreover, the lead examiners urge Canada to urgently find ways for cross-sharing expertise and, where permissible, information and evidence related to CFPOA cases, between the criminal authorities and the provincial securities commissions.*

*The lead examiners consider that Recommendations 3(a) and (b) in Phase 2 have not been satisfactorily implemented by Canada. They therefore recommend that Canada, in consultation with the provinces in an effort to ensure consistency of standards throughout Canada: (i) prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation for purposes that would include "bribing foreign public officials or of hiding such bribery"; (ii) consider whether the requirements to submit to independent external audit are adequate, in view of the rule that permits large private companies to exempt themselves from the requirement; (iii) consider broadening the prohibitions for participating in audits in order to improve auditor independence; and (iv) consider amending the law to require external auditors to report indications of foreign bribery to the competent authorities.*

*The lead examiners note that the implementation and enforcement of internal controls, ethics and compliance programmes by Canadian companies, as contained in Annex II of the 2009 Recommendation, is integral to the global fight against foreign bribery. While current efforts to promote corporate social responsibility go some way to encouraging the development of internal company controls, the merging together of corporate social responsibility programmes, which are encouraged but not legally required, and compliance programmes designed to prevent and detect CFPOA violations, has caused some confusion among the private sector. The lead examiners therefore recommend that Canada take steps to increase focus on promoting*

*compliance programmes and measures specific to the CFPOA, in particular as outlined in Annex II of the 2009 Recommendation.*

*Moreover, the lead examiners note that Canada has compiled comprehensive statistical information on various Criminal Code offences, such as forgery/making of a false document (sections 366-367) and falsification of books and records (section 397),, and that the only information missing is a differentiation between sanctions applied to legal versus natural persons. The lead examiners therefore consider that this recommendation should simply be followed-up in the future to determine whether in practice information on books and records offences related to CFPOA violations is satisfactory.*

## **8. Tax measures for combating bribery**

### *(a) Non-deductibility of bribes*

145. Section 67.5 of Canada's Income Tax Act (ITA) provides: "In computing income, no deduction shall be made in respect of an outlay made or expense incurred for the purpose of doing anything that is an offence under section 3 of the Corruption of Foreign Public Officials Act..." Since section 3 of the CFPOA sets out the foreign bribery offence, this explicit reference to the CFPOA means that Canada is in compliance with Recommendation I(i) of the 2009 Tax Recommendation (and Recommendation VIII(i) of the 2009 Recommendation). While bribes paid to foreign public officials are not tax-deductible, 'facilitation payments' are specifically not considered an illegal payment under subsection 3(4) of the CFPOA and, as such, would not be disallowed under ITA section 67.5. Representatives of the Canada Revenue Agency (CRA) were not aware of cases where a CRA tax auditor disallowed deduction of an expense on the basis that this was incurred as a foreign bribe, or allowed deduction of an expense on the basis that this was a 'small facilitation payment'.

### *(b) Detection and reporting of suspicions of foreign bribery*

146. In order to detect false claims for deductible expenses, section 67.5 of the ITA requires tax auditors to determine whether an expense amounted to a foreign bribe. Representatives from the CRA explained that tax auditors can determine this point themselves, i.e. without relying on an investigation by law enforcement authorities or a court decision. In doing so, tax auditors need to interpret the CFPOA provisions including, for example, whether a certain payment falls within the "reasonable expenses" exception (CFPOA 3(3)(b)) or the "small facilitation payments" exception (CFPOA 3(4)). Although the CRA provides general written guidance to tax auditors on the application of section 67.5 of the ITA, this does not include specific guidance on the exceptions in the CFPOA. Representatives from the CRA explained that, should the need arise, they could consult technical advisors, team leaders, managers and internal legal counsel. General guidance on section 67.5 of the ITA is found in the CRA Audit Manual. Part 2 of the CRA Enforcement and Disclosures Manual, which previously only referred to bribery offences under the Criminal Code, was revised since Phase 2 to include a reference to the CFPOA and a link to the relevant paragraph of the Audit Manual. The CRA also provides training to new tax auditors, and is developing training specific to section 67.5 of the ITA, which is expected to be available in April 2011.



147. According to the Income Tax Guide to the Non-Profit Organization (NPO) Information Return,<sup>45</sup> published by the CRA, an NPO is exempt from tax under Part I of the ITA for a fiscal period if it meets the definition of an NPO under paragraph 149(1)(l) of the ITA.<sup>46</sup> However, pursuant to subsection 149(12) of the ITA, an NPO is required to file an NPO Information Return if it received or was entitled to receive more than CAD 10 000 in taxable dividends, etc., in the fiscal period, the total value of its assets in the immediately preceding fiscal year was more than CAD 200 000, or it had to file an NPO Information Return for a previous fiscal period. Accordingly, there is some scope for the tax authorities to detect foreign bribery through tax audits of NPOs required to file NPO Information Returns.

148. However, according to the CRA representatives who participated in the on-site visit, there is not a detailed definition of an NPO in the ITA, and an organisation would be considered for-profit if it engaged in an activity with the expectation of eventually making a profit. Due to the disconnect between the ITA and Income Tax Guide on the one hand, and the information provided by the CRA representatives on the other, the lead examiners feel that it is doubtful that the CRA is prepared to detect foreign bribery through a tax audit of an NPO.

149. On the issue of reporting, the Working Group recommended in Phase 2 that Canada review the prohibition under subsection 241(1) of the ITA against reporting to law enforcement authorities non-tax criminal offences detected in the course of tax audits [Recommendation 4(c)]. This prohibition is still in place, although authorities have advised that the general prohibition against disclosure of taxpayer information is currently under review by the Department of Finance. As the law currently stands, the ITA provides four exceptions where taxpayer information may be disclosed to law enforcement authorities. First, disclosure may occur where criminal proceedings have been commenced [by the laying of an information or the preferring of an indictment in court – paragraph 241(3)(a)]. Second, disclosure of taxpayer information is allowed in respect of any legal proceeding relating to the administration or enforcement of the ITA, or law of a province that provides for the imposition or collection of a tax or duty [paragraph 241(3)(b)]. Third, taxpayer information may be given to the police when they obtain a court order under section 462.48 of the Criminal Code, whereby police can access taxpayer information that would aid an investigation in relation to certain offences [subparagraph 241(4)(e)(v)]. The Canadian authorities confirm that this does not include an investigation under the CFPOA. Fourth, taxpayer information may be disclosed where the information reveals an imminent danger of death or physical injury to any individual [subsections 241(3.1) to (3.3)]. The Canadian authorities state that disclosure of information in contravention of section 241 is a summary conviction offence, punishable by a fine not exceeding CAD 5000, imprisonment for a term not exceeding 12 months, or to both.

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<sup>45</sup> The Income Tax Guide to the Non-Profit Organization (NPO) Information Return can be found at: [http://www.cra-arc.gc.ca/E/pub/tg/t4117/t4117-e.html#C1\\_NPO](http://www.cra-arc.gc.ca/E/pub/tg/t4117/t4117-e.html#C1_NPO).

<sup>46</sup> Under paragraph 149(1)(l) of the ITA, an NPO is defined as a club, society or association that is not a charity, as defined in the ITA, and that is organised and operated solely for: 1) social welfare, 2) civic improvement, 3) pleasure or recreation, or 4) any other purpose except profit. In addition, no part of the income of such an organisation can be payable to or available for the personal benefit of any proprietor, member, or shareholder, unless the proprietor, member, or shareholder is a club, society, or association whose primary purpose and function are to promote amateur athletics in Canada.

150. Representatives from the CRA stated that they did not know of any requests from law enforcement authorities to disclose taxpayer information with regard to investigations under the CFPOA. They were also unaware of current CFPOA investigations, including the recent indictment laid against Nazir Karigar.

151. The CRA stated that it would be very unlikely for the CRA to receive requests from law enforcement authorities to disclose taxpayer information regarding CFPOA investigations, because law enforcement authorities would be aware that the CRA does not have legal authority to share such information for this purpose. The CRA also provided that information regarding the recent indictment laid against Nazir Karigar could be relevant to deciding whether to launch a tax audit. The CRA regularly utilises a wide variety of sources, including the media, when developing its cases for audit or investigation. In addition, the general Income Tax Act statute-barred provisions would allow the CRA to audit Mr. Karigar at a later date, most notably if a conviction were obtained under the CFPOA. In addition, law enforcement is able to provide relevant information to local CRA offices.

*(c) Guidance to taxpayers*

152. According to Recommendation I(ii) of the 2009 Tax Recommendation, Parties to the Convention should assess “whether adequate guidance is provided to taxpayers and tax authorities as to the type of expenses that are deemed to constitute bribes of foreign public officials”. Notwithstanding this, the CRA has provided no guidance to taxpayers in this regard.

*(d) Bilateral tax treaties and the sharing of information by tax authorities*

153. Since the revision of Article 26 of the OECD Model Tax Convention in 2005, the optional language in paragraph 12.3 of the Commentary (concerning the sharing of tax information received from foreign tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters, including the combating of foreign bribery if certain conditions are met) is not generally included in new bilateral tax treaties entered into by Canada. CRA representatives stated that, if requested by a negotiating party, the optional language could be included in bilateral tax treaties. However, given the general prohibition against the sharing of information by the CRA (see discussion above under subtitle “Detection and reporting of suspicions of foreign bribery 166), Canada would only be able to agree to allow the use of information for tax purposes, subject to specific exceptions in domestic law. Since Phase 2, Canada signed but has not yet ratified the Convention on Mutual Administrative Assistance in Tax Matters, which in Article 22.4 provides for the sharing of information by tax authorities, if certain conditions are met.

*Commentary*

*Payments of bribes to foreign public officials are expressly non-deductible under the federal Income Tax Act. While CRA tax auditors are provided with general training on this, and have the assistance of a technical advisor and manager, the lead examiners note that tax auditors would benefit from additional training on whether a claimed expense is a bribe and, in particular whether the exceptions under subsections 3(3) and (4) apply. The lead examiners therefore recommend that training of tax auditors be extended to include specific training on these exceptions. Noting that the CRA does not*

*provide guidance to tax payers as to the type of expenses that are deemed to constitute bribes to foreign public officials, the lead examiners recommend that steps be taken to do so. In addition, the lead examiners recommend that this training include the detection of foreign bribery through tax audits of NPOs.*

*The lead examiners note the continued prohibition against reporting to law enforcement authorities of non-tax criminal offences detected during the course of a tax audit. They reiterate Recommendation 4(c) in Phase 2, urging Canada to complete its review of this prohibition. Should the prohibition be relaxed or removed, the lead examiners further recommend that the CRA consider adopting a policy of including the optional language in paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties. The lead examiners also urge Canada to ratify the Convention on Mutual Administrative Assistance in Tax Matters as this will enable Canada, subject to its domestic laws, to share with its law enforcement authorities information received under that Convention from the tax authorities of the currently fifteen Parties to it.*

## **9. International cooperation**

### *(a) Mutual legal assistance*

154. The Mutual Legal Assistance Act<sup>47</sup> is Canada's domestic legislation that implements bilateral and multilateral mutual legal assistance (MLA) treaties and sets forth the procedure for the execution of foreign requests made to Canada ("incoming requests"). This legislation has not been amended since Phase 2. The central authority for MLA in Canada is the Department of Justice, International Assistance Group (IAG). The offices and agencies generally responsible for requesting MLA from abroad and executing incoming requests are largely the same since the end of Phase 2, although it should be noted (as mentioned above) that in 2008, specific designated teams were created at the federal police level, with the advent of the RCMP IACU.

155. Since the RCMP IACU and PPSC are the competent authorities for investigating and prosecuting respectively CFPOA cases, either may seek MLA from abroad in relation to the relevant investigation or prosecution under this legislation.

156. Execution of incoming MLA requests in relation to bribery of foreign public officials are processed by the IAG and may be executed by the RCMP IACU if no Canadian court order is required for execution (e.g. interviewing a suspect in Canada). The IAG has established a primary point of contact within its section to ensure that priority is given to requests for MLA in corruption cases.

157. If a Canadian court order is required and can be obtained under Canadian law, the request will be sent by the IAG to the appropriate provincial or federal Attorney General's office within Canada, whose counsel will be responsible for obtaining the appropriate court orders, and overseeing the execution of the request.

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<sup>47</sup> R.S.C. 1985, c. 30 (4<sup>th</sup> Supp)

158. In 2007, since Phase 2, Canada ratified the UN Convention against Corruption (UNCAC), which provides a broad legal basis for possible requests for legal assistance in foreign bribery cases, in addition to that under the OECD Convention. Due to legal constraints, authorities were unable to provide details concerning legal assistance requests made by Canada in relation to its own investigations of foreign bribery, although it was reported that Canada has made six such requests since Phase 2. Of these six requests, three were based on bilateral treaties, one was made under the Convention, and one was made under UNCAC. Each was replied to within two months of the requests being made. Authorities did not encounter any challenges as a result of waiting for the conclusion of these requests.

159. Canada reported that it has not received mutual legal assistance requests under the Convention, although it had received requests regarding the foreign bribery offence in reliance on Article 16 of UNCAC. Pursuant to section 46 of the Canada Evidence Act,<sup>48</sup> Canada would be unable to search and seize bank records in response to a request for such information. In addition, in the absence of a bilateral or multilateral treaty relationship, section 46 of the Canada Evidence Act may provide Canada with the legal means to execute a request for MLA from a foreign judicial authority, where a criminal matter is pending before that court. In such circumstances, Canada could, for example, compel a bank officer to appear before a judge and bring records to such a hearing, thus enabling Canada to comply with a request for such information. Counsel for the Attorney General of Canada would seek the relevant order and conduct any litigation associated with the order.

#### ***(b) Extradition***

160. Canada has the means to extradite for the offence of bribery of foreign public officials in the CFPOA, based on the Extradition Act<sup>49</sup> and on either a bilateral or multilateral treaty that Canada has ratified. The processing of such requests in Canada would be carried out by the IAG.

#### ***(c) Outreach***

161. The Canadian government has undertaken bilateral work with Chinese authorities over recent years, including the establishment in June 2010 of a memorandum of understanding between the RCMP and the Chinese Ministry of Public Security setting out procedures to request cooperation and exchange information and expertise in the combating of crime, including corruption offences. It is also notable that the RCMP IACU has been involved in, and hosted, training activities with overseas law enforcement authorities.

#### ***Commentary***

***Mechanisms in Canada for incoming and outgoing MLA remain substantially unchanged since Phase 2. Little information is available to assist the lead examiners to evaluate the efficiency of those mechanisms, due to the lack of incoming MLA requests concerning foreign bribery and due to the inability of authorities to share information about outgoing requests. To assist the Working Group in its continuing cross-cutting***

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<sup>48</sup> R.S.C. 1985, c. C-5

<sup>49</sup> S.C. 1999, c.18

*consideration of this important area, the lead examiners recommend that practice in this area be followed-up.*

*The lead examiners commend Canada's initiatives with potential key partners, including China, in the fight against the bribery of foreign public officials.*

## **10. Public awareness and the reporting of foreign bribery**

### ***(a) Awareness of the Convention and the offence of foreign bribery***

162. Since Phase 2, there have been a number of positive awareness-raising activities undertaken by Export Development Canada (EDC), the Canadian International Development Agency (CIDA) and the Department of Foreign Affairs and International Trade (DFAIT) trade commissions, including nationwide CSR Roundtables, and outreach work with SMEs, which are said to account for approximately 80% of EDC clients. The new RCMP IACUs have begun undertaking training on the CFPOA within the public administration, as well as awareness-raising in the private sector, although these activities are in their early stages due to the relatively recent establishment of the Teams. Authorities acknowledged during the on-site visit that although municipal and provincial police would be likely to forward foreign bribery allegations to the RCMP (see section 108), this would depend on the knowledge of the foreign bribery offence by individual investigators and their supervisors. In this regard, a representative from a municipal police force acknowledged not being aware of the elements of the offence under the CFPOA, though the representative acknowledged that the 'international' character of the offence would prompt him/her to refer the matter to the RCMP.

163. This heightens the need for awareness-raising throughout provincial and municipal jurisdictions in Canada, especially those within which high-risk industries operate. Training of this kind could focus on providing a good understanding of the core elements of the foreign bribery offence under the CFPOA, in order to ensure that relevant information can be spotted by law enforcement officers in provincial and municipal jurisdictions. Government authorities have taken the approach of educating companies engaged in export trade irrespective of the industry or country in which they operate, based on their rationale that bribery can occur in any industry and in any market.

164. Despite the efforts mentioned, including those of the RCMP discussed above, awareness of the CFPOA in the private sector appears low. Some representatives of the private sector (a representative of the auditing profession, a processing company and a company from the extractive sector) and civil society expressed the view that the level of awareness has not changed much since Phase 2 and that awareness raising activities by the RCMP are in their initial stages. Panellists consistently commented that awareness of the CFPOA amongst SMEs is low to non-existent. Some attributed lack of awareness in the private sector to a low level of visible enforcement of the CFPOA in Canada to date. The lack of priority in this area, and the accompanying lack of awareness, may also be due to a perception – as expressed by government panellists during the on-site visit – that Canadians “are not corrupt”.

165. Business representatives stated that they believe that most Canadian companies would not know where to go in the government if they had questions about the CFPOA, and that they would probably go to the municipal police. The Canadian authorities state that neither the PPSC

nor DOJ are in a position to advise businesses on the CFPOA, as it would be contrary to the solicitor-client relationship and to their obligations as members of the legal profession for government counsel to provide legal advice to outside parties. Businesses would be referred to their own legal counsel, as would be the case regarding a criminal offence.

166. Some representatives of the private sector (a representative of a business association, and a major manufacturing company) gave explanations during the on-site visit of what would amount to a ‘small facilitation payment’, or a ‘reasonable expense incurred’, under subsections 3(3) and (4) of the CFPOA respectively. Some stated that cultural expectations in the country of the foreign public official are relevant to the question of whether or not a payment is a bribe. Others stated that some industries operating in certain jurisdictions abroad cannot do business without paying bribes. The lead examiners believe that these comments reflect that greater awareness raising on the part of the Canadian government is required. Awareness by the private sector and civil society that foreign bribery is prohibited seems due at least in part to the profile of the FCPA in the United States and the UK’s recently enacted Bribery Act 2010.

167. The lead examiners found the level of awareness of the foreign bribery offence quite high among representatives from the accounting and auditing profession; although one representative stated that there is “no awareness in the corporate environment” of the recent amendment to the Criminal Code establishing the criminal liability of organisations. In any case, it seems that due to the low risk of detection and prosecution, foreign bribery would not constitute a material misstatement for the purpose of making a report to management in most cases.

168. The Canadian authorities do not believe that awareness of section 22.2 of the Criminal Code, which contains the new provisions on the liability of legal persons, is relevant, given that Canadian law has always included corporate liability.

#### ***(b) Duty to report suspicions of foreign bribery***

169. Since Phase 2, the Public Servants Disclosure Protection Act (PSDPA) came into force (in 2007). The PSDPA provides the possibility for public servants to report alleged offences within their own agency, or to the Public Sector Integrity Commissioner. Although the Act cannot be used by public sector employees to disclose improper acts by private sector individuals or companies, it could be used by public sector employees to report other employees in receipt of bribes. The relevance of the legislation to the reporting of foreign bribery cases is extremely limited, because the Act cannot be used by public service employees to disclose improper acts by private sector individuals or companies.

170. More broadly applicable guidelines can be seen in the DFAIT Policy and Procedure for Reporting Allegations of Bribery Abroad by Canadians and Canadian Companies, adopted in March 2010. The policy brings together earlier policies and practices in the area, which had formed the basis of training on the subject for all trade commission staff since 2004. It calls on all DFAIT officers, including those in foreign representations and overseas trade commissions, to forward to the RCMP any information received regarding suspected bribery of foreign public officials. The Working Group considers that, by adopting this policy and using it as the basis of continuing training, Canada has satisfactorily implemented Recommendation 4(b) in Phase 2. Further examples of guidelines – which satisfactorily implement Recommendation 4(d) in Phase 2 – are the Principles and Guidelines for Investigations in the CIDA. The Principles and Guidelines

require CIDA staff to report suspicions of defined offences – including those under the CFPOA – to law enforcement authorities.

171. Canada’s financial intelligence unit, FINTRAC, is legally obligated to refer reasonable suspicions (i.e. where there are “reasonable grounds to suspect”) of violations of a money laundering offence or a terrorist activity financing offence to the RCMP, pursuant to subsection 55(3) of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act. During the on-site visit, the lead examiners heard that FINTRAC refers one or two leads per month to the RCMP, including the IACU, on suspected domestic and foreign corruption offences.

***(c) Whistleblower protection***

172. Canada acknowledges that whistleblowers are a potential source of information that may lead to an investigation into allegations of foreign bribery. To that end, as well as providing the possibility for public servants to report alleged offences, the PSDPA stipulates that reprisals may not be made against public servants who make disclosures. As indicated in the preceding discussion, Canada provides that the PSDPA cannot be used by public sector employees to disclose improper acts by private sector individuals or companies, though it could be used by public sector employees to report other employees in receipt of foreign bribery.

173. With regard to both public and private sector employees, the Criminal Code was amended in 2005 to introduce a new offence of retaliation against employees for reporting a workplace offence. However, the lead examiners heard from representatives of the private sector (a major processing company) and civil society that whistleblower protection in Canada is not effective for various reasons, including the following: protection under subsection 425.1(1) of the Criminal Code relies on prosecutorial action, which may not always be forthcoming; such action involves proof of retaliation at a high (criminal) standard of proof; the short-to-medium term financial and other burdens on the individual (who is likely to lose employment) discourage whistle-blowing in the workplace; and there have been recent poor examples of treatment of whistleblowers in the public sector, which undermines trust in whistleblower protection mechanisms. During the on-site visit, authorities indicated that to date there were no recorded cases under subsection 425.1(1) of the Criminal Code since its entry into force. The Canadian authorities believe that it is premature to conclude that the Criminal Code offence of retaliation against employees is not effective.

***Commentary***

***The lead examiners welcome significant awareness-raising activities by the RCMP IAC Teams in the early stages since their establishment, and encourage them to sustain them in the long-run. Nevertheless, awareness of the CFPOA and the core elements of the foreign bribery offence remains low in the private sector and in some provincial and municipal law enforcement offices, with a corresponding poor understanding, or misunderstanding, of the elements of the offence and its exceptions. Canada would strongly benefit from a more targeted approach to awareness-raising activities. The lead examiners recommend that greater attention be paid to training within law enforcement authorities throughout Canada, to enable officers to spot suspicions of foreign bribery and thereby facilitate reporting to the RCMP IACU, especially those authorities that operate within jurisdictions in which high-risk***

*industries operate. They further recommend that greater efforts be made to raise awareness amongst high-risk industries themselves, and individuals and companies operating in countries where there is a high risk of bribe solicitation.*

*Since Phase 2, agencies within the public administration have adopted guidelines concerning reporting by public servants of suspicions of foreign bribery to law enforcement authorities. There have been several instances in recent years of reports to the RCMP of suspected foreign bribery and corruption offences under these mechanisms. In this regard, the lead examiners conclude that Canada has implemented Recommendations 4(b) and 4(d) in Phase 2.*

*Also since Phase 2, Canada has enacted a Criminal Code offence of retaliation against employees (in both the public and private sectors) for reporting a workplace offence. The lead examiners note the negative perceptions of this law by representatives of the private sector, but consider that it is premature to conclude whether the law is effective, and therefore recommend following up this issue.*

*The lead examiners recommend that to the extent appropriate and possible in the Canadian legal system, Canada consider options for encouraging voluntary disclosure of CFPOA violations and for cooperating with investigations, which may thereby increase the reporting of violations of the CFPOA.*

## **11. Public advantages**

174. For all public advantages administered by Canadian authorities, the consequence of conviction of an offence of foreign bribery does not automatically result in termination of the contract or support, or of debarment from future eligibility to apply for public procurement tenders, official development assistance contracts, or officially supported export credits. Debarment as a form of administrative sanction is a matter considered in Part B.3.(e) above.

### ***(a) Official development assistance***

175. Official Development Assistance (ODA) is administered by CIDA. Contracting with CIDA is regulated by various rules<sup>50</sup> and conditions<sup>51</sup>, which are publicly available on CIDA's website. According to these rules and conditions, since 2003, organisations wishing to obtain contribution funding from CIDA are required to sign an Anti-Corruption Declaration form, confirming that within the three years before signing the agreement, they have not been convicted of any corruption-related offence.<sup>52</sup> The Declaration also states that neither the organisation nor any of its officers, employees and subcontractors included in the project/program proposal is currently under sanction for corruption-related offence. In addition, one of the general conditions

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<sup>50</sup> The rules are set out in the following document available on CIDA's website: <http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/NIC-56143617-PTT>

<sup>51</sup> See the general conditions for contracting with CIDA: <http://www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/REN-218124737-P7R>

<sup>52</sup> The Anti-Corruption Declaration is available at: [http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/Form/\\$file/CIDA\\_497.pdf](http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/Form/$file/CIDA_497.pdf).



of contracting with CIDA is an anti-corruption clause, pursuant to which the contractor warrants that “no offer, gift or payment, consideration or benefit of any kind, which constitutes an illegal or corrupt practice, has or will be made to anyone, either directly or indirectly, as an inducement or reward for the award or execution” of the contract/contribution agreement. The anti-corruption clause does not require that the contractor include such an obligation in its contracts with sub-contractors.

176. In Phase 2, the Working Group recommended that Canada consider revisiting the policies of agencies such as CIDA, EDC, and Public Works and Government Services Canada (PWGSC) on dealing with applicants convicted of bribery and corruption [Recommendation 5(e)]. CIDA requires applicants to declare previous corruption-related convictions, although the existence of such a conviction may not exclude the award of a contract if the applicant can show that steps have been taken by it to counter the problem and prevent future similar conduct. Although such declarations are not subject to due diligence, CIDA does consider the compliance mechanisms in place within applicant companies. Representatives from CIDA explained that the evaluation criteria in this regard will be higher in the case of high-value ODA contracts, operations in high-risk industries or geographic areas, and will almost always be more thoroughly applied in the case of SMEs due to the practical difficulties that SMEs face in establishing and implementing CSR mechanisms. CIDA’s Principles and Guidelines for Investigations call for CIDA to take appropriate action against consultants, contractors and suppliers who subsequently engage in fraud or corruption, including termination of contracts. However, applicant declarations are not subject to due diligence, and there do not appear to be mechanisms for CIDA to learn of corrupt activities by existing contractors that occur during the course of a contract.

***(b) Officially supported export credits***

177. Relevant to Recommendation 5(e) in Phase 2, EDC has introduced improved due diligence mechanisms for pre-screening of applicants, through which underwriters look in public sources for any indicators of bribery or allegations of bribery. EDC will deny support to applicants convicted of bribery until such time as it is satisfied that the applicant has implemented systems to deter future bribery, and that corrective measures have been taken. Where an application for export credit is approved, customers are provided with advice (in the form of a template letter) about corruption offences under the CFPOA and Criminal Code, and Canada’s commitment to the Anti-Bribery Convention. Customers are provided with access to online tools to help them recognise bribery and to assist them in determining what to do if faced with bribe solicitation. Where it becomes aware of allegations of bribery by one of its customers, the EDC’s Anti-Corruption Program requires the information to be brought to the attention of EDC Management and Legal Services following which, if considered credible, the information will be passed on to the RCMP. Representatives from the EDC acknowledged that it is a challenge, however, to become aware and keep track of allegations of illegal conduct by its customers abroad.

178. The Canadian authorities confirm that official export credit contracts include anti-bribery clauses. EDC’s exporter declaration expressly warrants that the exporter has not and will not engage in conduct prohibited by the CFPOA, and is not charged and has not been convicted within the last five years of a foreign bribery violation in any country. The exporter must also warrant that, to the best of the exporter’s knowledge, no one acting on behalf of the exporter is

charged or has been convicted within the last five years of a foreign bribery violation in any country. The exporter must also disclose to EDC upon demand the identity of persons acting on the exporter's behalf and the amount and purpose of commissions and fees paid, or agreed to be paid to such persons.

***(c) Public procurement***

179. The Acquisitions Branch of PWGSC has recommended that consideration be given to the possibility of adding restrictions on dealings with applicants convicted of bribery of foreign public officials with respect to common service procurements, in the context of improving due diligence in contracting. This recommendation is currently being further developed for final consideration by PWGSC senior management.

180. In line with the Federal Accountability Act, the Canadian Commercial Corporation (CCC), Canada's international contracting and procurement agency, has included in all its domestic contracts with Canadian suppliers a clause prohibiting the bribery and corruption of government officials. Authorities advise that should the CCC determine that a Canadian supplier has contravened the CFPOA in the course of executing a contract with the CCC, the Corporation would apply various sanctions which could include termination of the contract.

***Commentary***

***The lead examiners are encouraged by the approach of CIDA, in determining whether or not to grant an ODA contract, to evaluate with higher levels of scrutiny applications concerning high-value contracts, operations in high-risk industries and geographic areas, and applications made by SMEs who might, by virtue of their size, operate without adequate compliance programs. They recommend that CIDA procedures could be further strengthened by undertaking due diligence concerning applicants' declarations about corruption-related convictions.***

***The lead examiners were also impressed by the steps taken since Phase 2 by EDC concerning notice given to applicants for export credit concerning the foreign bribery offence, tools provided to help customers recognise bribery and determine what steps to take, and mechanisms for verifying and reporting information concerning suspicions of foreign bribery. In respect of both CIDA and EDC, the lead examiners are further encouraged by the steps taken to revise policies on dealing with applicants convicted of bribery and corruption. Due to the current lack of action in this respect by the PWGSC, however, they must conclude that Recommendation 5(e) in Phase 2 remains only "partially implemented". The lead examiners therefore reiterate that Recommendation with regard to the PWGSC.***

## C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

181. The Working Group on Bribery welcomes Canada's recent enforcement efforts. Canada has over 20 CFPOA investigations and one ongoing prosecution. Recent progress in investigating CFPOA violations is largely due to the establishment of the RCMP International Anti-Corruption Unit, which has been making substantial efforts to investigate allegations of the bribery of foreign public officials and raise awareness of the offence. Canada is also commended for the enactment of the Criminal Code provision on the liability of legal persons, which covers the bribery of foreign public officials in circumstances analogous to those in the 2009 Recommendation. However, Canada has only completed one prosecution since it enacted its foreign bribery law in 1999. Given the size of Canada's economy and its high-risk industries, the Working Group recommends Canada review its law implementing the Convention and its approach to enforcement to determine why it has only had one conviction to date. Canada's implementation of the Convention is problematic in four important areas – the scope of the foreign bribery offence in the CFPOA, application of sanctions, scope of jurisdiction in the CFPOA, and factors that may be considered in CFPOA prosecution decisions. Moreover, the Public Prosecution Service of Canada has not yet dedicated resources for dealing with the soon expected substantial body of CFPOA prosecutions.

182. Regarding outstanding recommendations since the Phase 2 written follow-up report in June 2006, the Working Group concludes that Recommendations 4(b) and (d) are now satisfactorily implemented. The Working Group cannot assess whether Recommendation 2 has been satisfactorily implemented until there have been more prosecutions. The Working Group concludes that the following recommendations remain partially implemented: 3(a), and 5 (d), (e) and (f). The following recommendations remain not implemented: 3 (b), 4(c) and 5 (c). Regarding recommendation 5(b), which required further consideration by Canada to amend a particular aspect of the CFPOA, the Working Group now recommends the amendment.

183. In conclusion, based on the findings in this report on implementation by Canada of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. Due to the significance of the issues raised in this report, the Working Group recommends that Canada report back to it on progress in implementing the recommendations below in October 2011 and provide, in writing, the outcomes of its review of its implementation of the Convention, as described above. This would be followed by the normal oral report within one year of this report (March 2012), and a written follow-up report on all recommendations and follow-up issues within two years (March 2013).

### 1. Recommendations of the Working Group

#### *Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery*

1. The Working Group recommends that Canada amend the offence of bribing a foreign public official in the CFPOA so that it is clear that it applies to bribery in the conduct of all international business, not just business 'for profit'. (Convention, Article 1)

2. The Working Group recommends that Canada take appropriate measures to automatically apply, on conviction for a CFPOA violation, the removal of the capacity to contract with the Government or receive any benefit under such a contract, consistent with the domestic bribery offence in the Criminal Code. [Convention, Article 3; Commentary 26; 2009 Recommendation XI (i)]
3. The Working Group recommends that Canada urgently take such measures as may be necessary to prosecute its nationals for the bribery of foreign public officials committed abroad. (Convention, Article 4.2; Commentary 26; Recommendation V)
4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:
  - a) Clarify that in investigating and prosecuting offences under the CFPOA, considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, are never proper; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)
  - b) Ensure that resources for investigating CFPOA cases by the RCMP International Anti-Corruption Teams remain at least at their intended functional levels of six full-time regular RCMP members and a civilian member or public servant for each Team; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)
  - c) Urgently dedicate resources for the soon expected CFPOA prosecution case-load of potentially more than 20 cases; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)
  - d) Take appropriate measures to encourage provincial securities commissions to sanction books and records and other securities violations associated with CFPOA misconduct, and share with the RCMP and other relevant investigative authorities expertise and information about potential CFPOA violations; [Convention, Article 8.2; 2009 Recommendation X. A. (i) and (ii)]
  - e) In consultation with the provinces in an effort to ensure consistency of standards throughout Canada: (i) prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation for purposes that would include “bribing foreign public officials or of hiding such bribery”; (ii) consider whether the requirements to submit to independent external audit are adequate, in view of the rule that permits large private companies to exempt themselves from the requirement; (iii) consider broadening the prohibitions for participating in audits in order to improve auditor independence; and (iv) consider amending the law to require external auditors to report indications of foreign bribery to the competent authorities; [Convention, Article 8] and
  - f) To the extent appropriate and possible in the Canadian legal system, consider options for encouraging voluntary disclosure of CFPOA violations and for cooperating with investigations, which may thereby increase the reporting of violations of the CFPOA. [2009 Recommendation III (iv)]

### *Recommendations for ensuring effective prevention and detection of foreign bribery*

5. The Working Group recommends that Canada find an appropriate and effective means for making companies aware of the CFPOA, including the defence for ‘reasonable expenses incurred in good faith’ and the defence for ‘facilitation payments’, and increase efforts to raise awareness of the CFPOA specifically amongst: i) Industries at high risk for bribing foreign public officials, and individuals and companies operating in countries where there is a high risk of bribe solicitation; and ii) municipal and provincial law enforcement authorities, to enable them to spot suspicions of foreign bribery and thus facilitate reporting to the RCMP International Anti-Corruption Unit. [2009 Recommendation III (i), IV, VI (ii), and Annex I, paragraph A]

6. Further regarding the defence in the CFPOA for ‘facilitation payments’, the Working Group recommends that Canada as soon as possible implement Recommendation VI of the 2009 Recommendation by: i) periodically reviewing Canada’s policies and approach on small facilitation payments; and ii) encouraging companies, including SMEs, to prohibit or discourage the use of such payments in internal controls, ethics and compliance programmes or measures. [2009 Recommendation VI; and X. C. (i)].

7. The Working Group recommends that Canada promote compliance programmes or measures specifically targeting the prevention and detection of CFPOA violations in the private sector, including in particular the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance. [2009 Recommendation X. C. (i) and (ii)]

8. Regarding the tax treatment of bribes to foreign public officials, the Working Group recommends that Canada:

- a) Provide specific training for tax examiners on whether a payment comes under the defence for reasonable expenses incurred in good faith or facilitation payments, and the detection of foreign bribery by non-profit organisations; [2009 Recommendation VIII (i); 2009 Tax Recommendation II] and
- b) Complete as soon as possible the review of the prohibition against reporting non-tax criminal offences detected in the course of a tax audit, to law enforcement authorities, and identify methods to enable the tax authorities to share information about CFPOA violations, including by considering inclusion of the optional language in paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties. [2009 Recommendation VIII (i); 2009 Tax Recommendation I (ii) and (iii)]

9. Regarding public procurement contracting in Canada, the Working Group reiterates the Phase 2 recommendation that Canada revisit the policies of Public Works and Government Services Canada on dealing with applicants convicted of CFPOA violations. In addition, the Working Group recommends that Canada consider further strengthening CIDA procedures by undertaking due diligence concerning applicants’ declarations about corruption-related convictions. [Convention, Article 3.4; Commentary 24; 2009 Recommendation XI (i)]

## 2. Follow-up by Working Group

10. The Working Group will follow-up the issues below as CFPOA case law and practice develop:

- a) Application of the defence of ‘reasonable expenses incurred in good faith’; (Convention, Article 1)
- b) Due to the newness of the provision, application of the Criminal Code provision on the liability of legal persons, including in the following cases: i) the natural perpetrator(s) is (are) not prosecuted and/or convicted under the CFPOA; and ii) the relevant legal person was not created with an expectation of profit, including non-profit and government controlled entities; (Convention, Article 2; 2009 Recommendation IV, and Annex 1, paragraph B)
- c) Sanctions imposed on natural and legal persons in CFPOA cases, including confiscation of bribes and the proceeds of bribing foreign public officials; (Convention, Articles 3.1 and 3.2)
- d) Coordination in practice of investigations and prosecutions of CFPOA cases involving features of the federal criminal enforcement framework, including the following: i) the RCMP inspector in Ottawa who manages the RCMP anti-corruption programme and provides support to the two RCMP Anti-Corruption teams; ii) the PPSC subject-matter position who works with and advises the RCMP Anti-Corruption teams on ongoing investigations; iii) the DOJ’s International Assistance Group and the RCMP’s Legal Services Unit, with designated individuals to liaise with the International Anti-Corruption teams; and iv) the Integrated Market Enforcement Teams, which include RCMP investigators, PPSC legal advisors, securities regulators, and law enforcement agencies of local jurisdictions; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)
- e) Statistics compiled on convictions under the CFPOA, and related omissions and falsifications of book, records and accounts of companies; (Convention, Article 3)
- f) Application of the money laundering offence where violations of the CFPOA form the predicate offence; (Convention, Article 7)
- g) The efficiency of mechanisms for incoming and outgoing mutual legal assistance regarding cases of bribing foreign public officials; (Convention, Article 9.1; 2009 Recommendation XIII) and
- h) The operation of the relatively new Criminal Code offence of retaliation against employees. [2009 Recommendation IX (iii)]

**ANNEX 1 PHASE 2 RECOMMENDATIONS OF THE WORKING GROUP,  
AND ISSUES FOR FOLLOW-UP**

<b>Recommendations in Phase 2</b>		<i>Written follow-up</i> *
<i>Recommendations for ensuring effective measures for preventing and detecting foreign bribery</i>		
1.	The Working Group recommends that, with respect to promoting awareness of the Convention and the CFPOA, Canada establish a more systematic and coordinated approach to promoting awareness, and increase efforts to promote awareness of the CFPOA in all the government agencies involved in the implementation of the CFPOA. (Revised Recommendation, Paragraph I)	<i>Satisfactorily implemented</i>
2.	Concerning the investigation and prosecution of cases involving the bribery of foreign public officials, the Working Group recommends that Canada consider establishing a coordinating role for one of the principal agencies responsible for the implementation of the CFPOA for purposes including the following: 1. Collecting information from the police and prosecutorial authorities at the federal and provincial levels about investigations and prosecutions to ensure that, for instance, resources are not duplicated where more than one authority has jurisdiction; and 2. Maintaining specialized knowledge on the CFPOA to be available to the provincial (and where applicable, municipal) authorities involved in the enforcement of the offence. (Revised Recommendation, Paragraph I)	<i>Partially implemented</i>
3.	With respect to the prevention and detection of the bribery of foreign public officials through accounting requirements, external audit and internal company controls, the Working Group recommends that Canada:	
	a) Consider the introduction of amendments to the federal Canada Business Corporations Act (CBCA) to prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation, and consult with the provinces in an effort to ensure that the provincial legislation also meets these standards [Convention, Article 8.1; Revised	<i>Partially implemented</i>

\* The right-hand column sets out the findings of the Working Group on Bribery on Canada's written follow-up report to Phase 2, considered by the Working Group in June 2006.

	Recommendation, Paragraph V. A. (i)]	
	b) Review the relevant legislation in consultation with the provinces to consider: 1. whether the requirements to submit to an independent external audit are adequate, in view of the rule that permits large private corporations to exempt themselves from the requirement; and 2. broadening the prohibitions for participating in audits in order to improve auditor independence. [Revised Recommendation, Paragraphs V. B. (i) and (ii)]	<i>Not implemented</i>
	c) Consider requiring the auditor to report indications of foreign bribery to the competent authorities. [Revised Recommendation, Paragraph V. B. (iv)]	<i>Satisfactorily implemented</i>
	d) Encourage the development and adoption of adequate internal company controls, including standards of conduct. [Revised Recommendation, Paragraph V. C. (i)]	<i>Satisfactorily implemented</i>
4.	With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Canada:	
	a) Consider clarifying the policy statements on reporting wrongdoing and illegal acts in the workplace with a clear statement that an employee may either follow the internal disclosure procedure or report an offence directly to the law enforcement authorities, and that there should be no administrative or disciplinary measures applied to an employee who, in good faith, does decide to report directly to the law enforcement authorities. (Revised Recommendation, Paragraph I)	<i>Satisfactorily implemented</i>
	b) Issue specific instructions to foreign representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Canada. (Revised Recommendation, Paragraph I)	<i>Partially implemented</i>
	c) Review the prohibition under the federal Income Tax Act against reporting non-tax criminal offences detected in the course of tax audits performed by the Canadian Customs and Revenue Agency to the law enforcement authorities. (Revised Recommendation, Paragraph I)	<i>Not implemented</i>
	d) Review the disclosure policy and procedure of the Canadian International Development Agency (CIDA) and Export Development Canada (EDC) to ensure that there is disclosure to the law enforcement authorities or the Federal Prosecution Service of the Department of Justice, where, in the course of transacting business with a company, credible evidence arises that a violation of the CFPOA has occurred.	<i>Partially implemented</i>



	(Revised Recommendation, Paragraph I)	
<b><i>Recommendations for ensuring adequate mechanisms for the effective prosecution and sanctioning of foreign bribery offences</i></b>		
5.	The Working Group recommends that Canada:	
	a) Consider issuing some form of guidance to assist in the interpretation of the exception under paragraph 3 (4) of the CFPOA for facilitation payments. (Convention, Article 1; Commentary 9 to Convention)	<i>General issues for Convention Parties</i>
	b) Consider amending the part of the definition of “business” in paragraph 2 of the CFPOA that results in the requirement that the purpose of the bribe be for obtaining an advantage in the course of business for profit. (Convention, Article 1)	<i>Requires further consideration from Canada</i>
	c) Reconsider the decision to not establish nationality jurisdiction over the offence of bribing a foreign public official. In the event that Canada does not change its position, the Working Group recommends that this issue continue to be monitored. (Convention, Article 4.2 and 4.4; Phase 1 Evaluation)	<i>Not implemented</i>
	d) With respect to prosecutorial discretion and the guidelines in the FPS Deskbook, clarify that, in investigating and prosecuting the bribery of a foreign public official, there are no proper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved, and establish guidance to prosecutors on how to proceed when they decline to prosecute a case that potentially involves one of the public interest factors listed in the FPS Deskbook. (Convention, Article 5)	<i>Partially implemented</i>
	e) Consider revisiting the policies of agencies such as Export Development Canada (EDC), the Canadian International Development Agency (CIDA) and Public Works and Government Services Canada (PWGSC) on dealing with applicants convicted of bribery and corruption, given that Canada does not impose additional civil or administrative sanctions upon a person or company convicted of the bribery of a foreign public official. [Convention, Article 3.4, Revised Recommendation, Paragraphs II v) and VI ii)]	<i>Partially implemented</i>
	f) Compile statistical information on the sanctions for the offence of bribing a foreign public official as well as related omissions and falsifications in respect of the books, records and accounts of companies, in a manner that differentiates between the sanctions for legal persons versus natural persons and includes information about the forfeiture of bribes and the proceeds of bribery. It is also	<i>Partially implemented</i>

	recommended that Canada consider differentiating between the sanctions obtained through the plea-bargaining process and those obtained through ordinary trial proceedings (Convention, Article 3.1, 3.3 and 8.2).	
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**Follow-up by the Working Group**

6. The Working Group will follow up the following issues once there has been sufficient practice under the CFPOA:

- a) Application of the revised law on the liability of legal persons [Bill C-45 “An Act to amend the Criminal Code (criminal liability of organizations)”], which was introduced in the House of Commons on 12 June 2003, to CFPOA cases. (Convention, Article 2; Phase 1 Evaluation)
- b) Application of the exception under paragraph 3 (3) of the CFPOA for reasonable expenses incurred in good faith.
- c) Application of sanctions to natural and legal persons for offences under the CFPOA as well as related omissions and falsifications in respect of the books, records and accounts of companies. [Convention, Article 3.1, 3.3 and 8.2; Phase 1 Evaluation; Revised Recommendation, Paragraph V. A. (ii)]

7. In addition, the Working Group will follow-up implementation of the various initiatives<sup>107</sup> announced by the Government of Canada following the on-site visit.

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<sup>107</sup> Following the on-site visit, the Canadian authorities announced that it would be undertaking initiatives including the following:

- Ensure that the DFAIT media relations division has an accurate understanding of the CFPOA (in response to the release of erroneous information about the application of the CFPOA to the media).
- Amend the CIDA document “Anti-Corruption Programming: A Primer” to provide accurate information about the facilitation payments exception in the CFPOA.
- RCMP will take steps to add the CFPOA to the list of offences for which it has the mandate to investigate in its PROOF document.
- The CCRA began developing a section in its Audit Manual to deal with the application of section 67.5 of the Income Tax Act as it relates to outlays and expenses incurred under section 3 of the CFPOA. As well, CCRA undertook to revise its Investigation Manual to include a reference to the CFPOA.
- Team Canada plans to add links on the CFPOA to its Export Source website and will refer to the CFPOA in the next edition of “Step-by-Step Guide to Exporting”.
- Awareness training sessions will be held in order to assist federal public servants in interpreting the two policy documents regarding the internal disclosure of information on offences committed by government officials.
- The Minister of Finance of Québec announced in the budget speech of 11 March 2003 that the Québec Income Tax Act would be amended to disallow payments for the purpose of doing anything that is an offence under section 3 of the CFPOA, and that the amendment would operate retroactively to the date the CFPOA came into force.

## ANNEX 2 LIST OF PARTICIPANTS IN THE ON-SITE VISIT AND POST ON-SITE VISIT PANELS

### Government Ministries and Bodies

- Alberta Attorney-General
- Alberta Securities Commission
- Autorité des marchés financiers, gouvernement du Québec
- Canadian International Development Agency
- Canada Revenue Agency
- Department of Justice Canada
- Export Development Canada
- Financial Transactions and Reports Analysis Centre of Canada
- Financial Services Regulation Division, Government of Newfoundland & Labrador
- Foreign Affairs and International Trade Canada
- Manitoba Securities Commission
- New Brunswick Securities Commission
- Nova Scotia Securities Commission
- Ontario Attorney-General
- Ontario Securities Commission
- Public Prosecution Service Canada
- Royal Canadian Mounted Police
- Toronto Police Service
- Treasury Board of Canada Secretariat

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- In order to reinforce the practice that has evolved concerning the sharing of information about cases between the police agencies, the RCMP has undertaken to work with its partners to establish a protocol whereby police agencies would inform the RCMP about cases involving the CFPOA.
  - The FPS Deskbook will be amended to reinforce the recommendation already contained therein about the recording of reasons for decisions to not prosecute.
  - CIDA's auditors are exploring the possibility of conducting joint audits with other donors to more effectively verify and trace the use of funds where an applicant has been convicted of bribery.
  - The Government of Canada announced that on 12 June 2003 a Bill was introduced into Parliament [Bill C-46 "An Act to amend the Criminal Code (Capital Markets fraud and evidence gathering)"], which, inter alia, 1. creates an offence of threatening or retaliating against employees who report unlawful conduct to the law enforcement authorities, and 2. establishes the authority for a justice or judge to issue general and specific production orders for the obtaining of documents from persons, including financial institutions, other than those under investigation.
  - Establish a legislative and regulatory framework regarding the reporting by lawyers and legal firms of money laundering transactions to competent authorities.

## Private Sector

### *Private enterprises*

- 3 representatives from the extractive industries
- 1 energy company
- 1 major manufacturing company
- 1 major processing company
- 2 financial services institutions

### *Business associations*

- 2 business/industry associations

### *Legal profession and academics*

- 4 representatives of the legal profession
- 1 academic
- 1 corporate compliance expert

*Accounting and auditing profession*

- 5 representatives of large accounting and auditing firms
- 3 representatives of medium-sized accounting and auditing firms

Civil Society

4 representatives of non-governmental agencies

### **ANNEX 3 LIST OF ABBREVIATIONS, TERMS AND ACRONYMS**

AcSB	Accounting Standards Board
CBCA	Canada Business Corporations Act
CCC	Canadian Commercial Corporation
CFPOA	Corruption of Foreign Public Officials Act
CICA	Canadian Institute of Chartered Accountants
CIDA	Canadian International Development Agency
CRA	Canada Revenue Agency
CSR	Corporate Social Responsibility
DFAIT	Foreign Affairs and International Trade Canada
DOJ	Department of Justice Canada
DPP	Director of Public Prosecutions
EDC	Export Development Canada
FCPA	U.S. Foreign Corrupt Practices Act
FPS	Federal Prosecution Service
FINTRAC	Financial Transactions and Reports Analysis Centre of Canada
GAAP	Generally-Accepted Accounting Principles
IAC Teams	International Anti-Corruption Teams, RCMP
IACU	International Anti-Corruption Unit, RCMP
IAG	International Assistance Group, Department of Justice Canada
IFRS	International Financial Reporting Standards
ITA	Income Tax Act

MLA	Mutual Legal Assistance
MLACMA	Mutual Legal Assistance in Criminal Matters Act
OAS	Organization of American States
ODA	Official Development Assistance
PAEs	Publicly Accountable Enterprises
PPSC	Public Prosecution Service of Canada
PSDPA	Public Servants Disclosure Protection Act
PWGSC	Public Works and Government Services Canada
RCMP	Royal Canadian Mounted Police
SMEs	Small and Medium-sized Enterprises
TPS	Toronto Police Service
UNCAC	UN Convention against Corruption