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Ms. Preeya Khongwir
Committee Assistant to the Working Group on Bribery in International Business Transactions
Organization for Economic Cooperation and Development (OECD)
2, rue André Pascal
75016 Paris

Via email: Preeya.KHONGWIR@oecd.org

Re: Phase IV Evaluation of Canada's Implementation of the OECD Anti-Bribery Convention

Dear Ms. Khongwir,

I'm writing this submission both as the Founder and Managing Director of ACT International Consulting – a legal and policy consulting firm in the anti-corruption space – and as an Adjunct Professor of Anti-Corruption Law at the University of Ottawa. I therefore offer my perspective on Canada's implementation of the OECD Anti-Bribery Convention from both academia and the private sector as the owner of an SME.

Since Canada's Phase III evaluation, a lot has happened. Canada has strengthened the *Corruption of Foreign Public Officials Act* by increasing the maximum penalties (unlimited fines, 14 years imprisonment), broadening the definition of business, adding a books and records offence, and ensuring its application is on a nationality basis rather than only territorial. From my perspective these are all positive legislative advancements.

In addition, Canada has enacted a Remediation Agreement regime (otherwise known as Deferred Prosecution Agreements) under the *Criminal Code*.[1] While this regime responds to Article XVII on non-trial resolutions of the 2021 Anti-Bribery Recommendation[2], there remain several gaps in its application and consequently in how it responds to Article XVIII of the *Recommendation.* Specifically, article XVIII paragraph ii recommends that member countries "*develop clear and transparent criteria regarding the use of non-trial resolutions including, where appropriate, voluntary self-disclosure of misconduct, cooperation with law enforcement authorities, and remediation measures.*"

While the above legislative amendments are a positive step forward, Canada's overall evolution in the fight against corruption has been haphazard and disjointed as described below.

[1] Part XXII.1, s.715.3 *Criminal Code* R.S.C., 1985, c. C-46 - https://laws-lois.justice.gc.ca/PDF/C-46.pdf
[2] OECD/LEGAL/0378, https://legalinstruments.oecd.org/en/instruments?mode=advanced&typeIds=2

Remediation Agreements

As has been widely reported, the Remediation Agreement regime in Canada got off to a rocky start. The first discussions that took place on the usage of remediation agreements were shrouded in allegations of political interference in a prosecution which also put into question Canada's adherence to Article V of the Anti-Bribery Convention whereby enforcement actions shall not be influenced by considerations of national economic interest.[3]

Ultimately, a remediation agreement was not offered to SNC-Lavalin and the case was instead settled via a guilty plea for fraud under section 380(1)(a) of *Criminal Code*[4]. The result of this case led to a cooling off of the willingness to use remediation agreements. It took until May 2022 before Canada finally concluded its first one[5].

One of the main reasons for the lack of the use of remediation agreements to date is the accompanying lack of clarity surrounding the regime. Since the regime came into force in 2018, there have been several calls for guidance as to their application. To date, the only available guidance is a deskbook for prosecutors, but nothing that would help the private sector, or their legal counsel. While the OECD Anti-Bribery Convention promotes voluntary self-disclosure, the lack of guidance on remediation agreements undermines their effectiveness at promoting self-disclosure. In fact, it might have the opposite effect. Since convictions under Canada's CFPOA also lead to automatic debarment under Canada's public procurement integrity regime and there is underlying uncertainty on when a company might expect to be invited to negotiate a remediation agreement, companies have little incentive to self-disclose.

Canada needs to provide clear and transparent criteria, including guidance, on remediation agreements to facilitate their usage and promote understanding of the conditions that must exist for them to be considered by prosecutors and to truly promote and incentivize voluntary self-disclosure.

Integrity Regime

The integrity regime is an area of anti-corruption enforcement that has been very problematic in Canada. While it serves a noble purpose of attempting to ensure the federal government only does business with ethical suppliers, it is applied in an overly rigid manner.

Under the regime, any organization convicted of an offense under the *Corruption of Foreign Public Officials Act*[6] (CFPOA) will be automatically debarred for a 10-year period. If certain conditions are met,

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[3] See https://www.oecd.org/corruption/oecd-will-follow-canadian-proceedings-addressing-allegations-of-political-interference-in-foreign-bribery-prosecution.htm

[4] *R. c. SNC-Lavalin Construction inc. (Socodec inc.)*, 2019 QCCQ 18961 - https://www.canlii.org/en/qc/qccq/doc/2019/2019qccq18961/2019qccq18961.html?searchUrlHash=AAAAAQAWUi4gdi4gU05DLUxhdmFsaW4gMjAxOQAAAAAB&resultIndex=1

[5] *R. c. SNC-Lavalin inc.*, 2022 QCCS 1967 - https://www.canlii.org/en/qc/qccs/doc/2022/2022qccs1967/2022qccs1967.html

[6] https://laws-lois.justice.gc.ca/eng/acts/c-45.2/

there is the possibility of reducing the debarment period to 5 years. The problem is that it treats all cases and convictions as if they are the same. This is counter to one of the general cornerstones of Canadian criminal law where a penalty should be proportionate to the gravity of the offence.[7] By treating all offenders in the same way, regardless of the potential of a vastly differing set of circumstances, the integrity regime is applied in a way that is counter to the principles of remediation and sentencing.

Furthermore, the integrity regime discourages self-reporting. For entities that might depend on government contracts, an automatic 10-year debarment may be their death knell. While some entities might be fully deserving of a 10-year debarment period, others may not be. Some companies might accept a fair and just debarment period rather than an excessively punitive one.

Finally, the integrity regime does not align with other well-known debarment regimes such as that of the World Bank or other multilateral development banks. Flexibility is needed to ensure that the punishment fits the crime. A flexible approach that considers the circumstances of each case is much more likely to have a positive effect on countering corruption in Canada that would complement criminal sanctions as described in Article 3, paragraph 4 of the OECD Convention.

Enforcement

Canada, overall, has been criticized for its lack of anti-corruption enforcement. This is evidenced by the low number of corruption cases that have been prosecuted. What is further complicating this problem is a set of recent decisions that have set the bar astronomically high, perhaps unattainably high, to obtain a conviction. The combination of the *Jordan rule*[8] and the decisions in the *Barra and Govindia*[9] *cases* as well as the recent *Arapakota*[10] case*,* put into serious question the ability of Canada's enforcement mechanisms to deal with corruption cases.

It is estimated that corruption cases take on average between 3-7 years to investigate. They often involve thousands of documents. The Royal Canadian Mounted Police (RCMP) must send their file to the Public Prosecution Service of Canada (PPSC) who must then sift through all the available evidence to determine if and how to prosecute. With the *Jordan rule* significantly reducing timelines, combined with the fact that prosecutors must prove that defendant's had knowledge of the elements of the offence as per *Arapakota* and knowledge of the status that someone is indeed a public official as per *Barra and Govindia,* the threshold for proving an offence under the CFPOA has become overly cumbersome. The impact of these cases may truly hamper Canada's enforcement efforts, something that is very concerning to the anti-corruption community in Canada.

Furthermore, in order to invite a party to negotiate a remediation agreement, the PPSC must determine that there is a reasonable prospect of conviction in the case. But with such a high burden now set for the

[7] S.718.1 of the *Criminal Code.*
[8] *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. The Supreme Court of Canada established a presumptive ceiling between charges being laid and the trial being 18 months for cases tried in the provincial court, and 30 months for cases in the superior court.
[9] *R. v Barra and Govindia*, 2019 ONSC 1786
[10] *R. v. Arapakota*, 2023 ONSC 1567

PPSC to make their case, it threatens undermining the utility of remediation agreements and the tools that have been added to Canada's enforcement toolkit to combat corruption, specifically when it comes to prosecuting legal persons.

Education and Collective Action

One of the positive elements of the evolution of anti-corruption efforts in Canada is the increased focus on education at all levels. Specific courses on anti-corruption law or economic crime have been implemented in universities across the country. Certain programs also contain joint degree programs which helps to expose future lawyers and business professionals to the global framework to counter corruption.

Collective Action initiatives are also growing at a rapid pace. Given the enforcement challenges and lack of legislative guidance described above, collective action and grassroots movements might be what propels Canada forward in the fight against corruption.

However, collective action initiatives require the support of government. Article IV paragraph II of the 2021 Recommendation states that member countries should take concrete action "through collective action and partnerships between the private and public sector in awareness-raising activities." Canada could use more of this, and the government has a fundamental role to play in supporting collective action initiatives that bring together entities from the private and public sectors to discuss how to tackle corruption. Given the enforcement difficulties described above, collective action should be made a key policy plank of the government to combat corruption going forward.

Beneficial Ownership

While the very recent tabling of legislation[11] to create a national beneficial ownership registry is indeed positive news, it comes not a moment too soon. Canada's international reputation as a money-laundering hub has grown in recent years and the lack of a beneficial ownership registry has been cited as one of the main reasons why. The *Cullen Commission of Inquiry into Money Laundering in British Columbia*[12] made clear that Canada needs to take urgent action. While it is not possible to evaluate the impact that Bill C-42 will have in combatting corruption in Canada, there are certain elements of the bill that are encouraging, including:

- The capacity for it to be scaled out to the provinces, a crucial component given Canada's federalist nature. Companies can incorporate either federally or provincially, and for a registry to be truly effective, it must apply at all levels and in all provinces equally.
- It is intended to be fully searchable.

[11] Bill C-42 *An Act to amend the Canada Business Corporations Act and to make consequential and related amendments to other Acts*, *First Session, Forty-fourth Parliament, 70-71 Elizabeth II – 1 Charles III, 2021-2022-2023.* Tabled in the House of Commons on 22 March 2023.
[12] https://cullencommission.ca/

- It contains mechanisms for data verification.

As has been seen in other jurisdictions, a beneficial ownership registry is only as good as the data it contains. Therefore, while legislation to establish a registry is an excellent first step, there remains much work ahead to ensure Canada's registry is functional and effective.

Conclusion

There is no doubt Canada has come a long way over the past decade. However, the state of anti-corruption efforts is currently fragmented. To meet our obligations under the OECD Anti-Bribery Convention and evolve in the fight against corruption, Canada needs to:

- Provide guidance to the private sector on the application of remediation agreements.
- Provide flexibility in the integrity regime to consider particular circumstances and differing sets of facts.
- Ensure the RCMP and PPSC can investigate and prosecute corruption offences without undue burdens that distinguish corruption offences from other elements of criminal law.
- Provide support for education and collective action programs.
- Take proactive measures to encourage good corporate behaviour and knowledge of the anti-corruption framework namely through support of collective action initiatives.
- Ensure there is harmony between the federal and provincial governments when it comes to a beneficial ownership registry.

Thank you for the opportunity to contribute to Canada's Phase IV evaluation of the implementation of the OECD Anti-Bribery Convention. I would be pleased to further engage or answer any questions.

Sincerely,

Noah Arshinoff
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