

Submission to the OECD Working Group on Bribery for the Phase 4 Review of Canada

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30 March 2023

In this submission, I aim to contribute an independent academic perspective on Canada's efforts to implement the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Anti-Bribery Convention) and related instruments. Where possible, I have provided links to open-access online sites for supporting documents.

Legislative Framework

Canada relies on the enactment of the *Corruption of Foreign Public Officials Act*, SC 1998, c 34,¹ to give domestic legal effect to its obligations as a party to the OECD Anti-Bribery Convention.

The CFPOA was enacted in 1998 with remarkable speed, with no time spent while the proposed law was before Parliament for the consideration of such matters as bases for jurisdiction, victims reparations, multi-jurisdictional cooperation, or the law's interaction with immunities for certain foreign public officials. Indeed, as I have written in a peer-reviewed article taking stock of the legislation's first twenty years, Parliament spent only two days considering the provisions of what would become the CFPOA.² The reason why was that Canada wanted to be the country whose ratification would bring into force the OECD Anti-Bribery Convention, and to do that, it needed to have its domestic implementation legislation in place first. After being fast-tracked through Parliament, the CFPOA received Royal Assent on 10 December 1998, enabling Canada to ratify the OECD Anti-Bribery Convention a week later. The Act would enter into force on 14 February 1999, a day before the Convention entered into force on the international legal plane.

Fourteen years later, the CFPOA underwent substantial amendment with the enactment of the *Fighting Foreign Corruption Act*, SC 2013, c 26,³ although again without Parliament considering victims reparations, how to further assist multi-jurisdictional cooperation, and the difficulties

¹ Online at <https://laws-lois.justice.gc.ca/eng/acts/c-45.2/>

² Joanna Harrington, "Addressing the Corruption of Foreign Public Officials: Developments and Challenges within the Canadian Legal Landscape" [2018] 56 *The Canadian Yearbook of International Law* 98 at 107.

³ Online at https://laws.justice.gc.ca/eng/AnnualStatutes/2013_26/

posed by immunities. The stated aim was “to answer the call for enhanced vigilance”⁴ by updating the Act in response to concerns raised by stakeholders, and by the Working Group during Canada’s Phase 3 review. Six changes were made to the legislative scheme, including the removal of a distinctly Canadian focus on businesses “for-profit”, which had been recommended by the Working Group in Canada’s Phase 3 Report,⁵ and the extension of the jurisdictional basis to include nationality, alongside territory, which had been recommended by the Working Group in Canada’s Phase 1 and Phase 2 Reports.⁶ The 2006 Phase 2 Follow-up Report would later single out Canada as the only Convention party that had not established nationality jurisdiction for the bribery of a foreign public official.⁷ (A proposal to change this was made in 2009, but that Bill died on the order paper with the prorogation of Parliament.⁸) The 2013 amendments also removed the exception to the offence for so-called facilitation payments, about which the Working Group had expressed some concern in Canada’s Phase 1 and Phase 2 Reports,⁹ although the 2013 legislative change did not enter into force until 31 October 2017.¹⁰ The 2013 amendments also increased the maximum prison sentence from 5 to 14 years.

Note too that by 2013, Canada had also ratified the *Inter-American Convention Against Corruption* and the *United Nations Convention Against Corruption*, and while both treaties aim to address both active and passive foreign bribery, Canada took the position it could rely on its existing domestic law for the performance of these new international obligations.¹¹ This continues to be the case, with no amendments to the CFPOA following the adoption of the *2021 Recommendation for Further Combatting Bribery of Foreign Public Officials in International Business Transactions*, which also mentions addressing the demand side of foreign bribery.

Remediation Agreements

There has, however, been a new legislative development that relates to the inclusion in the 2021 Recommendation of non-trial resolutions and incentivizing anti-corruption compliance by companies. In 2018, the Parliament of Canada, opting once again for speedy passage, bolted on a Canadian version of a deferred prosecution agreement regime to both the CFPOA and the

⁴ House of Commons Debates, 41-1, vol 146, No 255 (24 May 2013) (Bob Dechert, Parliamentary Secretary to the Minister of Foreign Affairs), <https://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-255/hansard>

⁵ *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (2011) at 5, 10-11, <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf>

⁶ See the discussion in Canada’s *Phase 2 Report* (2004) at 32-33, <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf>

⁷ See *Canada: Phase 2: Follow-up Report* (2006) at para 9, <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/36984779.pdf>

⁸ As discussed in Harrington (2018), *supra* note 2 at 116.

⁹ *Phase 2 Report* (2004), *supra* note 6 at 27-28. The 2009 Recommendation would later recommend that countries review their policies and approach to facilitation payments and that companies prohibit or discourage their use.

¹⁰ SI/2017-69, <https://canadagazette.gc.ca/rp-pr/p2/2017/2017-11-15/html/si-tr69-eng.html>

¹¹ As discussed in Harrington (2018), *supra* note 2 at 113.

Criminal Code.¹² Known in Canada as a “remediation agreement”, the amendments needed to introduce this sentencing option were buried within a 582-page omnibus budget bill, and as such, were not extensively debated by parliamentarians.¹³ Now found as Part XXII.1 of the *Criminal Code*, the “remediation agreement” regime entered into force on 21 September 2018. It offers an alternative to prosecution for corporations willing to carry out certain specified obligations in return for a stay of criminal charges. An independently monitored internal anti-corruption compliance program can be one of those specified obligations, alongside an admission of responsibility and a duty to cooperate and assist with related prosecutions. Media reports have suggested that the availability of remediation agreements has encouraged companies to self-report bribery and corruption allegations to the RCMP to avoid criminal prosecution,¹⁴ with this being a matter to probe further as part of Canada’s Phase 4 review.

Canada’s remediation agreement regime also incorporates a verbatim copy of the OECD Anti-Bribery Convention’s article 5 obligation. Section 715.32(3) of the *Criminal Code* makes clear that “the prosecutor must not consider the national economic interest, the potential relations with a state other than Canada, or the identity of the organization or individual involved” with regards to a remediation agreement. As I indicate in a 2020 peer-reviewed article, published with an open access licence, there was much debate in Canada in 2019 about the article 5 bar on considering the “national economic interest” and whether this phrase can be interpreted so as to keep a large employer viable to save jobs.¹⁵ Some suggested, for example, that the phrase only has an inter-state application. The Phase 4 review provides an opportunity for the Working Group to probe further as to Canada’s position as to the meaning of the Convention’s bar on considering the “national economic interest”. Questions should also be asked as to the guidance to be provided by Canada on its approach more generally to remediation agreements, with the first remediation agreement having only been recently approved by the courts in May 2022. (The first Canadian remediation agreement does not involve a foreign bribery charge). Other jurisdictions with a more extensive experience with judicially-approved deferred prosecution agreements, including France and the UK, have developed, and then revised, such guidance.¹⁶

¹² <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-111.html#h-130598>

¹³ For a fuller discussion, see Joanna Harrington, “Providing for Victim Redress within the Legislative Scheme for Tackling Foreign Corruption” (2020) 43:1 *Dalhousie Law Journal* 245 at 258-262, <https://digitalcommons.schulichlaw.dal.ca/dlj/vol43/iss1/>

¹⁴ Robert Fife and Steven Chase, “RCMP says Canadian companies are now self-reporting allegations of bribery” *The Globe and Mail* (10 November 2021), <https://www.theglobeandmail.com/politics/article-rcmp-say-canadian-companies-are-now-self-reporting-allegations-of/>

¹⁵ Harrington (2020), *supra* note 13 at 259-261.

¹⁶ France’s Parquet National Financier first issued guidance on its approach to offering, negotiating and entering into a *convention judiciaire d’intérêt public* in 2019, with a revised version released in January 2023. The guidelines aim to improve predictability and seek to incentivize early and voluntary self-reporting and cooperation. See further: <https://www.tribunal-de-paris.justice.fr/75/actualites-mensuelles-parquet-national-financier>

Enforcement Record

The Working Group, and others, regularly report the number of convictions for foreign bribery as one measure of a country's record of enforcement, and one still hears Canada's *Corruption of Foreign Public Officials Act* described in public discourse as a "seldom enforced Act". I recognize that conviction counts do not take into account the effectivity of a prohibition's deterrence function, nor the impact of the educational outreach and capacity-building activities carried out by authorities such as the Royal Canadian Mounted Police (RCMP). Conviction counts also do not take into account charges that later result in acquittals or stays of proceedings; nor do they take into account a state's cooperation with multi-jurisdictional efforts that have helped secure convictions elsewhere. However, as the conviction count is a measure that is in use, it is important that Canada reports its count accurately, and a recommendation from the Working Group for more robust, and ideally, ongoing, public disclosure from Canada would not go amiss.

Annual Report to Parliament

To explain further, the Government of Canada (and specifically, the Ministers of Foreign Affairs, International Trade, and Justice) are statutorily required to prepare an annual report to Parliament on the implementation of the OECD Anti-Bribery Convention and the enforcement of the related Act. This obligation is found in section 12 of the CFPOA, with a web-based version of the contents of these annual reports, at least from 2014 on, found in the not-so-obvious place of a subsidiary section of the federal government's "Trade Policy in Focus" website.¹⁷

In its most recent annual report to Parliament, tabled on 6 October 2022, the Government of Canada states: "To date, there have been eight convictions under the CFPOA, two of which are being appealed as outlined in the ongoing matters below."¹⁸ A footnote, using the less familiar (and thus less user-friendly) Roman numerals rather than the Arabic numeral system,¹⁹ then directs the reader to a listing of five cases; with five plus two being seven, not eight, convictions.

Then, when one reads the report's description of the "Ongoing Matters", it also becomes clear that one of the two convictions identified as "being appealed" is not in fact a conviction, as the trial had yet to take place, and now that the trial has taken place, we know that this individual was acquitted.²⁰ The charge had been laid in 2020, after the new management of the company

¹⁷ <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng>

¹⁸ Global Affairs Canada, *Canada's Fight Against Foreign Bribery: Twenty-third Annual Report to Parliament (September 2021-August 2022)*, tabled on 6 October 2022, <https://www.international.gc.ca/transparency-transparence/bribery-corruption/2021-2022.aspx?lang=eng>

¹⁹ Roman numerals can also be read incorrectly by text-to-speech tools, and thus raise an accessibility concern.

²⁰ *R v Arapakota*, 2023 ONSC 1567, <https://www.canlii.org/en/on/onsc/doc/2023/2023onsc1567/2023onsc1567.html>

involved self-reported to the police an allegation of an illegal act by the former CEO involving an official from Botswana.²¹ As for the other case then identified as an “ongoing matter”, that individual lost the appeal of his conviction on 14 February 2023.²² Thus, there appears to be one, but not two, additional convictions under Canada’s CFPOA to add to the report’s listing of five convictions, with this tally of six convictions (2 natural persons and 4 legal persons) being one more than in the OECD’s most recent enforcement data, released in December 2022.²³ However, when one reads the description of the five cases in footnote xviii, it becomes clear that the fifth case involved a sanction for fraud, and not a conviction on the charge of foreign bribery. A footnote added to the OECD data reads: “For Canada: One of the legal persons listed above pleaded guilty to one count of fraud in connection with a foreign bribery scheme.”

These tallies also gloss over the conviction for one count under the CFPOA for Robert Barra and Shailesh Govindia, who were both sentenced on 7 March 2019 to 2.5 years in prison,²⁴ for their involvement in the plan to bribe Air India officials and the Indian Minister of Civil Aviation to secure a contract for facial-recognition software that underpins the *Karigar* conviction mentioned below. The two convictions, however, were set aside in 2021, and a new trial was ordered, on the basis that the trial judge had erred in failing to declare a mistrial in light of the Crown’s failure to make timely disclosure.²⁵ The Ontario Court of Appeal decision concerning this appeal also serves to clarify the *men reas* requirement for bribery under the CFPOA.

One New Conviction for the Phase 4 Review

Thus, to unpack this record further as a measure of progress for the Phase 4 review, the tally would suggest no notable increase in enforcement efforts, with Canada having reported on four of the five cases in its 2013 *Follow-up Report to the Phase 3 Report & Recommendations*.²⁶

The first conviction under Canada’s CFPOA was in 2005, and then much time passed before a second conviction in 2011, and a third in 2013. Canada already drew attention to both the 2011 and 2013 convictions in its Phase 3 Follow-up Report,²⁷ with these three convictions having each

²¹ Royal Canadian Mounted Police, Media Release, “RCMP lays charges under the Corruption of Foreign Public Officials Act” (12 November 2020), <https://www.rcmp-grc.gc.ca/en/news/2020/rcmp-lays-charges-the-corruption-foreign-public-officials-act>

²² *Bebawi c R*, 2023 QCCA 212, <https://www.canlii.org/fr/qc/qcca/doc/2023/2023qcca212/2023qcca212.html>

²³ *2021 Enforcement of the OECD Anti-Bribery Convention: Investigations, Proceedings, and Sanctions* (20 December 2022), <https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-enforcement-data-2022.pdf>

²⁴ *R v Barra and Govindia*, 2019 ONSC 1786, <https://www.canlii.org/en/on/onsc/doc/2019/2019onsc1786/2019onsc1786.html>

²⁵ *R v Barra*, 2021 ONCA 568, <https://www.canlii.org/en/on/onca/doc/2021/2021onca568/2021onca568.html>

²⁶ Available at <https://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>

²⁷ *Ibid* at pages 11, 17 and 18.

been secured by way of a negotiated guilty plea with the company involved.²⁸ All three cases involved Alberta-based companies operating in the natural resources sector. The fourth conviction was the first individual conviction under the CFPOA, arising in the technology sector, with Nazir Karigar found guilty at trial in 2013, and then sentenced in 2014.²⁹ Canada also mentioned this case in its 2013 Follow-up Report, with the charges having been laid in 2010.³⁰

The new addition to the enforcement statistics for the Phase 4 review is the conviction at trial of the former SNC-Lavalin executive Sami Bebawi in December 2019, with sentencing having taken place in January 2020,³¹ and the conviction upheld on appeal in February 2023.³² The activities of the Montreal-based engineering and construction giant, the SNC-Lavalin Group, in Libya from 2001 until its civil war in 2011 have attracted much public attention in Canada, not least because of the involvement of the Prime Minister in the company's efforts to secure a deferred prosecution agreement,³³ but also because of the details of millions spent on bribes for Saadi Gadhafi, the son of the late Libyan leader Muammar Gadhafi.³⁴ Bebawi was a key player in the scheme and benefitted personally through deception. He was convicted on counts of fraud and money laundering, including one count for the bribery of a foreign public official. He was sentenced to 8.5 years in prison, with a concurrent sentence of 4.5 years imposed for the count of foreign bribery under the CFPOA (count 2).³⁵ A fine of \$24.69 million was also imposed.³⁶

As for the corporate fraud conviction that was included in Canada's 2022 annual report to Parliament, it should be considered further by the Working Group – as an example of charges for foreign bribery being dropped in favour of securing a conviction on other grounds. As is now widely known, the SNC-Lavalin Group, and two of its affiliates, were charged in 2015 with one count each of a violation of the CFPOA in relation to dealings in Libya from 2001-2011. After

²⁸ *R v Watts and Hydro-Kleen Systems Inc*, [2005] AJ No 568 (QB); *R v Niko Resources Ltd*, [2011] AJ No 1586, 101 WCB (2d) 118 (QB); *R v Griffiths Energy International Inc*, [2013] AJ No 412 (QB).

²⁹ *R v Karigar*, 2013 ONSC 5199, 108 WCB (2d) 210, appeal dismissed 2017 ONCA 576, application for leave to appeal to the Supreme Court of Canada dismissed 15 March 2018, No 37784. On sentencing, see *R v Karigar*, 2014 ONSC 3093, 113 WCB (2d) 373.

³⁰ See page 20 of *Canada's Follow-up Report to the Phase 3 Report*, *supra* note 26.

³¹ *R c Bebawi*, 2020 QCCS 22, <https://www.canlii.org/en/qc/qccs/doc/2020/2020qccs22/2020qccs22.html>

³² *Bebawi c R*, 2023 QCCA 212, <https://www.canlii.org/fr/qc/qcca/doc/2023/2023qcca212/2023qcca212.html>

³³ An inquiry later found that the Prime Minister had used his position of authority to seek to influence the Attorney General to further the interests of the corporation involved: *Trudeau II Report*, by Mario Dion (Ottawa, Office of the Conflict of Interest and Ethics Commissioner, 2019). The widely-reported political scandal led to the resignation, among others, of the Prime Minister's Principal Secretary and Canada's top civil servant, the Clerk of the Privy Council and Secretary to the Cabinet. For citations, see the prologue to Harrington (2020), *supra* note 13.

³⁴ Lurid details of certain entertainment expenses are of public knowledge. See Vincent Larouche, "SNC-Lavalin spent \$1.95M on escorts, booze for Libyan dictator's son" *Toronto Star* (28 February 2019); Marie-Danielle Smith, "SNC-Lavalin paid for Gadhafi son's debauchery while he was in Canada: report" *National Post* (27 February 2019).

³⁵ *R c Bebawi*, Sentencing Judgment, *supra* note 31 at para 52.

³⁶ *Bebawi c R*, 2022 QCCA 1397, <https://www.canlii.org/fr/qc/qcca/doc/2020/2020qcca1397/2020qcca1397.html>

efforts by the company to secure the Canadian version of a deferred prosecution agreement were unsuccessful,³⁷ it was expected that the matter would go to trial. Then, in December 2019, three days after the conviction at trial of its former president Sami Bebawi, the affiliate SNC-Lavalin Construction Inc. entered a guilty plea to one charge of fraud, resulting in the remainder of the charges against it, and all charges against the other two entities, being dropped by the Crown, including the charges of bribery of a foreign public official.³⁸

In essence, the SNC-Lavalin Group had secured an alternative to prosecution agreement, without the label of a deferred prosecution agreement or remediation agreement. In an Agreed Statement of Facts, SNC-Lavalin Construction Inc. admitted directing approximately \$50 million to Saadi Gadhafi to use his influence to secure contracts for its benefit. As part of the resolution by guilty plea, SNC-Lavalin Construction Inc. was required to pay a fine of \$280 million in equal instalments over five years (being about \$45 million more than the gross profits it received from the fraudulent transactions). It was also required to “cause the SNC-Lavalin Group to maintain, and as required, further strengthen its compliance program, record keeping, and internal control standards and procedures”.³⁹ The latter aspect is a novel use of probation order that is worth probing further during the Phase 4 review, given that it was the subsidiary, and not the indirect parent company, that pleaded guilty to the count of fraud. The level of the fine is also worth probing further, in that while large, and thus sending a message for deterrence purposes, it is also less than the upper levels of fine in the US and UK sentencing guidelines.⁴⁰ At the end of the day, however, only SNC-Lavalin Construction Inc. was sanctioned for this matter, and with the charges under the CFPOA dropped, the various SNC-Lavalin entities avoided debarment from future Canadian government contracts.⁴¹ (A conviction for fraud only results in debarment if it is a fraud against His Majesty; here, the fraud was against Libya and its people).

Acquittals and Withdrawn Charges

A fuller picture of Canada’s enforcement record must also consider acquittals, with the OECD’s most recent enforcement data indicating that 3 natural persons have been acquitted on charges

³⁷ *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FC 282, <https://www.canlii.org/en/ca/fct/doc/2019/2019fc282/2019fc282.html>

³⁸ Public Prosecution Service of Canada, Media Release, “SNC Lavalin Construction Inc. Pleads Guilty to Fraud” (18 December 2019), https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2019/18_12_19.html

³⁹ *Ibid.* See also *R c SNC-Lavalin Construction inc. (formerly Socotec Inc.)*, No 500-73-004261-158, Judgment on Sentencing of LeBlond JCQ, Court of Quebec (Criminal and Penal Division) (18 December 2019) at para 9.43 and reflected in paragraph 3(a) of the order, with the details of the compliance program found in Appendix A, <https://www.canlii.org/en/qc/qccq/doc/2019/2019qccq18961/2019qccq18961.html>

⁴⁰ A point made in *R c SNC-Lavalin Construction inc. (formerly Socotec Inc.)*, Sentencing Judgment of LeBlond JCQ, *supra* note 39 at para 9.40, with the discussion found at paras 9.6-9.39.

⁴¹ The SNC-Lavalin Group would go on to secure Canada’s first remediation agreement five months later, but in relation to a domestic bribery matter concerning a contract to refurbish a bridge in Montreal: *R c SNC-Lavalin inc.*, 2022 QCCS 1967, <https://www.canlii.org/en/qc/qccs/doc/2022/2022qccs1967/2022qccs1967.html>

of foreign bribery in Canada.⁴² Here again, there is a need for clarity, with one law firm reporting that it secured the first acquittal under the CFPOA in 2023,⁴³ although earlier applications for the exclusion of evidence also led to a similar fate, with the CFPOA charges then dropped.⁴⁴

Canada's record of acquittals and stayed proceedings under the CFPOA is not well-known. A full picture would include the three individuals involved with the SNC-Lavalin Group's activities in relation to the Padma bridge development project in Bangladesh,⁴⁵ plus one foreign national who successfully secured a stay of proceedings for want of jurisdiction,⁴⁶ as well as the 2023 acquittal of Damodar Arapakota. Media reports suggest another charge under the CFPOA may have been dropped. It concerned an individual working in the aviation sector who was charged with offering a bribe to Thai officials, but a year later, the charges were withdrawn.⁴⁷

Ongoing Investigations

Of course, these tallies also do not take into account ongoing investigations. Unfortunately, however, Canada used to be more forthcoming in its disclosure of at least the number of active investigations. In the statutorily required annual report to Parliament on its efforts to fight foreign bribery, the Government of Canada used to report how many active investigations were then underway. But this practice stopped in 2017, with a renewed emphasis on treating "allegations of corruption with the utmost confidence for reasons of privacy and ensuring the integrity of investigations" given as the explanation for the change in practice.⁴⁸ In previous reports, however, it was not considered a breach of privacy to disclose that Canada was engaged in "10 active investigations" (from the 2016 annual report), with previous annual reports for 2015, 2014, 2013, and 2012 advising that there were 12, 27, 36 and 34 ongoing investigations respectively. There is also no privacy bar preventing the re-telling of the OECD's

⁴² *2021 Enforcement of the OECD Anti-Bribery Convention: Investigations, Proceedings, and Sanctions* (20 December 2022), <https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-enforcement-data-2022.pdf>

⁴³ "Fasken Secures First-Ever Acquittal in Landmark Bribery and Corruption Case" (10 March 2023), <https://www.fasken.com/en/news/2023/03/damodar-arapakota-landmark-decision>

⁴⁴ *R v Wallace*, 2017 ONSC 132, <https://www.canlii.org/en/on/onsc/doc/2017/2017onsc132/2017onsc132.html>

⁴⁵ *Ibid.* An earlier proceeding before Canada's highest court provides the background, with the RCMP relying on information received from the World Bank's Integrity Vice Presidency to obtain judicial authorizations to intercept private communications: *World Bank Group v Wallace*, 2016 SCC 15, [2016] 1 SCR 297, <https://www.canlii.org/en/ca/scc/doc/2016/2016scc15/2016scc15.html>

⁴⁶ *Chowdhury v Her Majesty the Queen*, 2014 ONSC 2635, <https://www.canlii.org/en/on/onsc/doc/2014/2014onsc2635/2014onsc2635.html>

⁴⁷ "Canadian General Aircraft president charged with conspiring to bribe Thai officials in plane deal" *CBC News* (24 November 2016); Meghan Grant, "Charges dropped against Calgary man accused of conspiring to bribe Thai officials in jet deal" *CBC News* (6 December 2017).

⁴⁸ Global Affairs Canada, *Canada's Fight Against Foreign Bribery: Eighteenth Annual Report to Parliament (September 2016-August 2017)*, tabled on 6 October 2017, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng>>.

data on overall ongoing investigations, with Canada’s 2022 annual report able to repeat that “485 investigations are ongoing in 32 States Parties and 181 prosecutions are ongoing in 13 States Parties” from the OECD’s 2021 report.⁴⁹ This approach does not, however, let Parliament, or the public, know how many investigations or prosecutions are ongoing in Canada.

Multi-jurisdictional Cases

There also remains a need for information to be provided on Canada’s efforts to cooperate with and provide assistance in multi-jurisdictional cases, some of which may lead to a conviction for foreign bribery to which Canada has contributed. The Nordion case is one example, with the US Securities and Exchange Commission thanking the RCMP, among others, for assistance with regards to a bribery scheme involving Russian officials.⁵⁰ Another example arises from the SNC-Lavalin and Libya situation, where another executive (Riadh Ben Aïssa) pleaded guilty to Swiss charges of bribery and corruption, with the Swiss authorities having benefitted from some cooperation with the RCMP. A deeper consideration of multi-jurisdictional cases, however, may also reveal where there might be areas of weakness within a state’s system, with Canada’s corporate conviction in the *Griffiths Energy International* case, and the payment of a fine that was subsequently described by the English Court of Appeal as a “relatively modest sum”,⁵¹ leading to what would become known as the Chad oil case for the UK’s Serious Fraud Office.⁵²

Recommendations

- Establish and maintain a Justice Canada, or Public Prosecution Service of Canada, webpage to provide easy public access to accurate and ongoing information (not solely an annual point-in-time count) on Canadian efforts to enforce the OECD Anti-Bribery Convention and related instruments. The Act is in place; the Convention is in place; enforcement needs to be the focus, with Justice Canada, or the Public Prosecution Service of Canada, being the federal government departments that are better placed to monitor and report on progress on enforcement. Indeed, back in 1998, during the enactment of the CFPOA, then Foreign Minister Lloyd Axworthy had advised Parliament that the law’s enforcement would be a matter for the federal Minister of Justice and for provincial Attorneys General.⁵³

⁴⁹ Global Affairs Canada, *Canada’s Fight Against Foreign Bribery: Twenty-third Annual Report to Parliament (September 2021-August 2022)*, tabled on 6 October 2022, <https://www.international.gc.ca/transparency-transparence/bribery-corruption/2021-2022.aspx?lang=eng>

⁵⁰ Harrington (2018), *supra* note 2 at 103.

⁵¹ *Saleh v Director of the Serious Fraud Office*, [2017] EWCA Civ 18 at para 22, <https://www.bailii.org/ew/cases/EWCA/Civ/2017/18.html>

⁵² See further, Serious Fraud Office, Case Information, Chad Oil, <https://www.sfo.gov.uk/cases/chad-oil/>

⁵³ As cited in Harrington (2018), *supra* note 2 at 110.

- The proposed webpage needs to be developed into a trusted, reliable, official, accessible library of information on charges laid under the CFPOA, the number of persons (natural and legal) sanctioned for the bribery of foreign public officials under Canadian law, and the use of remediation agreements for offences under the CFPOA.
- Factsheets need to be developed and made accessible on this website for those cases that have resulted in convictions under the CFPOA so as to serve as case studies for educational and training purposes, with a documents folder providing easy access to the judgments.
- The proposed webpage should also be used to maintain access to documents from Canadian authorities which are made public for only a specific period of time (such as RCMP media releases), thus enabling this webpage to become a trusted source for historical information.
- The proposed webpage could also serve as place to find specific information on how the Government of Canada plans to meet its commitment to the 2021 Recommendation.

A Final Area of Concern

Questions remain as to how best to provide redress for the victims of foreign bribery, with the victim surcharges assessed in the foreign bribery cases of *Niko Resources* and *Griffiths Energy International* providing no assistance to the victims of the crimes in Bangladesh and Chad. Indeed, with regards to the *Griffiths Energy International* case, it was the UK's Serious Fraud Office that seized and redirected the benefits from the bribery to provide assistance to the crime's overseas victims.⁵⁴ A similar concern arises for the victims in Libya in relation to the activities of SNC-Lavalin Construction Inc. To this end, in my academic work, I have discussed the creation of a fund to which some portion of the financial penalties for foreign bribery could be directed to support the provision of development assistance to the affected foreign countries.⁵⁵

About the Author

Professor Joanna Harrington holds the Eldon Foote Chair in International Business Law at the University of Alberta. A law professor for over 20 years, she works on issues of foreign relations law, public international law, human rights, and transnational crime. Recent work has focussed on the foreign corruption of public officials, the corporate commission of transnational crimes, deferred prosecution agreements, and extradition. She is also a co-author of the leading Canadian textbook, *International Law: Doctrine, Practice, and Theory*. She has made a request to observe and/or participate as an academic in the Working Group's on-site visit in June 2023.

⁵⁴ "SFO recovers 4.4m from corrupt diplomats in 'Chad Oil' share deal," Media Release (22 March 2018), <https://www.sfo.gov.uk/2018/03/22/sfo-recovers-4-4m-from-corrupt-diplomats-in-chad-oil-share-deal/>

⁵⁵ See Harrington (2020), *supra* note 13.