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Article 7

# Corruption at the Intersection of Business and Government: The OECD Convention, Supply-Side Corruption, and Canada's Anti-Corruption Efforts to Date

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# Corruption at the Intersection of Business and Government: The OECD Convention, Supply-Side Corruption, and Canada's Anti-Corruption Efforts to Date

## **Abstract**

Over the last twenty years, international and regional conventions have been concluded to combat the corruption of public officials. Part I of the paper explains the genesis of international anti-corruption law and its focus on the “supply-side” of bribery transactions, drawing on the negotiating history and the experience of practitioners involved in the development of international anti-corruption law. Parts II and III examine Canada's implementation of its international obligations and its enforcement record to date. Part IV of the paper concludes with an analysis of the challenges faced by Canadian businesses and the limitations of the focus on supply-side of bribery transactions.

## **Keywords**

Corruption

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## Corruption at the Intersection of Business and Government: The OECD Convention, Supply-Side Corruption, and Canada's Anti-Corruption Efforts to Date

MILOS BARUTCISKI & SABRINA A. BANDALI\*

Over the last twenty years, international and regional conventions have been concluded to combat the corruption of public officials. Part I of the paper explains the genesis of international anti-corruption law and its focus on the "supply-side" of bribery transactions, drawing on the negotiating history and the experience of practitioners involved in the development of international anti-corruption law. Parts II and III examine Canada's implementation of its international obligations and its enforcement record to date. Part IV of the paper concludes with an analysis of the challenges faced by Canadian businesses and the limitations of the focus on supply-side of bribery transactions.

Depuis une vingtaine d'années, des conventions internationales et régionales ont été conclues afin de lutter contre la corruption d'agents publics. S'inspirant de l'historique des négociations et de l'expérience des spécialistes qui les ont mises au point, la première partie de l'article traite de la genèse des lois internationales de lutte contre la corruption

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et du fait qu'elles ciblent le « côté de l'offre » des transactions entachées de corruption. La seconde et la troisième parties examinent la mise en œuvre par le Canada de ses obligations internationales et l'historique de leur application à ce jour. En conclusion, la quatrième partie de l'article analyse les défis auxquels doivent faire face les entreprises canadiennes et les limitations du ciblage du « côté de l'offre » des transactions entachées de corruption.

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**IN 1997, CANADA AND THE TWENTY-EIGHT OTHER** Members of the Organisation for Economic Co-operation and Development (“OECD”), along with five additional countries, signed the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.<sup>1</sup> The signature and ratification of this convention marked an important milestone in a campaign against corruption that had been picking up momentum through the early 1990s.

The principal thrust of the campaign was to tackle supply-side corruption—that is, to counter corruption by cutting off the supply of bribe payments.

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1. 17 December 1997, 37 ILM 1 (entered into force 15 February 1999) [*OECD Convention*].

Although all countries prohibit bribery of their own officials, prior to the entry into force of the *OECD Convention* on 15 February 1999, the United States was the only country in the world that expressly prohibited the payment of bribes to foreign officials, as a result of the enactment of the *Foreign Corrupt Practices Act*<sup>2</sup> (“*FCPA*”) in 1977.

Since the development of the international consensus on addressing the supply side of bribery transactions, several trends have driven multinational enterprises to focus on anti-corruption compliance. The increase in corporate focus on these issues has in turn encouraged the emergence of specialized anti-corruption compliance professionals, investigators, lawyers, and other advisors. While the focus on the supply side has produced significant improvements in training, internal controls, and corporate compliance generally, it has also created significant direct and indirect costs for companies,<sup>3</sup> which can quickly become difficult to control or make proportional to the corruption risk at issue. In addition, even the most robust compliance regimes can be circumvented if the incentives are high enough and circumventers devote sufficient effort. So long as the efforts to constrain supply-side corruption are not matched by equivalent efforts on the demand side, there will be inefficiencies and misallocation of resources both in compliance activities and in the broader international campaign against corruption.

This article aims to explain the development and limits of the focus on supply-side corruption from the perspective of a practitioner who participated in the genesis and implementation of the supply-side approach. Part I explains the origins of the international focus on the supply side of bribery transactions—memorialized in the *OECD Convention*—based on process documents and the experience of practitioners involved in the development of this approach. Notwithstanding the broader scope of subsequent anti-corruption conventions, such as the *United Nations Convention against Corruption*<sup>4</sup> (“*UNCAC*”), combating supply-side corruption remains the dominant focus of Canada’s

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2. 15 USC tit 15 § 78m (1977) [*FCPA*].

3. Corporate anti-corruption compliance entails substantial direct and indirect costs at both the operational day-to-day level and in the transactional deal context (*i.e.*, mergers and acquisitions, joint ventures, borrowing and financing, et cetera). Direct costs include the administrative costs of maintaining compliance staff, training, monitoring and audit, third-party due diligence, counsel and forensic investigation fees, and other costs related to the ongoing implementation of compliance procedures. There are also substantial indirect costs that come into play in the context of impacts on commercial negotiations, diversion and distraction of management resources, and the costs of delay in implementing transactions resulting from due diligence and other compliance-related activities.

4. 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) [*UNCAC*].

implementation of its international anti-corruption obligations. Accordingly, Parts II and III presents an overview of Canada's record to date in implementing those obligations, including the adoption of the *Corruption of Foreign Public Officials Act*<sup>5</sup> ("CFPOA"), legislative changes to the CFPOA in 2013, and the evolution of Canadian law enforcement efforts. Part IV presents some reflections on the limits of the *OECD Convention's* current approach and suggestions for future directions.

## I. OVERVIEW OF THE INTERNATIONAL RULES

### A. THE FOCUS ON SUPPLY-SIDE CORRUPTION (BRIBE PAYERS)

Over the last twenty years, several international and regional conventions have been concluded to combat official corruption. These include the *Inter-American Convention against Corruption*<sup>6</sup> in 1996, the *OECD Convention*<sup>7</sup> in 1997, the Council of Europe *Criminal Law Convention on Corruption*<sup>8</sup> in 1999, the *African Union Convention on Preventing and Combating Corruption*<sup>9</sup> in 2009, and the *UNCAC*<sup>10</sup> in 2003. Of these, the instrument that has had the greatest impact on international business is the *OECD Convention*.

Before the *OECD Convention*, bribing a foreign public official was not only tolerated but was legally permissible everywhere except in the United States. In fact, in Canada and many other jurisdictions, the cost of paying a bribe was a deductible business expense for income tax purposes.<sup>11</sup> This practice only changed in 1996 as a result of an OECD Recommendation calling for the elimination of tax deductibility for bribes.<sup>12</sup> This Recommendation was a precursor of the *OECD Convention*. In fact, the preferential tax treatment of bribes continued to be an issue after the adoption of the *OECD Convention*.<sup>13</sup>

5. SC 1998, c 34 [CFPOA].

6. 29 March 1996, OASTS No B-58 (entered into force 6 March 1997).

7. *OECD Convention*, *supra* note 1.

8. 27 January 1999, Eur TS No 173 (entered into force 1 July 2002).

9. 11 July 2003, 43 ILM 5 (entered into force 5 August 2006).

10. *UNCAC*, *supra* note 4.

11. See *Income Tax Act*, RSC 1985, c 1 (5th Supp) s 67.5. This section now prohibits deducting expenses incurred for the purpose of doing anything that would be an offence under s 3 of the CFPOA or the domestic bribery provisions of the *Criminal Code*. See CFPOA, *supra* note 5, s 3. See also *Criminal Code of Canada*, RSC 1985, c C-46, ss 121-23, 426.

12. OECD, *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*, 35 ILM 1311 (11 April 1996).

13. US, Bureau of Economic and Business Affairs, *Battling International Bribery* (Washington: US Department of State, 1999) at 33 [*Battling International Bribery*].

There are several reasons for the historical tolerance of foreign bribery. The first is the predominantly territorial basis of criminal law.<sup>14</sup> When a company pays a bribe to a foreign official in a host country, the *actus reus* of the bribery offence often occurs entirely in the host country and outside of the territorial jurisdiction of the company's home country laws. Accordingly, absent rules conferring nationality-based or some other form of extraterritorial jurisdiction, the company's home country cannot assert adjudicative jurisdiction over the offence. Second, the principles of international comity and sovereign equality make it improper—or at the very least, difficult—for one country to dictate norms of conduct for officials of another sovereign country in the foreign sovereign's territory. Third, both companies and governments have historically followed a pragmatic and relativistic approach to transactions and commercial operations in multiple jurisdictions: when in Rome, do as the Romans do.

As the scope and volume of international business has expanded, all three of these rationales for tolerating foreign corruption have increasingly come under criticism. International and domestic laws, standards, and commercial norms have developed that depart from these three principles. Nonetheless, in the years leading up to the *OECD Convention*, the principles of territoriality, comity, and sovereign equality, along with pragmatic relativism, made the emergence of an international consensus on anti-corruption far from inevitable.

## 1. GENESIS OF THE INTERNATIONAL ANTI-CORRUPTION CONSENSUS

The international consensus to tackle corruption through coordinated international efforts was the result of two parallel movements during the early 1990s. The first came from non-governmental organizations (“NGOs”), notably Transparency International (“TI”), who were motivated by the frustration of seeing billions of dollars in development aid being misappropriated by corrupt officials and siphoned into offshore accounts. The second—perhaps surprisingly to some—came from the US business community, which felt that it was at a competitive disadvantage in international business due to the fact that its foreign competitors did not face a legal burden equivalent to the *US FCPA*.

### I. ANTI-CORRUPTION AND THE NGO COMMUNITY

In the 1990s, individuals and organizations involved in international development began to identify and publicize the harmful effects of bribery and corruption. The most prominent NGO to engage on the issue of corruption was TI, which

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14. See *Libman v The Queen*, [1985] 2 SCR 178 at 183-84, 21 DLR (4th) 174 [*Libman*].

was founded in 1993 as a coalition of civil society and business that aimed to create a global anti-corruption movement. Industry-specific organizations also began to take action against corruption. For example, in 1995, the International Federation of Consulting Engineers began to include anti-corruption language in its model contracts, and in 1996, both the International Chamber of Commerce (“ICC”) and the American Bar Association (“ABA”) published recommendations encouraging their members to support anti-corruption activity.<sup>15</sup>

Around this same time, international development organizations and think tanks, such as the UK’s Overseas Development Institute (“ODI”), observed greater attention to and discussion of the possibility of tying aid funding to political reform in developing countries, known as “political conditionality.”<sup>16</sup> The ODI noted that, among other things, “[the] current donor interest in questions of governance and democracy [and] ... [t]he motivation for political and institutional reform stems from a desire to improve aid effectiveness, by preventing waste and corruption and strengthening the overall policy environment.”<sup>17</sup>

International organizations and international financial institutions also played a key role in providing a platform to identify the problem corruption posed to the effective use of development aid. For example, at its 1992 High Level Meeting, the OECD Development Assistance Committee (“DAC”)—made up of the representatives of the major foreign aid donor countries—addressed what OECD Development Co-operation Directorate Director Helmut Führer<sup>18</sup> called “one of the last taboo subjects,”<sup>19</sup> namely corruption. The DAC highlighted the detrimental impacts of corruption on development, observing that “corruption can result in the misuse of aid as well as domestic resources and can damage the reputation of aid efforts in donor countries.”<sup>20</sup> In 1996, the DAC formally recommended that Members introduce anti-corruption provisions for procurement that is funded by bilateral aid, in keeping with the

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15. Carolyn Hotchkiss, “The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business” (1998) 17:1 J Pub Pol’y & Marketing 108 at 112.

16. Overseas Development Institute, “Aid and Political Reform,” Briefing Paper (January 1992) at 2, online: <[www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6774.pdf](http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6774.pdf)>.

17. *Ibid.*

18. Führer was the Director of the OECD Development Co-operation Directorate from 1975 to 1993.

19. *The Story of Official Development Assistance: A History of the Development Assistance Committee and the Development Co-operation Directorate in Dates, Names and Figures* (Paris: OECD, 1994) at 60.

20. *Ibid.* at 61.



rationale that corruption wastes the scarce resources available for development.<sup>21</sup> The DAC Recommendation was one of the precursors to the 1997 OECD Revised Recommendation<sup>22</sup> and the subsequent *OECD Convention*.<sup>23</sup>

The anti-corruption campaigners of the 1990s felt that there was little prospect of disciplining governments for condoning corruption by their own officials. However, they believed that corruption could be curbed by imposing harsh penalties on the bribe payers (hence the term “supply side”). This belief was the motivation behind the OECD’s anti-corruption work in the 1990s.

## II. ANTI-CORRUPTION AND THE US BUSINESS COMMUNITY

By the early 1990s, the US business community had become an important proponent of international anti-corruption efforts. Since 1977, US-domiciled companies had been subject to domestic federal anti-corruption legislation in the form of the *FCPA*. While competitors from other countries were free to bribe with impunity, US companies had the burden of complying with the *FCPA*, which prohibited making payments to foreign government officials in order to obtain or retain business.

Soon after the United States enacted the *FCPA*, the American business community argued that the Act disadvantaged American companies relative to foreign competitors.<sup>24</sup> Within the first few years of the *FCPA*’s operation, the US Government Accountability Office (“GAO”) conducted a survey of a sample of the largest US firms and found that over 60 per cent of respondents felt that, all other conditions being equal, American companies could not compete internationally

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21. OECD, Development Assistance Committee, *Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement: Follow-up report*, (May 1997), online: <[www.oecd.org/daf/anti-bribery/recommendationonanti-corruptionproposalsforaid-fundedprocurementfollow-upreport.htm](http://www.oecd.org/daf/anti-bribery/recommendationonanti-corruptionproposalsforaid-fundedprocurementfollow-upreport.htm)>.
22. OECD, *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*, 36 ILM 1016 (23 May 1997) [1997 Revised Recommendation].
23. *Supra* note 1.
24. See e.g. US, *Subcommittee on International Finance and Monetary Policy and Subcommittee on Securities on the Impact of the Foreign Corrupt Practices Act on US Business*, 97th Cong (Washington: United States General Accounting Office, 1981) (Donald L Scantlebury) [Scantlebury Statement]. Donald L Scantlebury was the Chief Accountant of the General Accounting Office and Division Director of the Accounting and Financial Management Division. See also US, *Joint Hearing before the Subcommittee on International Finance and Monetary Policy and the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs*, 98th Cong (Washington: United States Government Printing Office, 1983) at 68, 78.

against foreign competitors able to pay bribes.<sup>25</sup> Over 50 per cent of respondents believed that an international anti-bribery treaty would strengthen the United States's competitive position.<sup>26</sup> The GAO accordingly argued that Congress should urge the President to actively pursue an international agreement.<sup>27</sup>

Throughout the 1980s and 1990s, the US business community and a variety of US government actors advocated for an international treaty to address the problem of corruption and ameliorate the disadvantages created by the *FCPA*. Industry organizations such as the US Chamber of Commerce strongly supported *FCPA* reform efforts to mitigate the unintended detrimental impacts of the *FCPA* on business. Proposed bills, such as the 1983 *Business Accounting and Foreign Trade Simplification Act*, not only included clarifications of US domestic legislation but also called on the President to pursue negotiations towards an international agreement on illicit payments and to report any progress to Congress.<sup>28</sup> However, it was not until the *Omnibus Foreign Trade and Competitiveness Act of 1988* that the *FCPA* was successfully amended.<sup>29</sup> Among other things, the 1988 Act required the President to negotiate an agreement with the OECD to internationalize the *FCPA*'s anti-bribery provisions.<sup>30</sup>

The concern that the *FCPA* disadvantaged the United States against its economic competitors appears to explain why decision makers chose to act specifically at the OECD. An international agreement among this organization's members—most of the world's largest economies, accounting for the overwhelming majority of exports and foreign direct investment—would bind the US business community's major competitors, thereby levelling the economic playing field for American companies.<sup>31</sup>

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25. *Scantlebury Statement*, *supra* note 24 at 14.

26. *Ibid.*

27. *Ibid* at 15.

28. US, Bill S 414, 98th Cong, 1983.

29. Pub L 100-418, 102 Stat 1107.

30. Ellen Gutterman, "Easier Done than Said: Transnational Bribery, Norm Resonance, and the Origins of the US Foreign Corrupt Practices Act" (2015) 11:1 Foreign Pol'y Analysis 109 at 117.

31. See William J Clinton, "Statement by the President" (10 November 1998), online: The United States Department of Justice <[www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/signing.pdf](http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/signing.pdf)> (statement delivered at the signing of the *International Anti-Bribery and Fair Competition Act of 1998* at The White House). See also The United States Department of Justice, "Proposed Legislative History: International Anti-Bribery Act of 1998" (14 November 2012), online: <[www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/leghistory.pdf](http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/leghistory.pdf)>.

### III. ANTI-CORRUPTION AT THE OECD

Following these developments at home, US officials at the OECD began in 1989 to advocate for other OECD Members to criminalize the bribery of foreign officials in commercial transactions.<sup>32</sup> This is not to say that bribery was previously absent from the policy work of the OECD; for example, the 1976 OECD *Guidelines for Multinational Enterprises*<sup>33</sup> included a specific anti-bribery provision.<sup>34</sup> However, guidelines for the conduct of multinational enterprises could hardly satisfy the wishes of the US business community that OECD Member countries introduce *FCPA*-like legislation domestically to criminalize the offer or payment of bribes to foreign officials.

As with previous efforts to develop an international agreement on illicit payments, the United States's efforts were met with opposition. Prominent OECD Members, such as Germany, France, Japan, and Spain, initially opposed the initiative.<sup>35</sup> Specifically, France and Germany objected to the extraterritorial effect of the proposed bribery offence. Germany also raised concerns regarding the difficulty of detecting and proving the existence of bribery.<sup>36</sup> However, by 1994, their opposition abated, and the OECD adopted a formal anti-corruption Recommendation.<sup>37</sup> In addition to calling on member states to take effective measures to deter, prevent, and combat the bribery of foreign public officials, the *1994 Recommendation* required the Committee on International Investment

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32. Mark Pieth, "International Cooperation to Combat Corruption" in Kimberly Ann Elliott, ed, *Corruption and the Global Economy* (Washington: Institute for International Economics, 1997) 119 at 122-23 [Pieth, "International Cooperation to Combat Corruption"]. See also US, House Commerce Committee, 105th Cong, *International Anti-Bribery and Fair Competition Act of 1998* (Washington: US Government Printing Office, 1998) at 10.
33. OECD, *Guidelines for Multinational Enterprises, National Treatment, International Investment Incentives and Disincentives, Consultation Procedures* (Paris: OECD, 1976), online: <[www.oecd.org/daf/inv/mne/50024800.pdf](http://www.oecd.org/daf/inv/mne/50024800.pdf)>. The Guidelines were annexed to the 1976 *Declaration on International Investment and Multinational Enterprises*. See OECD, *Declaration on International Investment and Multinational Enterprises*, 15 ILM 967 (21 June 1976).
34. *Ibid* at 972. In particular, it states, "Enterprises should ... not render – and they should not be solicited or expected to render – any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office" (*ibid*).
35. Barbara Crutchfield George, Kathleen A Lacey & Jutta Birmele, "The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes toward Corruption in Business Transactions" (2000) 37:3 Am Bus LJ 485 at 496.
36. *Ibid*.
37. OECD, *Recommendation of the Council of the OECD on Bribery in International Business Transactions*, 33 ILM 1389 (27 May 1994) [*1994 Recommendation*]. See also Pieth, "International Cooperation to Combat Corruption," *supra* note 32 at 122-23.

and Multinational Enterprises (“CIME”) to review it and its implementation within three years.<sup>38</sup>

As part of the review process, the OECD consulted with business and NGOs to obtain their input regarding the implementation of the *1994 Recommendation*.<sup>39</sup> When developing and negotiating the draft *OECD Convention* text, OECD delegations also consulted with members of the business community that had played such a significant role in putting anti-corruption on the international agenda. For example, the OECD’s standing advisory body, the Business and Industry Advisory Committee (“BIAC”), consulted closely with the OECD delegations during the negotiation of the *OECD Convention*.<sup>40</sup> The OECD has officially recognized BIAC since its founding in 1962 as the voice of the business community in OECD Member states. This is not to say, however, that members of BIAC were always unequivocal on all anti-corruption issues. For example, members of BIAC were divided with respect to the appropriate scope of the *OECD Convention* including with respect to, among other things, whether it should apply to state-owned enterprises (“SOEs”) (through the definition of a “foreign country”), or contributions to candidates for political office and political parties (through the definition of a “public official”).

Other international business organizations were also consulted by the OECD, such as the ICC, a business association whose mandate includes the promotion of an open international trade and investment system. Notably, the ICC was an early proponent of an international anti-corruption treaty. Its efforts began in 1975, when it established a committee chaired by Lord Shawcross.<sup>41</sup> The 1977 Shawcross Report recommended that the United Nations (“UN”) draw up an international anti-bribery treaty and called for businesses to impose

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38. *1994 Recommendation*, *supra* note 37, art IX.

39. OECD, *OECD Actions to Fight Corruption (Note by the Secretary-General)* (Paris: OECD, 1997) at 2.

40. Letter from M Pieth to HK van Egmond (29 September 1997) [on file with authors]. See also OECD, Committee on International Investment and Multinational Enterprises, *OECD Actions to Fight Corruption: Review of the 1994 Recommendation on Bribery in International Business Transactions, Including Proposals to Facilitate the Criminalisation of Bribery of Foreign Public Officials* (Paris: OECD, 1997) at 10 [OECD, *Review of the 1994 Recommendation*].

41. Hartley William Shawcross was a former Attorney General of Great Britain and prosecutor at the Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, held between 20 November 1945 and 1 October 1946. See Encyclopaedia Britannica, “Hartley William Shawcross, Baron Shawcross of Friston” (31 December 2003), online: <[www.britannica.com/biography/Hartley-William-Shawcross-Baron-Shawcross-of-Friston](http://www.britannica.com/biography/Hartley-William-Shawcross-Baron-Shawcross-of-Friston)>.

some form of self-regulation.<sup>42</sup> However, the proposed UN convention failed to gather enough support, and in the 1990s, the ICC shifted its attention to the OECD, perceiving it as a more effective forum within which such a treaty could be negotiated.<sup>43</sup>

## B. THE OECD ANTI-BRIBERY CONVENTION

### 1. DEVELOPING A BINDING CONVENTION

Although CIME was originally expected to report to the Council in May 1997,<sup>44</sup> before the Council Meeting convened, France and Germany argued that the only way to ensure fairness among all Members was to negotiate a binding convention. Moreover, they asserted that a convention was required because each country's legal system was different.<sup>45</sup> Both the United States and TI opposed this position reportedly because they feared that negotiating a binding convention would take years and therefore delay international action.<sup>46</sup>

The parties reached a compromise by combining the convention proposal with a collective pledge to legislate within a specified time period.<sup>47</sup> The *1997 Revised Recommendation* therefore engaged two parallel strategies: (1) It called on Members to adopt national laws criminalizing the bribery of foreign public officials by the end of 1998 and (2) it committed the Council to open negotiations immediately to conclude an international convention to criminalize bribery by the end of 1997 in order for the convention to enter into force by the end of 1998.<sup>48</sup>

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42. International Chamber of Commerce, Commission on Ethical Practices, *Recommendations to Combat Extortion and Bribery in Business Transactions*, 17 ILM 417 (29 November 1977) at 418.

43. Fritz Heimann & Mathias Hirsch, "How International Business Combats Extortion and Bribery: Anti-corruption Efforts by the International Chamber of Commerce," in OECD, *No Longer Business as Usual: Fighting Bribery and Corruption* (Paris: OECD, 2000) at 170-71.

44. Pieth, "International Cooperation to Combat Corruption," *supra* note 32 at 125.

45. Paul Blustein, "Fight Looms Over Foreign Bribery," *The Washington Post* (9 May 1997), online: <[www.washingtonpost.com/archive/politics/1997/05/09/fight-looms-over-foreign-bribery/3ea22baa-631c-4263-8695-9aec56c6c3b8](http://www.washingtonpost.com/archive/politics/1997/05/09/fight-looms-over-foreign-bribery/3ea22baa-631c-4263-8695-9aec56c6c3b8)>.

46. Paul Blustein, "Pact to Bar Bribery is Reached," *The Washington Post* (24 May 1997), online: <[www.washingtonpost.com/archive/business/1997/05/24/pact-to-bar-bribery-is-reached/b1817181-a12b-4183-b508-0ea40d19c2a1](http://www.washingtonpost.com/archive/business/1997/05/24/pact-to-bar-bribery-is-reached/b1817181-a12b-4183-b508-0ea40d19c2a1)>.

47. *Ibid.*

48. *1997 Revised Recommendation*, *supra* note 22, art III.

## 2. FOCUS ON THE SUPPLY SIDE OF BRIBERY TRANSACTIONS

One of the reasons that the *OECD Convention* is such a significant instrument in the fight against corruption is because of its focus on the supply side of international bribery. By making the potential cost of engaging in bribery greater than its benefits, the *OECD Convention* targets private companies in capital-exporting OECD countries, seeking to cut off the flow of international bribery at its source. As a result of the *OECD Convention*, all thirty-four OECD Member states and six additional signatories now prohibit bribery of foreign officials.

The *OECD Convention* binds the home countries of the vast majority of international businesses, making it an important consideration for many multinational corporations. The fact remains that even today—despite the emergence of global corporations from China, Russia, Brazil, India, Indonesia, Malaysia, and many other countries—the overwhelming majority of multinational corporations are domiciled in OECD countries and therefore are subject to the foreign corruption laws introduced as a result of the *OECD Convention*.

## 3. CONTENT AND SCOPE OF THE OECD CONVENTION

The *OECD Convention* is short and focused, with one central obligation: Article 1 requires State parties to introduce strict measures to criminalize the bribery of foreign officials.<sup>49</sup> The *OECD Convention* also addresses ancillary matters such as jurisdiction,<sup>50</sup> penalties,<sup>51</sup> enforcement cooperation,<sup>52</sup> and peer review.<sup>53</sup>

Despite its reach, the *OECD Convention* does not have the broader scope and coverage of later conventions, such as the *UNCAC*. Most notably, it does not address so-called passive bribery and the systemic or institutional challenges faced by countries where public officials solicit bribes<sup>54</sup> (of course, the distinction between “active” and “passive” bribery is somewhat misleading since bribe recipients are rarely passive and play an active role in soliciting or extorting bribes and incentivizing corrupt practices).

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49. *Supra* note 1, art 1.

50. *Ibid*, art 4.

51. *Ibid*, art 3.

52. *Ibid*, arts 5, 9, 10.

53. *Ibid*, art 12.

54. OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Paris: OECD, 1997) at 14, online: <[www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)>.

#### 4. IMPLEMENTATION, COMPLIANCE, AND PEER REVIEW

To implement their obligations under the *OECD Convention*, states must make legislative changes (for example, by introducing the offence of bribing a foreign public official into domestic criminal law) and follow those changes up through law enforcement activity. On both fronts, the record of compliance with the *OECD Convention* by Member states is mixed; however, it is steadily improving, in part as a result of the *OECD Convention's* peer-review process. The peer-review process consists of three phases. In the first phase, peer country reviewers consider the target country's legislation. In the second phase, the reviewers examine whether the legislation that exists is effectively applied. In the third phase, the reviewers focus on enforcement efforts and any outstanding recommendations. Discussions about the scope and focus of a fourth phase of review took place recently,<sup>55</sup> and this further stage of review may commence in late 2015.

The intention of a peer-review process is to encourage countries to “name and shame” each other, raising the bar of what constitutes adequate implementation. Peer-review processes and the scrutiny of anti-corruption NGOs, which use independent metrics to monitor performance, shine a spotlight on the progress or lack thereof by countries in the fight against bribery. The result has been the increasingly vigorous implementation and enforcement of foreign bribery laws not only by the United States but also by Germany, Korea, Italy, Japan, France, Norway, Switzerland, the UK, Belgium, and Canada.

For example, after the OECD Working Group expressed concern about the United Kingdom's existing legislative framework,<sup>56</sup> the United Kingdom stated its intention to reform its laws<sup>57</sup> and ultimately introduced the *Bribery Act*,<sup>58</sup> one of the most comprehensive anti-bribery laws in the world. Similarly in Canada,

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55. OECD, “Public Consultation on Phase 4 monitoring of the OECD Anti-Bribery Convention” (2015), online: <[www.oecd.org/corruption/2014-call-for-comment-phase-4-anti-bribery-convention.htm](http://www.oecd.org/corruption/2014-call-for-comment-phase-4-anti-bribery-convention.htm)>. The public consultation was launched on 5 November 2014 and ended on 1 December 2014 (*ibid*).

56. OECD, *United Kingdom: Review of Implementation of the Convention and 1997 Recommendation* (Paris: OECD, 1999) at 24-25, online: <[www.oecd.org/daf/anti-bribery/anti-briberyconvention/2754266.pdf](http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2754266.pdf)>.

57. OECD, *United Kingdom: Review of Implementation of the Convention and 1997 Recommendation: Phase I Bis Report* (Paris: OECD, 2003) at 1, 16-17, online: <[www.oecd.org/daf/anti-bribery/anti-briberyconvention/2498215.pdf](http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2498215.pdf)>.

58. *Bribery Act 2010* (UK), c 23.

criticism of the government's lax enforcement<sup>59</sup> prompted both the continued acceleration of enforcement efforts and legislative amendments to implement the Working Group's key recommendations.<sup>60</sup> Because of the supply-side focus of the *OECD Convention* obligations, companies and individuals who offered or paid bribes are the focus of enforcement efforts by OECD Member states. Since the *OECD Convention* entered into force, 427 foreign bribery enforcement actions have been undertaken globally.<sup>61</sup> Although the peak of enforcement occurred in 2011, when seventy-eight cases were concluded, the *OECD Foreign Bribery Report* also discloses that foreign bribery cases are taking longer to prosecute (increasing in length from an average of two years between the accused's last criminal act and the sanction in 1999 to an average of 7.3 years in 2013). The *OECD Foreign Bribery Report* speculates that a number of factors may be responsible for this trend, including the complexity of investigations and the willingness of individuals or entities accused to resist or to settle the charges against them.<sup>62</sup>

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59. See OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (Paris: OECD, 2011) at 6, 59-60, online: <[www.oecd.org/canada/Canadaphase3reportEN.pdf](http://www.oecd.org/canada/Canadaphase3reportEN.pdf)> [OECD, *Phase 3 Report*]; OECD, News Release, "Canada's enforcement of the foreign bribery offence still lagging; must urgently boost efforts to prosecute" (28 March 2011), online: <[www.oecd.org/newsroom/canadasenforcementoftheforeignbriberyoffencesstilllaggingmusturgentlyboosteffortstoprosecute.htm](http://www.oecd.org/newsroom/canadasenforcementoftheforeignbriberyoffencesstilllaggingmusturgentlyboosteffortstoprosecute.htm)>.
60. Global Affairs Canada, News Release, "Strengthening Canada's Fight Against Foreign Bribery" (5 February 2013), online: <[www.international.gc.ca/media/aff/news-communiqués/2013/02/05b.aspx?lang=eng](http://www.international.gc.ca/media/aff/news-communiqués/2013/02/05b.aspx?lang=eng)> [Global Affairs Canada, "Strengthening Canada's Fight"].
61. OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (Paris: OECD, 2014) at 11, online: <[www.oecd-ilibrary.org/docserver/download/2814011e.pdf?expires=1459014725&id=id&accname=guest&checksum=DD9E181BC5E9D17A8D1221A46FDFEDEB](http://www.oecd-ilibrary.org/docserver/download/2814011e.pdf?expires=1459014725&id=id&accname=guest&checksum=DD9E181BC5E9D17A8D1221A46FDFEDEB)> [OECD, *OECD Foreign Bribery Report*]. The *OECD Foreign Bribery Report* analyzes case information from all countries that have enacted the offence of bribery of foreign public officials in their domestic criminal law.
62. *Ibid* at 13-14.



In Canada, as discussed in greater detail in Part III, below, corporate fines of 9.5 million Canadian dollars (“CAD”)<sup>63</sup> and 10.35 million CAD<sup>64</sup> have been imposed in two cases since 2011. In 2013, the first individual was tried and convicted of conspiring to offer a bribe<sup>65</sup> and was sentenced to three years of imprisonment.<sup>66</sup> In total, monetary sanctions totalling 5.4 billion US dollars (“USD”) have been imposed in countries with a foreign bribery offence.<sup>67</sup> These fines, together with the reputational damage of being convicted of criminal bribery, have resulted in a significant shift in corporate attitudes. Of the cases analyzed in the *OECD Foreign Bribery Report*, 31 per cent were brought to the attention of law enforcement authorities through corporations’ self-reporting.<sup>68</sup> Moreover, many multinational corporations have adopted strict anti-corruption compliance policies and other internal controls at substantial expense. Of the 137 cases brought to law enforcement through self-reporting, companies detected the bribery through internal audits in 31 per cent of cases or due diligence in mergers and acquisitions (“M&A”) transactions in 28 per cent of cases.<sup>69</sup> Given that both internal audits and M&A due diligence can be complex and resource-intensive, these statistics indicate that companies are willing to devote time and resources to detecting and avoiding anti-corruption liability. The *OECD Convention’s* focus on the supply side of bribery transactions aims to incentivize this kind of change.

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63. See *R v Niko Resources Ltd* (2011), 101 WCB (2d) 118, [2012] AWLD 4536 (QB) [*Niko*]. Niko Resources pled guilty for bribing a foreign public official in Bangladesh (*ibid* at para 1). Through its subsidiary, Niko Bangladesh, the company provided the use of a vehicle and paid travel and accommodation expenses for the then State Minister for Energy and Mineral Resources to attend an oil and gas industry exhibition in Calgary (see points 4-5 in *ibid* at para 21). The use of the vehicle was valued at approximately 191,000 CAD and the trip cost 5,000 CAD (*ibid*). Niko was fined 9.5 million CAD (including a 15 per cent victim surcharge) (*ibid* at para 21).
64. See *R v Griffiths Energy International*, [2013] AJ No 412 (QL) at para 10 (QB) [*Griffiths*]. Griffiths Energy entered a guilty plea on one count of bribery contrary to the *CFPOA* and was fined 9 million dollars plus a 15 per cent victim surcharge for a total penalty of \$10.35 million (*ibid* at para 10). Griffiths Energy admitted to having paid a 2 million dollar success fee to a company controlled by the wife of the ambassador to Canada of the Republic of Chad in connection with securing an oil and gas concession in the African country (*ibid* at para 7).
65. *R v Karigar*, 2013 ONSC 5199 at para 42, 108 WCB (2d) 210 [*Karigar*, Trial Decision].
66. *R v Karigar*, 2014 ONSC 3093 at para 37, 113 WCB (2d) 373 [*Karigar*, Sentencing Decision].
67. OECD, *OECD Foreign Bribery Report*, *supra* note 61 at 18.
68. *Ibid* at 15-16.
69. *Ibid* at 16-17.

## II. CANADA'S IMPLEMENTATION OF ITS INTERNATIONAL OBLIGATIONS

### C. THE CFPOA

While all OECD Member countries have adopted laws to implement the *OECD Convention*, several have yet to enforce those laws in a serious way. For several years after its ratification of the *OECD Convention*, Canada was a case in point. In 1998, Canada passed the *CFPOA*, thus implementing its obligation under the *OECD Convention* to create a foreign bribery offence at domestic law. However, Canada did not commit any resources to the enforcement of the *CFPOA* at the time of its enactment nor did it identify any particular agency as having primary responsibility for the investigation and prosecution of *CFPOA* offences.

The *CFPOA* is a criminal statute that prohibits the offering, promising, or giving of anything of value to a foreign public official, whether directly or indirectly, in exchange for using the foreign public official's position or influence to obtain a business advantage. In the original *CFPOA*, "business" was specified to be "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere *for profit*."<sup>70</sup> When the legislation entered into force in February 1999, the offence was punishable by up to five years of imprisonment or a fine in the court's discretion.<sup>71</sup>

Originally, Canada's jurisdiction over foreign bribery offences was territorial in scope: In order for Canada to have jurisdiction over an alleged offence, a court had to find that the offence had a "real and substantial link" with Canada, pursuant to the test for jurisdiction under Canadian common law (established in *Libman*).<sup>72</sup> In *R v Karigar*, the only existing jurisprudence on the application of territorial jurisdiction to the bribery of a foreign public official, the Ontario Superior Court of Justice concluded that Canada could assert territorial jurisdiction over a bribery offence where few elements of the offence occurred in Canada. In rejecting the defendant's argument that the court lacked territorial

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70. *CFPOA*, *supra* note 5, s 2 [emphasis added]. The definition of "business" was later amended, removing "for profit." See *Fighting Foreign Corruption Act*, SC 2013, c 26, s 2(3), amending *CFPOA*, *supra* note 5, s 2.

71. Office of the Director of Public Prosecutions, "Corruption of Foreign Public Officials: Guideline of the Director Issued Under Section 3(3)(c) of the *Director of Public Prosecutions Act*" in *Public Prosecution Service of Canada Deskbook* (Ottawa: PPSC, 2014) at 2, online: <[www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfp/fps-sfp/tpd/d-g-eng.pdf](http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfp/fps-sfp/tpd/d-g-eng.pdf)> [PPSC, "Corruption of Foreign Public Officials"].

72. *Libman*, *supra* note 14 at 213.

jurisdiction<sup>73</sup> because *Libman* requires “the bulk of the elements of the offence”<sup>74</sup> to have occurred in Canada, Justice Hackland held that “[t]he substantial connection test is not limited to the essential elements of the offence as submitted by the accused.”<sup>75</sup> Moreover, Justice Hackland noted that in the specific context of a bribery offence, “one cannot segregate or otherwise deal with the bribery as a separate and discrete issue thereby excluding the legitimate aspects of the transaction from consideration in applying the substantial connection test.”<sup>76</sup>

## 1. ELEMENTS OF THE OFFENCE

To obtain a conviction under the *CFPOA* for the offence of bribing a foreign public official, the prosecution must prove both the *actus reus* (the prohibited act) and *mens rea* (a guilty mind). With respect to the proof of *mens rea* in this context, there is no requirement to prove a specific corrupt intent. It is sufficient for the prosecution to prove that the accused, having reason to know or suspect that a third party might make or offer a bribe on its behalf, failed to make appropriate further inquiries or to take remedial action (*i.e.*, the doctrine of willful blindness). The prosecution must also establish the following elements of the *actus reus*:

Every person ..., in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official

- (a) as consideration for an act or omission by the official in connection with the ... official's duties or functions; or
- (b) to induce the official to use his or her position to influence any acts or decisions of the [government] ... for which the official performs duties or functions.<sup>77</sup>

As noted above, when first introduced, the *actus reus* of the offence as defined in the *CFPOA* required that the bribe be offered or paid to obtain an advantage in the course of business “for profit.”<sup>78</sup>

The offence contemplates an exchange, or *quid pro quo*, between the person making the bribe and the official such that the benefit is given or offered to

73. A pretrial motion ruling directed that this argument would be dealt with as a substantive defence and heard at the close of the Crown's case. See *R v Karigar*, 2012 ONSC 2730 at para 11, [2012] OJ No 6531 (QL).

74. *Karigar*, Trial Decision, *supra* note 65 at para 37.

75. *Ibid* at para 39.

76. *Ibid* at para 39.

77. *CFPOA*, *supra* note 5, s 3(1).

78. *Ibid*, s 2. See also *Fighting Foreign Corruption Act*, *supra* note 70, s 2(3).

the official in order to induce the official to use his or her official position to the business advantage of the person making the bribe. In *Karigar*, the court concluded that the use of the verb “agree” in the phrase “agrees to give or offer” imports the concept of conspiracy into the *CFPOA*, such that an agreement by persons to give or offer a bribe to a foreign public official is a violation of the *CFPOA* whether or not there is proof that the public official was offered or received the bribe.<sup>79</sup> In the *Karigar* decision, Justice Hackland specifically observed that interpreting the legislation this way meets Canada’s obligations under the *OECD Convention*.<sup>80</sup>

## 2. FACILITATION PAYMENTS

The Canadian legislation also included an exception for “facilitation payments.” The exception exempts a payment “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” by deeming that such payment does not amount to a “loan, reward, advantage or benefit” paid to obtain “an advantage in the course of business” such as to trigger the commission of the bribery offence.<sup>81</sup> Although the *CFPOA* does not define “acts of a routine nature,” it includes an illustrative list of examples:

- (a) the issuance of a permit, licence or other document to qualify a person to do business;
- (b) the processing of official documents, such as visas and work permits;
- (c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and
- (d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.<sup>82</sup>

The *CFPOA* further specifies that a decision to award new business, to continue existing business, or to encourage another person to make such a decision are not considered acts of a routine nature and therefore cannot fall under the exception for facilitation payments.<sup>83</sup>

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79. *Karigar*, Trial Decision, *supra* note 65 at para 28.

80. *Ibid.*

81. *CFPOA*, *supra* note 5, s 3(4).

82. *Ibid.*, ss 3(4)(a)-(d).

83. *Ibid.*, s 3(5).

#### D. JUNE 2013 AMENDMENTS TO THE CFPOA

Although the enactment of the *CFPOA* was a welcome milestone in Canada's implementation of its obligations under the *OECD Convention*, the legislation was subject to criticism, both through the peer-review process and in other fora. The OECD's 2004 Phase 2 Report on Canada's implementation of its obligations under the *OECD Convention* identified a number of perceived legislative deficiencies, including the continued exception for facilitation payments, the "for profit" requirement in the definition of "business," and most importantly, the lack of nationality-based jurisdiction.<sup>84</sup> In 2009, the government had introduced Bill C-31,<sup>85</sup> which, if passed, would have amended the *CFPOA* to permit nationality-based jurisdiction. However, the bill died in the committee stage when Parliament was prorogued in December 2009.

In the winter of 2011–2012, the Department of Foreign Affairs and International Trade ("DFAIT"), as it was then called, undertook a broad consultation regarding the *CFPOA*. The consultation involved corporate, legal, and NGO representatives from various sectors, and it resulted in the introduction of significant amendments to the *CFPOA* in 2013 relating to: (1) nationality jurisdiction, (2) clarification of the definition of "business" for the purposes of bribery, (3) elimination of facilitation payments, and (4) the establishment of a books and records offence. The amendments also increased the maximum penalty on a guilty plea or conviction for individuals (from five to fourteen years of imprisonment) and conferred exclusive jurisdiction on the Royal Canadian Mounted Police ("RCMP") for investigation and charges under the *CFPOA* (the latter change is discussed in greater detail in Part III, below).

#### 3. NATIONALITY-BASED JURISDICTION

Canada's lack of nationality jurisdiction for foreign bribery offences was a significant area of concern with respect to its implementation of the *OECD Convention*. In its Phase 2 Follow-Up Report in 2006, the Working Group noted that "Canada is the only Party to the Convention which has still not established

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84. OECD, *Canada: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (Paris: OECD, 2004) at 39, online: <[www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf](http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf)>.

85. Bill C-31, *An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act*, 2nd Sess, 40th Parl, 2009 (referred to Committee in the House of Commons on 27 November 2009).

nationality jurisdiction for the foreign bribery offence.”<sup>86</sup> Canada’s response was that the *OECD Convention* did not mandate the creation of nationality-based jurisdiction; Article 4 of the *OECD Convention* simply requires that Parties review whether their current basis for jurisdiction is effective to fight foreign bribery.<sup>87</sup> Canada took the position that the “real and substantial connection” test established in *Libman* has permitted Canada to extend its territorial criminal jurisdiction where circumstances warrant, and that in the one foreign bribery case concluded at the time, jurisdiction was not an issue.<sup>88</sup> However, Canada also stated that it was monitoring this aspect of its implementation, and that “if there was evidence that nationality jurisdiction is necessary to implement the Convention effectively,” Canada would reconsider its implementation.<sup>89</sup>

In its Phase 2 Follow-Up Report, the Working Group noted that its concern was based on the “much narrower” scope for territorial jurisdiction in Canada due to the requirement that there be “substantial” links between the elements of the offence and Canada.<sup>90</sup> Furthermore, the Working Group noted that Article 4.2 of the *OECD Convention* requires countries that have established nationality jurisdiction over other offences to apply it to the offence of foreign bribery, and that as Canada has nationality jurisdiction over several other offences, it should expand the scope of its jurisdiction in this context as well.<sup>91</sup>

Accordingly, the 2013 amendments established nationality-based jurisdiction for foreign bribery offences. Pursuant to the new section 5(1), Canada may take jurisdiction over offences committed outside of Canada where the person committing the offence was a Canadian citizen, permanent resident, or was incorporated (or otherwise formed or organized) in Canada.

#### 4. DEFINITION OF BUSINESS

By deleting the words “for profit” from the definition of “business,” the *CFPOA* as amended prohibits the paying of a bribe to obtain an advantage in business, whether that business is for-profit or not-for-profit. Importantly, this expands

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86. OECD, *Canada: Phase 2 Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions* (Paris: OECD, 2006) at 5, online: <[www.oecd.org/daf/anti-bribery/anti-briberyconvention/36984779.pdf](http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/36984779.pdf)> [OECD, *Phase 2 Follow-Up Report*].

87. *Ibid* at 21.

88. *Ibid*.

89. *Ibid*.

90. *Ibid* at 5.

91. *Ibid*.

the scope of the *CFPOA* to apply to the conduct of Canadian NGOs or other non-commercial entities.

Canada had originally resisted eliminating the “for profit” requirement; in its response to the OECD Working Group on Bribery, Canada indicated that it thought the *CFPOA*’s application to for-profit activity was in keeping with reference to “Business Transactions” or “*transactions commerciales*” in the title of the *OECD Convention*.<sup>92</sup> The Working Group disagreed, noting that the *OECD Convention* does not create a distinction between transactions that are for-profit and not-for-profit.<sup>93</sup>

## 5. ELIMINATION OF FACILITATION PAYMENTS EXCEPTION

The treatment of facilitation payments was an issue for several Parties to the *OECD Convention*. Nonetheless, in its Phase 3 Report the OECD Working Group concluded that Canada was failing to implement the (post-*OECD Convention*) recommendation<sup>94</sup> that Member countries periodically review their policies on and approach to facilitation payments.<sup>95</sup> The *2009 Recommendation* further recommended 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 ... .”<sup>96</sup>

The June 2013 amendments eliminate the *CFPOA*’s exception for facilitation payments. Canada’s response to the Phase 3 Report indicates that this amendment is a result of Canada’s completion of a review of its policies on and approaches to the issue of small facilitation payments.<sup>97</sup> However, this change will only come into force at a future date to be determined by the federal Cabinet, in order to give Canadian companies and individuals time to bring their internal controls and practices into compliance with the “zero tolerance” approach of the revised *CFPOA*.<sup>98</sup> At time of writing, no date for the entry into force of this amendment has been announced.

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92. *Ibid* at 20.

93. *Ibid* at 4.

94. OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transaction* (Paris: OECD, 2009), online: <[www.oecd.org/daf/anti-bribery/44176910.pdf](http://www.oecd.org/daf/anti-bribery/44176910.pdf)> [OECD, *2009 Recommendation*].

95. OECD, *Phase 3 Report*, *supra* note 59 at 16.

96. OECD, *2009 Recommendation*, *supra* note 94, art VI(ii).

97. OECD, *Canada: Follow-Up to the Phase 3 Report & Recommendations* (Paris: OECD, 2013) at 12-13, online: <[www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf](http://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf)> [OECD, *Follow-Up to Phase 3*].

98. *Ibid*.

## 6. BOOKS AND RECORDS OFFENCE

The 2013 amendments created a new and separate “books and records” offence, which criminalizes the creation or maintenance of secret, incomplete, or inaccurate books and records for the purpose of engaging in or hiding the bribery of foreign public officials. Under section 4 of the *CFPOA*, it is now an offence to keep secret accounts, falsely record, not record, or inadequately identify transactions, enter liabilities with incorrect identification of their object, use false documents, or destroy accounting books and records earlier than permitted by law, for the purpose of concealing bribery of a public official.<sup>99</sup> As a result, *CFPOA* liability can now flow from conduct relating to the financial records of a corporation made after an alleged corruption offence.

The introduction of this offence was intended to implement Article 8 of the *OECD Convention*, which requires that each State Party “provide effective, proportionate and dissuasive civil, administrative or criminal penalties” for omissions and falsifications of “the books, records, accounts and financial statements of such companies” that are done “for the purpose of bribing foreign public officials or of hiding such bribery.”<sup>100</sup> Although Canada maintained its position that the *Criminal Code* contains several provisions that are relevant to the Article 8 obligation, it reported that the amendments to the *CFPOA* supplemented the *Criminal Code* provisions and provided law enforcement with additional tools.<sup>101</sup>

The new books and records offence is potentially the most important recent Canadian development in promoting compliance. For the first time, senior corporate officials can incur liability under the *CFPOA* for their conduct after a corrupt incident if they participate in or turn a blind eye to a cover-up of past misconduct.

## E. DEBARMENT AND NON-CRIMINAL LAW MECHANISM

Canada also uses alternative administrative measures to promote compliance with anti-corruption laws through its provision of services to Canadian companies operating abroad and through public procurement policies. Since 2004, Export Development Canada (“EDC”) has had a policy of debarring companies from EDC support until the EDC considers that the company has taken appropriate

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99. *CFPOA*, *supra* note 5, s 4.

100. *OECD Convention*, *supra* note 1, art 8.

101. OECD, *Follow-Up to Phase 3*, *supra* note 97 at 10.



measures to deter further bribery.<sup>102</sup> Since late 2012, the department of Public Works and Government Services (“PWGSC”) (which administers procurement for the federal government) automatically disqualifies companies convicted of an offence under the *CFPOA* from federal government contracts.<sup>103</sup> In the spring of 2014, the PWGSC extended this policy to companies convicted of bribery offences in foreign jurisdictions and under foreign laws.<sup>104</sup> In 2015, the federal government introduced a new government-wide integrity regime for its procurement and real property transactions which responded to many of these criticisms.<sup>105</sup>

After these developments, Canada’s debarment regime came under some criticism for its broad scope, perceived inflexibility, and absence of sufficient due process mechanisms, among other things.<sup>106</sup> In its 2015 Budget, the federal government committed to introducing a new government-wide integrity regime for its procurement and real property transactions, and this further stage of review is scheduled to commence in 2016.<sup>107</sup>

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102. Export Development Canada, “EDC’s Anti-Corruption Policy Guidelines,” online: <[www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Documents/anti-corruption-guidelines.pdf](http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Documents/anti-corruption-guidelines.pdf)>.
103. Global Affairs Canada, *Fourteenth Annual Report to Parliament: Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act* (7 November 2013), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-14.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-14.aspx?lang=eng)> [Global Affairs Canada, *Fourteenth Annual Report*]. See also Public Works and Government Services Canada, “Ineligibility and Suspension Policy” (3 July 2015), online: <[www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html](http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html)>.
104. Public Works and Government Services Canada, “Backgrounder on the new government-wide integrity regime” (3 July 2015), online: <[www.tpsgc-pwgsc.gc.ca/ci-if/synopsis-backgrounder-eng.html](http://www.tpsgc-pwgsc.gc.ca/ci-if/synopsis-backgrounder-eng.html)>.
105. James Munson, “Ottawa makes anti-corruption waivers a condition of Trade Commissioner Service,” *iPolitics.ca* (9 December 2014), online: <[newcanadianmedia.ca/item/21941](http://newcanadianmedia.ca/item/21941)>.
106. Barrie McKenna, “Ottawa working to modify strict anti-corruption rules,” *The Globe and Mail* (27 January 2015), online: <[www.theglobeandmail.com/report-on-business/ottawa-working-to-modify-strict-anti-corruption-rules/article22661799](http://www.theglobeandmail.com/report-on-business/ottawa-working-to-modify-strict-anti-corruption-rules/article22661799)>.
107. Government of Canada, “Chapter 5.1 – Balancing the Budget and Reducing the Debt Burden” (21 April 2015), online: <[www.budget.gc.ca/2015/docs/plan/ch5-1-eng.html#Improving\\_the\\_Integrity\\_of\\_Federal\\_Procurement](http://www.budget.gc.ca/2015/docs/plan/ch5-1-eng.html#Improving_the_Integrity_of_Federal_Procurement)>.

### III. CANADA'S ENFORCEMENT RECORD TO DATE

As noted above, despite the entry into force of the *CFPOA* in February 1999,<sup>108</sup> there was no dedicated enforcement agency for most of the first decade of the *CFPOA*'s existence.<sup>109</sup> The *CFPOA* was originally drafted so that every police officer in the country (federal, provincial, or municipal) was empowered to investigate and lay charges pursuant to its provisions. Further, an entry-level prosecutor (federal or provincial) could prosecute the charges it created. This approach was fundamentally ineffective. By putting everyone in charge, it effectively left no one in charge. The result was that there was little real enforcement of Canada's international corruption law for the first decade of the *CFPOA*'s existence and scant attention was paid to the *CFPOA* by Canadian companies. Canada's lack of enforcement contrasted starkly with US *FCPA* enforcement through the 1990s and the dramatic upswing in convictions in the 2000s,<sup>110</sup> culminating in the record fine paid by Siemens in 2008 (eight hundred million USD).<sup>111</sup>

The situation changed in Canada in late 2007 and 2008. Following repeated criticism in the OECD peer-review process and TI's annual reviews, as well as Canada's ratification of the *UNCAC* in October 2007, the Canadian government established a dedicated International Anti-Corruption Team ("IACT") within the RCMP's Commercial Crime Branch.<sup>112</sup> The IACT consisted of two seven-person teams based in Ottawa (the nation's capital and the location of the centre of Canadian federal government as well as foreign embassies) and

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108. *CFPOA*, *supra* note 5, s 13.

109. In 2008, the RCMP established the International Anti-Corruption Unit, which was dedicated to the enforcement of the *CFPOA*. See Global Affairs Canada, "Strengthening Canada's Fight," *supra* note 60.

110. Shearman & Sterling LLP, "Recent Trends and Patterns in FCPA Enforcement" (March 2006) at 2, online: <[www.shearman.com/-/media/Files/NewsInsights/Publications/2006/03/Recent-Trends-and-Patterns-in-FCPA-Enforcement/Files/View-Full-Text/FileAttachment/LIT\\_032706.pdf](http://www.shearman.com/-/media/Files/NewsInsights/Publications/2006/03/Recent-Trends-and-Patterns-in-FCPA-Enforcement/Files/View-Full-Text/FileAttachment/LIT_032706.pdf)>.

111. US Securities and Exchange Commission, Press Release, 2008-294, "SEC Charges Siemens AG for Engaging in Worldwide Bribery" (15 December 2008), online: <[www.sec.gov/news/press/2008/2008-294.htm](http://www.sec.gov/news/press/2008/2008-294.htm)>. The 800 million USD refers to fines paid to US authorities only (*ibid*). Siemens also paid 854 million USD to German authorities (*ibid*). See also Jeffrey J Meagher & Matthew J Fader, "Siemens Pays Record \$800 Million to Settle Foreign Corrupt Practices Act Charges" (23 December 2008), online: <[www.klgates.com/siemens-pays-record-800-million-to-settle-foreign-corrupt-practices-act-charges-12-23-2008](http://www.klgates.com/siemens-pays-record-800-million-to-settle-foreign-corrupt-practices-act-charges-12-23-2008)>.

112. Fritz Heimann & Gillian Dell, *Progress Report 2008: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Berlin: Transparency International, 24 June 2008) at 18, online: <[archive.transparency.org/regional\\_pages/americas/conventions/report\\_card](http://archive.transparency.org/regional_pages/americas/conventions/report_card)>.

Calgary (the centre of Canada's extractive industries and the corporate home of many companies operating in high-risk jurisdictions). Its purpose was to focus on detecting, investigating, and preventing international corruption (including bribery, embezzlement, and laundering of the proceeds of crime), particularly in the public sector. The two teams were coordinated and overseen by a dedicated senior RCMP officer—the Officer in Charge of Sensitive Investigation and International Corruption—a position established by the RCMP in 2005.<sup>113</sup>

The result was a predictable rise in Canadian enforcement activity. The latest report to Parliament on Canada's implementation of the OECD Convention, tabled in February 2016, disclosed that the RCMP had twelve active CFPOA investigations underway.<sup>114</sup> This compares to twenty-seven investigations in October 2014,<sup>115</sup> and thirty-six active investigations at the time of the previous report to Parliament in November 2013.<sup>116</sup> While the 2016 report indicates a decrease in active investigations, it is unclear whether this reflects an overall decrease in enforcement resources dedicated to anti-corruption matters, or a focus on fewer, larger and more complex investigations. Given that the Canadian economy is one-tenth the size, these figures compare favourably with the United States, where the number of active investigations is believed to be between 83 and 150.<sup>117</sup>

Both federal and provincial Crown prosecutors can prosecute *CFPOA* offences. However, since mid-2012, the RCMP appears to have taken a policy decision to refer *CFPOA* matters exclusively to the Public Prosecution Service of Canada ("PPSC"), which represents the federal Crown in criminal prosecutions. The PPSC has designated senior counsel to coordinate *CFPOA* matters and in

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113. *Ibid* at 4.

114. Global Affairs Canada, *Sixteenth Annual Report to Parliament: Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act* (4 February 2016), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-16.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-16.aspx?lang=eng)> [Global Affairs Canada, *Sixteenth Annual Report*].

115. Global Affairs Canada, *Fifteenth Annual Report to Parliament: Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act* (3 October 2014), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-15.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-15.aspx?lang=eng)> [Global Affairs Canada, *Fifteenth Annual Report*].

116. Global Affairs Canada, *Fourteenth Annual Report*, *supra* note 103.

117. Richard L. Cassin, "The Corporate Investigations List (April 2016)" (5 April 2016), *The FCPA Blog* (blog), online: <<http://www.fcpablog.com/blog/2016/4/5/the-corporate-investigations-list-april-2016.html>>.

March 2014 issued a guideline that emphasized the importance of coordinating the prosecution of *CFPOA* offences at a national level.<sup>118</sup>

In addition, over the same time period, two parallel trends converged to make anti-corruption an important priority for the Canadian corporate community. First, the fact that many of Canada's largest companies are cross-listed on US stock exchanges made them subject to the *FCPA*. Increasing enforcement in the United States prompted US-listed Canadian companies to implement greater compliance measures. Second, US purchasers' and lenders' potential *FCPA* exposure led to more robust due diligence in acquisitions of Canadian companies and in corporate finance involving US lenders. The next section presents an overview of key milestones in Canada's enforcement record to date.

#### A. THE EARLY YEARS: HYDRO-KLEEN

As noted above, there was little active enforcement of the *CFPOA* during the first decade of its existence. The first case concluded in Canada involved illegal payments of 28,299.88 CAD by Hydro Kleen Systems Inc. ("Hydro Kleen") to a US immigration official working at the Calgary International Airport.<sup>119</sup> In return for these payments, the official advised Hydro Kleen's employees on how to use work visas to obtain entry into the United States.<sup>120</sup> Unbeknownst to the company, the official also obstructed the entry of Hydro Kleen's competitors' personnel into the United States.<sup>121</sup>

The bribery scheme came to light due to complaints from a competitor whose personnel were turned back at the Calgary airport.<sup>122</sup> The competitor hired a private investigator and turned over evidence to the RCMP, which pursued the investigation and ultimately laid charges of bribery against the company, its president, an employee, and the US official.<sup>123</sup> The court fined Hydro Kleen 25,000 CAD pursuant to a negotiated plea,<sup>124</sup> and the charges against the president and the employee were stayed.<sup>125</sup> The US official was sentenced to six months imprisonment on each count<sup>126</sup> and was deported to the United

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118. PPSC, "Corruption of Foreign Public Officials," *supra* note 71 at 1-3.

119. *R v Watts*, [2005] AJ No 568 (QL) at para 20 (QB) [*Hydro Kleen*].

120. *Ibid* at paras 56-57.

121. *Ibid* at paras 61-64.

122. TRACE Anti-Bribery Compliance Solutions, "Trace Compendium: Hydro Kleen" (2015), online: <[www.traceinternational2.org/compendium/view.asp?id=128](http://www.traceinternational2.org/compendium/view.asp?id=128)>.

123. *Ibid*. See also *Hydro Kleen*, *supra* note 119 at paras 41, 43.

124. *Ibid* at para 189.

125. *Ibid* at paras 82, 189.

126. *R v Garcia*, 2002 ABPC 156 at para 32, 325 AR 85.

States.<sup>127</sup> This light sentence and relatively minor fine indicated how far Canada was from the kind of active enforcement seen in other jurisdictions, including the United States.

## B. THE SECOND WAVE: INVESTIGATIONS AND PROSECUTIONS IN THE PUBLIC EYE

Throughout the 2000s, Canada's enforcement record remained bare, with the *Hydro Kleen* prosecution being the only case prior to 2010. However, after dedicated law enforcement resources were devoted to anti-corruption in 2008, there was a noticeable upswing in enforcement activity. For example, in 2010, the RCMP laid charges against Mr. Nazir Karigar under paragraph 3(1)(b) of the *CFPOA* for allegedly making a payment to an Indian government official to secure a multi-million dollar procurement contract for Cryptometrics, a Canadian high-tech firm.<sup>128</sup> These charges resulted in Canada's first contested trial under the *CFPOA* in 2013, as discussed below. In 2011, the RCMP executed a search warrant against Blackfire Exploration, a junior Calgary-based mining company, reportedly after receiving a complaint from mining watchdog NGOs.<sup>129</sup> Also in 2011, the RCMP executed search warrants at the offices of SNC-Lavalin Group Inc. in Oakville, Ontario in relation to its investigation into alleged corruption in the World Bank-funded Padma Bridge project in Bangladesh.<sup>130</sup> However, notwithstanding the importance of these developments and the benefit of the public having an opportunity to learn of them through RCMP press releases and media coverage, there was little reason for most companies to suspect how high the stakes were about to become.

In June 2011, Niko Resources Ltd. ("Niko"), a Canadian public company in the oil and gas exploration sector, pleaded guilty to one count of bribery based on events that occurred in 2005.<sup>131</sup> The guilty plea was entered with an agreed statement of facts in the Alberta Court of Queen's Bench, where Niko admitted

127. OECD, *Phase 2 Follow-Up Report*, *supra* note 86 at 26.

128. *Karigar*, Trial Decision, *supra* note 65 at paras 1-2.

129. Les Whittington & Brett Popplewell, "Mining watchdogs want probe," *The Toronto Star* (10 March 2010), online: <[www.thestar.com/news/canada/2010/03/10/mining\\_watchdogs\\_want\\_probe.html](http://www.thestar.com/news/canada/2010/03/10/mining_watchdogs_want_probe.html)>.

130. See Greg McArthur, "RCMP raid Calgary miner over bribery allegations," *The Globe and Mail* (29 August 2011), online: <[www.theglobeandmail.com/news/national/rcmp-raid-calgary-miner-over-bribery-allegations/article542841](http://www.theglobeandmail.com/news/national/rcmp-raid-calgary-miner-over-bribery-allegations/article542841)>. See also Ross Marowits, "SNC-Lavalin faces new bribery allegations," *Metro* (15 May 2013), online: <[metronews.ca/news/canada/673053/snc-lavalin-faces-new-bribery-allegations](http://metronews.ca/news/canada/673053/snc-lavalin-faces-new-bribery-allegations)>.

131. *Niko*, *supra* note 63 at para 1.

to having attempted to influence the then-Bangladeshi State Minister for Energy and Mineral Resources by providing a vehicle for his personal use, valued at 190,984 CAD, and paying the travel costs for him to attend an Energy Expo in Calgary and a subsequent personal trip to New York, valued at 5,000 CAD.<sup>132</sup> These benefits were allegedly paid to obtain the minister's support in relation to the negotiation of a gas purchase and sale agreement with a state enterprise and mitigation of the fallout resulting from a gas blowout at one of Niko's sites in Bangladesh.<sup>133</sup> The RCMP learned of the potential *CFPOA* violations through reports from DFAIT.<sup>134</sup>

The Crown was unable to prove that any influence was obtained as a result of providing these benefits.<sup>135</sup> Nonetheless, and notwithstanding the Crown's acknowledgement of Niko's cooperation with the RCMP investigation and guilty plea before charges were formally laid, Niko was sentenced to pay a significant fine: 8.3 million CAD plus a fifteen per cent victim surcharge, for a total penalty of 9.5 million CAD. In addition, Niko was subject to a significant probation order, which required the company to undertake audits of its compliance with anti-corruption laws under court supervision for three years.<sup>136</sup> Indeed, the terms of the order provide a roadmap for other companies looking to understand what robust corporate anti-corruption compliance might look like.

Less than two years later, Canada would mark its second significant prosecution. In January 2013, Griffiths Energy International Inc. ("Griffiths") entered a guilty plea on one count of bribery contrary to the *CFPOA*.<sup>137</sup> Griffiths admitted to having paid a two million CAD success fee to a company controlled by the wife of the ambassador to Canada of the Republic of Chad in connection with securing an oil and gas concession in the African country.<sup>138</sup> The Crown did not allege and Griffiths did not admit that any influence was actually realized as a result of these payments.<sup>139</sup> Indeed, when Griffiths's new board and management learned of the corrupt arrangements after a significant change in personnel at the

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132. See *R v Niko Resources Ltd* (2011), 101 WCB (2d) 118, [2012] AWLD 4536 (QB) (Agreed Statement of Facts at paras 4-5) [*Niko*, Agreed Statement of Facts].

133. *Ibid* at para 58.

134. *Ibid* at para 45.

135. *Ibid* at para 58.

136. *Niko*, *supra* note 63 at para 21.

137. *Griffiths*, *supra* note 64 at para 5.

138. *Ibid* at para 7.

139. *R v Griffiths Energy International*, [2013] AJ No 412 (QL) (QB) (Agreed Statement of Facts at para 50) [*Griffiths*, Agreed Statement of Facts].

top levels of the company, the new leadership undertook an internal investigation and shared these results with the PPSC and RCMP.<sup>140</sup>

Griffiths was fined 9 million CAD plus a 15 per cent victim surcharge for a total penalty of 10.35 million CAD.<sup>141</sup> This significant fine was levied notwithstanding the fact that the company voluntarily disclosed the matter to the Canadian and US authorities when it came to the attention of new management and cooperated fully in the RCMP investigation.<sup>142</sup> In fact, the court's reasons suggest that the fine would have been considerably higher in the absence of the voluntary disclosure and Griffiths's cooperative conduct.<sup>143</sup>

Once underway, Canadian enforcement increased rapidly. There have been two corporate convictions with substantial monetary penalties (*Niko* and *Griffiths*), one individual convicted and sentenced to three years' imprisonment (*Karigar*), as well as the use of a variety of enforcement and investigative tools in addition to the search warrants mentioned above—including the use of anti-money laundering proceedings under the *Criminal Code* to seize assets related to corruption; a grant of immunity to a corporate official in exchange for providing evidence for prosecution under the *CFPOA*; the issuance of numerous *Criminal Code* production orders by the courts in *CFPOA* cases; and formal enforcement cooperation with the US Securities and Exchange Commission, US Department of Justice, UK Serious Fraud Office, Swiss Attorney General, and other foreign law enforcement agencies in international corruption cases, including repeated use of Mutual Legal Assistance Treaties.

### C. TESTING THE *CFPOA*: *KARIGAR* AND PENDING *SNC-LAVALIN* CASES

*Niko* and *Griffiths* sent strong signals to the Canadian business community that *CFPOA* enforcement was active and serious. However, because both cases proceeded by way of what amounts to a negotiated settlement, no legal issues came before the courts to test the limits and contours of the legislation. When the first contested cases began to work their way through the courts in 2013 and 2014, Canadian judges started to have the opportunity to clarify significant principles relevant to anti-corruption law in Canada.

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140. *Ibid* at paras 41-43.

141. See *Griffiths*, *supra* note 64.

142. *Ibid* at paras 15-17.

143. *Griffiths*, Agreed Statement of Facts, *supra* note 139 at paras 52-56.

1. *R V KARIGAR*—TRIAL AND SENTENCING DECISIONS

In June 2013, Nazir Karigar, a Canadian citizen, was found guilty of bribery under the *CFPOA* for an agreement to pay bribes to certain officials of Air India and the Indian Minister of Civil Aviation with regard to the procurement of an airport security system. Mr. Karigar had acted as an agent for Cryptometrics Canada, a Canadian technology company.<sup>144</sup> In contesting the case against him, Mr. Karigar argued that (1) the Crown had not adduced sufficient evidence to establish the *actus reus* of the offence because the Crown failed to present any evidence regarding the actual payment of sums to foreign public officials<sup>145</sup> and (2) that Canada can only assert territorial jurisdiction over the matter if there is a real and substantial connection between the essential elements of the offence and Canada.<sup>146</sup>

With respect to the first issue, Justice Hackland of the Ontario Superior Court of Justice concluded that the use of the verb “agree” in the phrase “agrees to give or offer” in section 3(1) imports the concept of conspiracy into the *CFPOA* such that an agreement by persons to give or offer a bribe to a foreign public official is a violation of the Act, whether or not there is proof that the public official was offered or received the bribe.<sup>147</sup>

With respect to the second issue, Justice Hackland concluded that the “real and substantial connection” test does not require that all of the essential elements of the offence have a substantial connection to Canada. Instead, Justice Hackland analyzed the tainted transaction as a whole, noting that it included a Canadian company and an agent (Mr. Karigar) who was for many years a Canadian business resident.<sup>148</sup> Although the “directing minds” of the corrupt transaction were based in New York and the dealings with public officials occurred in India,<sup>149</sup> at the relevant time, Mr. Karigar was employed by the Canadian company and the advantage that would have been obtained by the payment of bribes was for the benefit of the Canadian company. Cryptometrics Canada would have been a party to the contemplated procurement contract, and much of the work would have been done by its employees in Ottawa.<sup>150</sup>

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144. *Karigar*, Trial Decision, *supra* note 65 at para 1.

145. *Ibid* at paras 21-22.

146. *Ibid* at paras 34, 37.

147. *Ibid* at paras 28-29, 33.

148. *Ibid* at para 39-40.

149. *Ibid* at para 38.

150. *Ibid* at para 40.



The *Karigar* interpretation is consistent with the earlier position taken by Canada with respect to its implementation of the *CFPOA* that the “real and substantial connection” test need not be interpreted so narrowly as to present a barrier to the effective prosecution of *CFPOA* offences. The finding in *Karigar* is important despite the introduction of nationality jurisdiction in 2013 since the “real and substantial connection” test still applies to the activities of non-Canadian companies and individuals for the purposes of the application of the *CFPOA*.

Following the trial and subsequent guilty verdict, Mr. Karigar was sentenced to three years’ imprisonment in April 2014.<sup>151</sup> In June 2014, the RCMP laid charges against three foreign nationals believed to have assisted in the bribery scheme, and Canada-wide warrants for these individuals remain outstanding.<sup>152</sup>

## 2. *SNC-LAVALIN*: INVESTIGATIONS AND FIRST CHARGES

Corruption investigations into the activities of SNC-Lavalin Group Inc. (“SNC”) have received a significant amount of media attention since the RCMP executed a search warrant at SNC premises in September 2011 in relation to the Padma Bridge construction project in Bangladesh.<sup>153</sup> In addition to the Padma Bridge project, SNC has been under investigation in relation to public contracts in Libya as well as a high profile public construction project in Canada.<sup>154</sup>

In 2012, the RCMP arrested and charged two former SNC employees; after a preliminary inquiry in April 2013, both individuals were committed to stand trial, although the details of the case are subject to a publication ban.<sup>155</sup> That same year, the RCMP charged a former senior vice-president of SNC and two other individuals under the *CFPOA* in connection with the Padma Bridge

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151. *Karigar*, Sentencing Decision, *supra* note 66 at para 37.

152. Royal Canadian Mounted Police, Press Release, “RCMP Charge Individuals with Foreign Corruption” (4 June 2014), online: <[www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2014/0604-corruption-eng.htm](http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2014/0604-corruption-eng.htm)>; Global Affairs Canada, “Fifteenth Annual Report,” *supra* note 114.

153. Marowits, *supra* note 129.

154. See Graeme Hamilton, “RCMP charges SNC-Lavalin with fraud and corruption linked to Libyan projects,” *Financial Post* (19 February 2015), online: <[business.financialpost.com/news/rcmp-charges-snc-lavalin-with-fraud-and-corruption-linked-to-libyan-projects](http://business.financialpost.com/news/rcmp-charges-snc-lavalin-with-fraud-and-corruption-linked-to-libyan-projects)>. See also Tristin Hopper, “Federal agency boss took \$1.5M in kickbacks from SNC-Lavalin contract to restore Montreal bridge, report alleges,” *National Post* (13 February 2014), online: <[news.nationalpost.com/news/canada/federal-agency-boss-took-1-5m-in-kickbacks-from-snc-lavalin-contract-to-restore-montreal-bridge-report](http://news.nationalpost.com/news/canada/federal-agency-boss-took-1-5m-in-kickbacks-from-snc-lavalin-contract-to-restore-montreal-bridge-report)>.

155. Global Affairs Canada, *Fifteenth Annual Report*, *supra* note 115. See also Marowits, *supra* note 1.

investigation.<sup>156</sup> In April 2014, the Ontario Superior Court found that Canada lacked adjudicative jurisdiction over one of these individuals, a Bangladeshi national who was not present in Canada and who lacked any citizenship or residency ties to Canada.<sup>157</sup> Although Canadian courts may have jurisdiction over the offence, unless and until the accused is physically present in Canada, or Bangladesh offers to surrender him to Canada, Canadian courts do not have jurisdiction over his person.<sup>158</sup> Accordingly, the prosecution against the Bangladeshi national has been stayed while the others continue. Prosecutions and investigations also continue with respect to alleged payments to third parties relating to public contracts in Libya; although charges have been laid, none of the Libya-related matters has yet proceeded to trial.<sup>159</sup>

In February 2015, the RCMP laid fraud and corruption charges against SNC, its division SNC-Lavalin Construction Inc., and its subsidiary SNC-Lavalin International Inc.<sup>160</sup>

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156. Royal Canadian Mounted Police, Press Release, "RCMP Charge Former SNC Lavalin Senior Executive" (18 September 2013), online: <[www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2013/0918-lavalin-eng.htm](http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2013/0918-lavalin-eng.htm)>. See also Global Affairs Canada, *Fifteenth Annual Report*, *supra* note 114.
157. *Chowdhury v Canada*, 2014 ONSC 2635 at paras 6, 39, 52, 57, 309 CCC (3d) 447.
158. *Ibid* at para 54.
159. See Milos Barutciski, Matthew S Kronby & Sabrina A Bandali, "Canada Lays Corruption and Fraud Charges Against SNC-Lavalin" (19 February 2015), *Bennett Jones Thought Network* (blog), online: <[blog.bennettjones.com/2015/02/19/canada-lays-corruption-fraud-charges-snc-lavalin](http://blog.bennettjones.com/2015/02/19/canada-lays-corruption-fraud-charges-snc-lavalin)>. In April 2012, the RCMP executed a search warrant at SNC headquarters pursuant to a mutual legal assistance request by the Swiss authorities (*ibid*). The Swiss authorities had arrested a former executive vice-president of SNC for money laundering and corruption, and in August 2014, they reached a plea deal that saw the executive plead guilty in October 2014 to bribery in exchange for the twenty-nine months of incarceration he served and an order to repay millions of dollars to SNC (*ibid*). Two weeks later, the executive was extradited to Canada, where he is expected to face prosecution of the domestic corruption charges laid against him in relation to a large public construction project in Quebec (*ibid*). In February 2014, the RCMP laid charges against a former executive vice-president of construction and a former vice-president and financial controller in relation to the Libya corruption allegations (*ibid*). In September 2014, the RCMP laid additional charges against the former executive vice-president for obstructing justice and against a Canadian lawyer for obstructing justice and extortion, alleging that the two men sought to obtain a statement from the former executive vice-president detained in Switzerland in exchange for money (*ibid*). See also Royal Canadian Mounted Police, Press Release, "Charges Laid in Project Assistance" (10 September 2014), online: <[www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2014/0910-assistance-eng.htm](http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2014/0910-assistance-eng.htm)>.
160. Royal Canadian Mounted Police, Press Release, "RCMP Charges SNC-Lavalin" (19 February 2015), online: <[www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm](http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm)>.

## IV. FUTURE DIRECTIONS AND CONCERNS

### D. THE CHALLENGE FOR CANADIAN BUSINESS

As Canadian business looks to expand in new markets in the twenty-first century, it is inevitable that companies will look to emerging markets. While offering lucrative business opportunities, many developing countries suffer from weak institutions and an uncertain commitment to the rule of law. This is particularly acute in resource-rich regions where Canadian businesses have a competitive advantage (*e.g.*, mining and energy expertise). Canadian companies are increasingly adopting more robust anti-corruption compliance policies to respond to the scrutiny of international anti-corruption enforcement agencies and to provide some initial protection in light of their obligations under the *CFPOA*. However, this trend towards enhancing compliance mechanisms is still in its early stages, and companies are prone to adopting formal measures rather than establishing deeply-rooted compliance cultures.

Nonetheless, the increase in enforcement levels and awareness by businesses and their legal and financial advisors is leading to significant changes in compliance and transaction practices. These changes include more exacting corruption-related representations and warranties, conditionality, covenants, and indemnities in M&A and finance agreements; increasingly detailed due diligence by buyers and lenders; more process-driven compliance mechanisms (reporting and approval requirements); tighter internal controls as companies become more familiar with the qualitative functions of enterprise software; and a growing cadre of experienced Canadian specialist professionals (lawyers, accountants, compliance professionals, and internal investigators).

Increasing enforcement by the RCMP prompts greater compliance efforts by Canadian companies. So too does the need to satisfy capital markets that the company business is sustainable and that potential foreign lenders, joint venture partners, and acquirers will not be buying a liability when they invest in a Canadian business. Canadian companies that are issuers in the United States are also subject to the jurisdiction of US anti-corruption laws and potential criminal and civil enforcement actions by the US Department of Justice or Securities and Exchange Commission, respectively. Resource transparency initiatives, such as

those undertaken by the United States,<sup>161</sup> the European Union,<sup>162</sup> and Canada,<sup>163</sup> also dovetail with the evolution of compliance culture, particularly in the resource sector. Similarly, public outrage at corruption-related scandals reported by the media also contributes to greater corporate sensitivity to potential corruption issues. However, Canadian businesses will also feel countervailing pressure as they expand in more challenging markets and compete more frequently with multinationals and SOEs from countries that do not have the same level of commitment to anti-corruption enforcement. Thus, the same frustrations that prompted the US business community to advocate for an international anti-corruption agreement can similarly be expected to motivate peers in other countries seeking to level the global playing field with respect to the supply side of bribery transactions.

#### E. LIMITATIONS OF THE OECD CONVENTION APPROACH AND FUTURE DIRECTIONS

As the above analysis indicates, Canada's enforcement of the *CFPOA* has taken on significant momentum since 2008 in addressing the supply side of bribery transactions involving Canadian companies. However, the *OECD Convention* and the laws inspired by it are not a complete solution to the issue of bribery and corruption in international business. In the following section, we summarize some of the limitations of the *OECD Convention's* approach and possible future directions.

First, the predominant focus on supply-side corruption is a significant limitation to the effectiveness of the *OECD Convention*. Prominent signatories did not view the *OECD Convention* as a final solution to bribery and corruption in international business.<sup>164</sup> Indeed, following the adoption of the *OECD Convention*, the United States pursued demand-side initiatives, including the encouragement of global norms and regional and bilateral efforts.<sup>165</sup> Members of the business community believed that the *OECD Convention* should have

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161. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, 124 Stat 1376 (2010).

162. EC, *Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC*, [2013] OJ, L182/19, art 44.

163. *Extractive Sector Transparency Measures Act*, SC 2014, c 39.

164. *Battling International Bribery*, *supra* note 13 at vi-vii.

165. *Ibid* at vii.

extended to “international bribery in the private sector and bribery of foreign officials for purposes other than to obtain or retain business.”<sup>166</sup> Moreover, the composition of the international business community has significantly changed. When the *OECD Convention* came into force in 1999, there were few multinational corporations from outside the OECD countries. Today, leading multinationals from China, Russia, India, Brazil, Malaysia, Indonesia, and many other non-OECD countries compete vigorously in international business.

The *OECD Convention’s* scope is problematic. While non-OECD countries are beginning to adopt foreign bribery laws, the record to date is still weak and enforcement is virtually non-existent. As a result, one of the motivations for the adoption of the *OECD Convention*—to level the playing field between international companies—is under increasing pressure.

In addition, the *OECD Convention* fails to resolve the practical realities faced by the international business community. No matter how sophisticated the compliance systems are, business is not conducted in situations of perfect control. When confronted with bribe solicitation or extortion by a corrupt official, business executives are faced with a sharp dilemma: resist and jeopardize the company’s business objectives or succumb and jeopardize the company’s (and the executive’s own) legal exposure. Even if the company has a robust compliance culture, resisting corrupt practices inevitably results in a significant diversion of employee time and corporate resources. Instead of doing business, employees find themselves spending time reporting to lawyers and compliance officers, filling out due diligence forms, and assisting internal investigations. In addition to the effort needed to maintain robust compliance, so long as the temptation to succumb to a bribe solicitation in order to gain a business advantage exists, determined individuals may succeed in circumventing internal controls, leading to both potential liability and further investigative and compliance costs. Fundamentally, companies face a continuing challenge of allocating scarce resources among competing priorities and have to weigh the cost, benefits, and risks they face when determining how robust they can afford their anti-corruption efforts to be.

This reality supports the position that there is a need to make greater efforts to address demand-side corruption. A striking imbalance exists between the effort and resources devoted to addressing supply-side and demand-side corruption. While OECD Members have committed substantial resources to investigating and prosecuting international bribery, they have devoted little to developing mechanisms that will assist their companies when confronted with bribe solicitation or extortion. Admonishing private enterprises to “just say no” and

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166. OECD, *Review of the 1994 Recommendation*, *supra* note 40 at 10.

pointing to the applicable laws is of little practical assistance. Some bodies, such as the United Nations Office on Drugs and Crime, have issued practical guides that address demand-side issues, but these remain dependent on the willingness of governments to address corruption internally.<sup>167</sup>

If the international community could reach a sustained consensus to address the demand-side of bribery transactions as they have with supply-side corruption, international mechanisms could be developed to assist companies trying to behave ethically, furthering the gains made in the development of corporate compliance efforts to date. What is needed is a menu of tools that would allow companies confronted by corruption to obtain the international community's assistance in resisting such corruption without exposing their entire investment in the host country to ransom. This challenge goes beyond the scope of criminal law. We offer the following suggestions for future examination and development.

First, international organizations such as the UN and its various agencies could explore the establishment of a high-level contact point for reports of bribe solicitation and the development of a registry of official corruption. Similar to the "name and shame" logic of peer-review systems used to assess legislative compliance with and enforcement of international anti-corruption conventions, such a registry could create an internationally-accessible record of historic country risk based on bribe solicitations themselves.

Second, countries could explore the development of collective action through a joint diplomatic mechanism that addresses persistent bribe solicitations or endemic corruption. For example, there have been discussions within the OECD, TI, the Business 20 summit, and other fora regarding the establishment of a high-level reporting mechanism that would allow companies faced with bribe solicitation or extortion to bring the matter to the attention of high levels of government through an independent channel. This proposal could also be extended and internationalized by enabling a multilateral forum to respond to such allegations. The implementation of such a mechanism would require a serious commitment on the part of the countries involved—at the very highest level—to combating corruption and to protecting companies invoking the procedure from retaliation.

Third, the *OECD Convention* and other international agreements encourage states to adopt nationality-based jurisdiction over their companies' international conduct. A measure of symmetry would be provided by conferring limited

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167. See e.g. UNODC, *Technical Guide to the United Nations Convention against Corruption* (New York: UN, 2009), online: <[www.unodc.org/documents/corruption/Technical\\_Guide\\_UNCAC.pdf](http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf)>.

jurisdiction on the bribe payer's country over the bribe solicitor (*i.e.*, the corrupt foreign official). Although criminal jurisdiction is likely not feasible, including as a result of international comity and sovereign equality, there may be other forms of enforcement or jurisdiction that strike an appropriate balance. For example, civil jurisdiction backed by banking and travel sanctions could be equally effective if enforced multilaterally.

Finally, official corruption could be introduced as a cause of action in international investment treaties. This would protect businesses that are committed to ethical conduct by affording them a mechanism to seek redress for the loss of business or other harm that may result from resisting a bribe solicitation.

These measures may not be easy to develop or implement and may not garner an international consensus any time soon. However, there is ample scope for international efforts against demand-side corruption just as there was against supply-side corruption. Moreover, unless the demand-side is addressed, the achievements on the supply-side may well risk being eroded over time, to everyone's detriment.

The focus on supply-side corruption has led to important results evidenced by the substantial resources committed to corporate compliance, training, internal controls, and internal investigations. Robust compliance policies and internal controls impose costs that go beyond the direct costs of their implementation. However, they also impose transaction costs indirectly through the diversion of management's attention away from business decision making and through the delays caused by the adherence to formal compliance obligations such as due diligence and reporting. Companies incur these costs even where the risks are less significant or non-existent. At the same time, even the most robust compliance regimes can be circumvented if the incentives are high enough and the circumventers devote sufficient effort. As in all areas of public policy, it is important to make sure that limited resources are allocated efficiently. The effort devoted to fighting supply-side corruption will ultimately result in a misallocation of scarce resources and a reversal of its results, unless it is matched by an equivalent effort on the demand side.