Implementing the OECD Anti-Bribery Convention in Canada

Phase 4 report

OECD

This Phase 4 Report on Canada by the OECD Working Group on Bribery evaluates and makes recommendations on Canada's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 12 October 2023.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability and international co-operation, as well as covering unresolved issues from prior reports.

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Executive Summary

This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions evaluates and makes recommendations on Canada's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report details Canada's particular achievements and challenges in this regard, including with respect to enforcement of anti-foreign bribery laws, as well as the progress that Canada has made since its Phase 3 evaluation of March 2011.

The Working Group welcomes the important legislative reforms undertaken by Canada to enhance its foreign bribery framework since 2011, including increasing the sanctions available, repealing the facilitation payment exemption, and introducing nationality jurisdiction under the Corruption of Foreign Public Officials Act (CFPOA). In addition, Canada has introduced the Remediation Agreement (RA) framework, a non-conviction-based resolution mechanism that aims to bolster enforcement against companies by encouraging voluntary disclosure to, and cooperation with, law enforcement authorities. Noting that only one foreign bribery case has been resolved through an RA since its introduction in 2018, the Working Group encourages Canada to ensure that the mechanism reaches its full potential, including by issuing appropriate guidance and ensuring that it is not undermined by conflicting administrative policies. The Working Group also welcomes the updated prosecutorial guidelines which clarify that factors prohibited by the Anti-Bribery Convention (i.e., national economic interest, the potential effect upon relations with another State or the identity of the accused) must not be taken into account in prosecuting foreign bribery cases, or when inviting companies to enter into an RA.

Despite these commendable steps, enforcement of the foreign bribery offence remains exceedingly low 25 years after the adoption of the CFPOA, considering the size of Canada's economy and the industrial sectors in which its companies operate. Since the entry into force of the CFPOA in 1999, charges have been laid in only nine cases, and conclusion of foreign bribery cases with sanctions remains scarce, with only two individuals convicted for foreign bribery and four companies sanctioned. The sharp increase in the number of foreign bribery investigations reportedly opened since Phase 3, although encouraging, is offset by the high proportion of discontinued investigations. Due to the limited case information publicly available, the root causes of the deficiencies in detecting, investigating and prosecuting foreign bribery, are difficult to pinpoint. The recent pattern of restrictive court interpretation of the CFPOA is also a source of concern calling for action. In addition to enhancing its detection capacity, the Working Group thus calls on Canada to conduct an analysis of its foreign bribery enforcement actions to date to identify the challenges that may impede effective investigation and prosecution of the foreign bribery and related offences, and to develop an action plan to address these. As a starting point, Canadian agencies and law enforcement should collect comprehensive data on how foreign bribery is detected, investigated, prosecuted, and sanctioned, with a view to assessing the impact of its policies and making informed adjustments as necessary based on priority areas. Furthermore, the Working Group recommends that Canada promptly provide the public with easily accessible information on important elements of resolved foreign bribery cases. This, along with publication of data, would contribute to raising awareness, building much needed trust in the existing framework, and generally enhancing CFPOA enforcement.

The report and its recommendations reflect the findings of experts from Austria and New Zealand and were adopted by the Working Group on 12 October 2023. It is based on legislation, data and other materials provided by Canada, as well as research conducted by the evaluation team. Information was also obtained during an on-site visit to Toronto and Ottawa in May-June 2023, during which the evaluation team met representatives of Canada's public and private sectors, law enforcement, media, and civil society. Ahead of the on-site visit, the evaluation team received relevant written submissions from academia and civil society organisations, all of which are publicly accessible and referenced in this report. Canada will submit a written report in two years on the implementation of all recommendations and its enforcement efforts.

1. Introduction

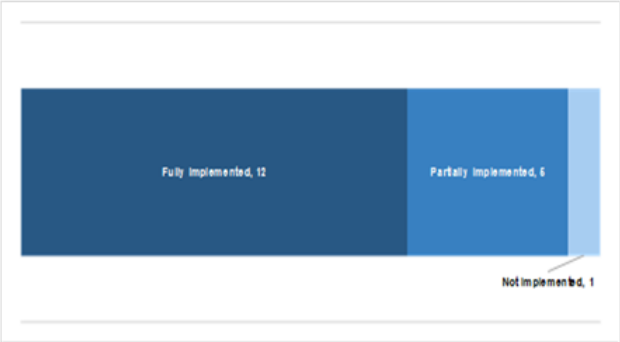
1. In October 2023, the Working Group on Bribery in International Business Transactions (Working Group or WGB) concluded its fourth evaluation of Canada's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation) and related instruments.

1.1. Previous evaluations of Canada by the Working Group on Bribery

2. The Working Group, composed of the 45 countries Party to the OECD Anti-Bribery Convention,[1] conducts successive phases of peer-review evaluations to monitor all Parties' implementation and enforcement of the Convention and related instruments. Since Phase 2, evaluations have included an on-site visit to obtain governmental and non-government views in the evaluated country. The evaluated country may comment on but not veto the evaluation report and recommendations. Evaluation reports are published on the OECD website.

3. The last full evaluation of Canada in Phase 3 dates to March 2011. In 2013, the Working Group concluded that, of the 18 recommendations resulting from the Phase 3 evaluation, 12 were fully implemented, 5 partially implemented, and 1 not implemented (see Annex B).[2]

Figure 1. Canada's implementation of Phase 3 recommendations



Box 1. Previous Working Group on Bribery Evaluations of Canada

2013 Phase 3 follow-up report

2011 Phase 3 report

2006 Phase 2 follow-up report

2004 Phase 2 report

1990 Phase 1 report

[1] As of October 2023, the Working Group includes the 38 OECD countries + 7 non-members.

[2] The Working Group determined that Canada had fully implemented recommendations 1, 3 and 4(e)(i) in its Phase 3 additional written follow-up report (March 2014) [DAF/WGB/M(2014)1/FINAL].

1.2. Phase 4 process and on-site visit

4. The monitoring process is based on principles agreed by the Parties. Phase 4 evaluations focus on the cross-cutting issues of enforcement, detection and corporate liability. They also address outstanding recommendations from previous evaluations and changes to domestic legislation or the institutional framework. Phase 4 takes a tailored approach, considering each country's unique situation and challenges, and reflecting positive achievements. This report therefore does not revisit issues that were not deemed problematic in previous phases and which have not been affected by later developments.

5. The team for this evaluation was composed of lead examiners from Austria and New Zealand, as well as members of the OECD Anti-Corruption Division.[3] After receiving Canada's responses to the standard Phase 4 questionnaire and country-specific supplementary questions, the evaluation team conducted an on-site visit in Toronto and Ottawa on 30 May – 2 June 2023. The evaluation team met representatives of the Canadian government, law enforcement, prosecutors, private sector (companies, lawyers, and auditors), and civil society (non-governmental organisations, academia and media) (see Annex C for a list of participants). The evaluation team was not able to meet with representatives of judicial authorities, and was disappointed by the small number of representatives from the private sector in attendance (three companies and only one business association). The evaluation team expresses its appreciation to all on-site visit participants for their openness and contributions. In particular, the evaluation team welcomes the high level of engagement and the major contribution of Canadian civil society (NGOs and academia), which, in addition to actively participating in the on-site visit, submitted four written contributions covering a broad range of topics under evaluation.[4] The evaluation team is grateful to Canadian authorities for the cooperation throughout the evaluation and the organisation of the on-site visit, although the team noted delays in obtaining information from Canada at several stages of the evaluation.

1.3. Canada's economy and foreign bribery risks

1.3.1. Economic background

6. Canada is a federal state comprised of ten provinces and three territories, with a population of 38.2 million. Canada has the 7th highest GDP of the 45 Working Group countries.[5] In 2022, Canada's GDP was USD 2 002 billion (CAD 2 652 billion and EUR 1 839 billion).[6]

7. Exports are vital to Canada's economy. As an energy producer, Canada benefits from oil and gas trade but is also subject to the shocks of global oil prices, as seen after the 2014 global oil price collapse.[7] In terms of trade, Canada ranked 9th in the Working Group for exports of goods and 14th for the export of

[3] Austria was represented by Silvia Thaller, Central Public Prosecutor's Office for the Prosecution of Economic Crimes and Corruption and Christian Manquet, Federal Ministry of Justice, Section IV. New Zealand was represented by Alexandria Mark, Senior Policy Advisor, Ministry of Justice and John Woolford, Manager of Investigations, Serious Fraud Office. The OECD Anti-Corruption Division was represented by France Chain, Senior Legal Analyst and Coordinator of the Phase 4 Evaluation of Canada, and Paul Whittaker, Elisabeth Danon and Martha Monterrosa, Legal Analysts from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

[4] Submissions by the private sector and civil society to the WGB.

[5] UNCTAD Stat GDP total and per capita (2021).

[6] OECD (2023), *OECD Economic Surveys: Canada 2023*. *Note*: all conversions from Canadian dollar (CAD) to US dollar (USD) and euro (EUR) in this report are calculated based on the conversion rate on 1 July 2023.

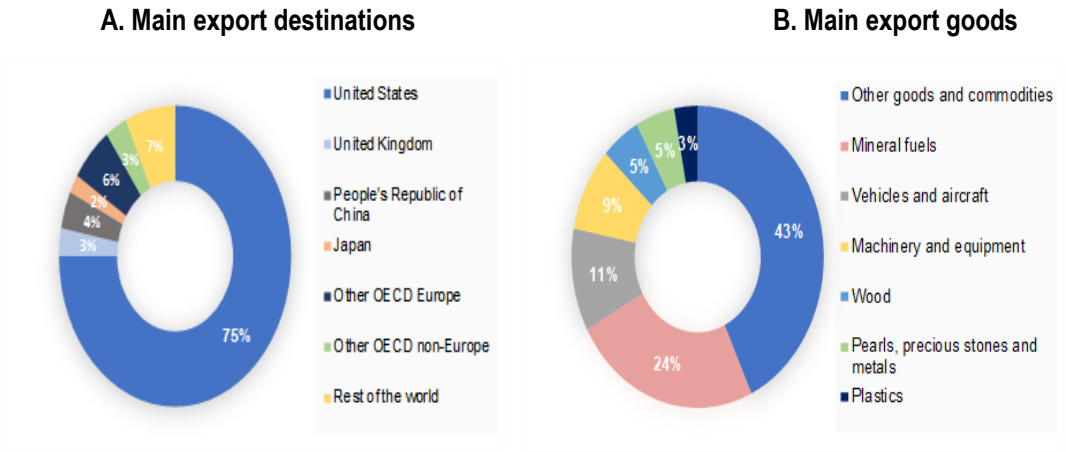
[7] *Ibid*., Box 1.6, p. 39.

services in 2022.[8] The United States is, by far, Canada's most important trading partner, accounting for nearly three quarters of goods and exports and around half of services exports as of 2021. The other main export destinations were China (4%), OECD Europe (6%), United Kingdom (3%) and Japan (2%).[9]

8. Canada's top exported goods were mineral fuels (24%), vehicles and aircrafts (11%), machinery and equipment (9%), lumber and wood (5%), and precious stones and metals (5%). The main exports of services included transport (17%), travel (15%), construction (13%), insurance and pension (11%) and financial services (10%). In 2021, Canada's export levels to several markets, including the United States, Japan, South Korea, Chinese Taipei, Spain and Indonesia, were record breaking.[10] Canada's growth in good exports was primarily driven by natural resources exports and particularly energy products.[11]

9. Canada's major imports were manufactures (76%), agriculture products (10.1%), fuels and mining products (8.4%). The main import partners were United States (48.5%), China (14%), European Union countries (11%), Mexico (5.5%) and Japan (2.5%).[12]

Figure 2. Exports by main destinations and main goods



Source: OECD (2023), International Trade by Commodity Statistics Database

10. In terms of foreign direct investment (FDI), Canada ranked respectively 5th and 4th among 45 Working Group members in outward and inward FDI stocks in 2022.[13] The top destinations are the United States, then Luxembourg, France, Australia, Brazil, Hong Kong and the United Kingdom. Some of these may be "pass through" countries for investment destined for other jurisdictions.[14] Unlike the slow recovery following the 2008 global financial crisis, Canada had a strong rebound in outward and inward FDI in 2021,

[8] UNCTAD Stat (2022), Merchandise exports and services exports.

[9] OECD (2023), *OECD Economic Surveys: Canada 2023*, Box. 1.5.

[10] GAC (2022), *Canada's State of Trade 2022*, p. 14.

[11] *Ibid*., p. 17.

[12] WTO (2022), *Canada Trade Profile*.

[13] OECD (2022), FDI stocks (indicator: millions USD): Outward FDI stocks and Inward FDI stocks.

[14] GAC (2022), *Canada's State of Trade 2022*, pp. 26-27.

surpassing its pre-pandemic levels.[15] Canada's top FDI flows by sector included trade and transportation, finance and insurance, management of companies and enterprises, and energy, mining and quarrying.[16]

1.3.2. Foreign bribery risks

11. Canada's businesses operating abroad have a relatively high exposure to foreign bribery. The majority of Canada's exports and investments are related to high-risk sectors including manufacturing, energy and mining. The manufacturing and extractive sectors (including mining, quarrying, petroleum and gas) are highly sensitive to foreign bribery, accounting for 27% of concluded cases at the time of the 2014 OECD Foreign Bribery Report.[17] Moreover, Canada exports a significant level of goods to China (second highest destination for exports), which according to the 2022 Transparency International Corruption Perceptions Index, is ranked rather high in their perceived level of public sector corruption.[18]

12. Small- and medium-sized enterprises (SMEs) are internationally active and play an important role in Canada, contributing to 50.4% of Canada's GDP.[19] A relatively large number of SMEs export directly and are thus at risk of being exposed to foreign bribery. In 2021, SMEs contributed to 42.7% of the total value of exported goods, whose main export destinations were the United States, China, and the United Kingdom.[20]

13. State-owned enterprises (SOEs) play a relevant role in the Canadian economy, ranking 16th in numbers of SOEs in OECD countries. Forty-seven Canadian SOEs play a role in sectors such as finance, transportation and real estate sectors.[21]

14. Finally, while Canada ranks well in indicators of domestic corruption, the country's score in corruption perception indexes has trended downward, in part due to corrupt practice allegations involving governments, municipalities, corporations and senators.[22] In particular, corruption linked to public constructions contracts in Quebec drew wide public condemnation, culminating in the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry in 2015.[23] The commission, led by Justice France Charbonneau, concluded corruption and collusion were "far more widespread than believed" in Quebec's construction sector and provided a series of recommendations to

[15] *Ibid*., *Canada's State of Trade 2022*, p. 23.

[16] OECD (2023), *OECD International Direct Investment Statistics 2022*; see also: GAC (2022), *Canada's State of Trade*, p. 25.

[17] OECD (2014), *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, OECD Publishing, Paris, https://doi.org/10.1787/9789264226616-en, p. 22.

[18] Transparency International (2023), Corruption Perceptions Index 2022.

[19] Innovation, Science and Economic Development Canada (2022), *Key Small Business Statistics 2022*. (SMEs are defined as a business establishment with 1 to 499 paid employees.)

[20] *Ibid*.

[21] OECD (2014), *The Size and Sectoral Distribution of SOEs in OECD and Partner Countries*; Note: This study took into account Crown corporations owned by the federal government but does not include provincial or municipal Crown corporations. In terms of total number of SOEs, Canada ranked 16th out of the 34 OECD countries that responded to the survey.

[22] OECD (2023), *OECD Economic Surveys: Canada 2023*, p. 44.

[23] Charbonneau Commission Report (2015); *Rapport Final* (in French only); See also: Transparency International Canada Charbonneau Commission public monitoring; CBC News (24 November 2015); Lexology (25 November 2015).

prevent corruption and collusion in the awarding and management of public contracts.[24] Subsequent criminal proceedings of domestic misconduct, such as fraud,[25] in the Quebec construction sector involved a large Canadian construction and engineering company with an active presence internationally, that also has been implicated in foreign bribery allegations (see below ***SNC-Lavalin***).

1.4. Foreign bribery enforcement since Phase 3

15. In terms of enforcement, in 2011, the Phase 3 report noted that:

- Canada had concluded one foreign bribery case against a legal person (***Hydro-Kleen Group Inc. (United States)***);
- Charges had been laid against one natural person (***Cryptometrics (India)*** case);
- Investigations were underway in the ***Niko Resources Ltd. (Bangladesh)*** case; and
- Canada reported that it had more than 20 ongoing investigations.

16. In 2013, at the time of Canada's two-year written follow-up report, two further cases had been concluded against legal persons (***Griffiths Energy International Inc. (Chad) and Niko Resources Ltd. (Bangladesh)***).

17. In addition to the cases mentioned above, Table 1 below shows all concluded and ongoing foreign bribery proceedings from (and including) Phase 3 to the time of the present Phase 4 report (see Annex A for case summaries). In summary:

- 19 natural persons were charged, of which:
  - 2 were convicted, and 4 have charges pending against them as of the time of this report; and
  - 13 were acquitted or saw charges stayed, of which 1 is under appeal.
- 5 legal persons were charged, of which:
  - 4 were sanctioned through a plea deal, of which one not under the Corruption of Foreign Public Officials Act (CFPOA) but on fraud charges; and
  - 1 was sanctioned through Canada's first Remediation Agreement (RA) in a foreign bribery case.

Table 1 – Concluded or ongoing foreign bribery proceedings (information in the public domain)

Case	Date of resolution	Natural persons (NP) involved and resolution	Legal persons (LP) involved and resolution
Hydro-Kleen Group Inc. (United States)	2005 (Phase 3)	2 NPs charged and charges stayed (2005)	1 LP, plea deal
Niko Resources Ltd. (Bangladesh)	2011 (Phase 3)	No NP Charged	1 LP, plea deal
Griffiths Energy International Inc. (Chad)	2013 (Phase 3 written follow-up report)	No NP charged[26]	1 LP, plea deal
Cryptometrics (India)	2014-2021 (Phase 3)	4 NPs charged: • 1 NP convicted (2014) • 1 NP, charges stayed (2019) • 2 NPs convicted in 2019;	No LP charged

[24] *Ibid*.

[25] R. c. SNC-Lavalin Inc., 2022 QCCS 1967 (31 May 2022).

[26] In September 2023, a US federal judge sentenced a former founding shareholder of Griffiths Energy to three years of prison under the US Foreign Corrupt Practices Act for his role in this case.

		conviction set aside in 2021 by Court of Appeal; PPSC declined to pursue	
Canadian General Aircraft (Thailand)	2017	1 NP charged and charges stayed (2017)	No LP charged
SNC-Lavalin (Bangladesh)	2017	5 NPs charged: • 1 NP, charges stayed (2014) • 1 NP, charges stayed (2015) • 3 NPs acquitted after legal challenge to evidence (2017)	No LP charged
SNC-Lavalin (Libya)	2019-2023	2 NPs charged: • 1 NP, charges stayed (2019) • 1 NP convicted in 2020; upheld on appeal in Feb. 2023	LP charged but not convicted under CFPOA; plea deal for fraud (2019)
Ultra Electronics Forensic Technology Inc. (Philippines)	2023, ongoing	4 NPs charged (pending),	1 LP, RA concluded (2023)
IMEX Systems (Botswana)	2023, appeal pending	1 NP charged and acquitted (2023). PPSC appealed	No LP charged

18. In addition to the above, from 2018 until the end of 2022, the Royal Canadian Mounted Police (RCMP) reports that it has opened 31 new CFPOA investigations (on average 6 per year). Canada further reports that, during the same period, at least 33 investigations have been closed (which includes cases opened before 2018).

19. No further information was provided in relation to ongoing investigations and prosecutions as the RCMP and Public Prosecution Service of Canada (PPSC) are of the view that they cannot comment on ongoing investigations and cases unless charges have been laid and the cases have been prosecuted through the courts and thus have entered the public record. As noted in the Phase 3 report, and recalled by the PPSC at the time of this Phase 4, this confidentiality is rooted in long-standing Canadian practice, but not in rules that specify what may and may not be shared; rather it is a function of prosecution privilege, derived from convention and common law, which Canadian law enforcement chooses not to waive. This position, combined with the lack of data on foreign bribery enforcement, (even in aggregated form, for example, detection sources, investigative tools used, reasons for closing investigations, etc.,), made it difficult to assess the specific challenges manifestly encountered by Canadian law enforcement in enforcing the foreign bribery and related offences, as detailed further in the present report.

Commentary

The lead examiners welcome positive steps since Phase 3, including the broadening of the foreign bribery offence and introduction of nationality jurisdiction under the CFPOA, as well as the adoption of RAs as a form of non-trial resolution (NTR), which have the potential to enhance foreign bribery enforcement. They are also encouraged by the extremely high level of involvement of civil society organisations and academia, which submitted four well-researched written contributions, and actively participated in the panels during the Phase 4 on-site visit. [27]

Furthermore, the lead examiners are respectful of the position of Canadian law enforcement authorities to not discuss details of ongoing cases not in the public domain. Nevertheless, in the absence of sufficient information on the conduct of ongoing or even concluded cases, as well as of available data, the lead examiners are seriously concerned that, 25 years after the adoption of Canada's CFPOA, Canada's enforcement of the foreign bribery offence remains low, especially taking into consideration the size of its economy and the sectors in which Canadian companies operate. Although 20 foreign bribery investigations were reportedly ongoing at the time of Phase 3, which was deemed encouraging, these have failed to translate into prosecutions. Since the entry into force of the CFPOA, charges have been laid in only nine cases, and conclusion of foreign

[27] Submissions by the private sector and civil society to the WGB.

bribery cases with sanctions remains particularly low, with only two natural persons convicted for foreign bribery and four legal persons sanctioned. Furthermore, while the lead examiners are encouraged by the sharp increase in the number of foreign bribery investigations reportedly opened since Phase 3, this progress is offset by the high proportion of discontinued investigations. The lead examiners therefore recommend that Canada take all necessary measures – as further detailed in the present report – including by developing a concerted action plan, to increase enforcement against both natural and legal persons, and further urge Canada to create a database to maintain statistics, including on sources of detection, investigation, prosecution and termination of cases involving the foreign bribery offence and related offences.

As developed in this report, efforts by Canadian agencies and the private sector to prevent, detect and report foreign bribery appear uneven, with a high-level of engagement by certain public bodies (e.g., Global Affairs Canada (GAC) or Export Development Canada (EDC)) and the defence bar, but a lack of awareness and training for others, including certain key Ministries and business organisations. In addition, as also detailed below, the absence of an effective system for the protection of reporting persons (whistleblowers) as well as lack of clarity around self-reporting by companies constitute significant obstacles to the effective detection of foreign bribery.

2. Prevention, detection and reporting of the foreign bribery offence

20. As Canada does not systematically maintain or publish statistics on foreign bribery detection sources, it is not possible to provide a breakdown of how ongoing and concluded foreign bribery cases were detected since Phase 3. This lack of data makes it difficult to assess the particular challenges encountered by stakeholders in the public and private sector that may be in a position to detect and report suspicions of foreign bribery and related offences.

Commentary

The lead examiners are concerned that Canadian agencies with a potential role in detecting foreign bribery do not collect data on relevant reports received and transmitted to law enforcement authorities. They therefore recommend that the relevant Canadian agencies and Ministries systematically collect, maintain, and consider publishing, data on foreign bribery reports, with a view to allowing for an assessment of the effectiveness of the various reporting channels.

2.1. Canadian public officials generally

2.1.1. Awareness, reporting processes and application in practice

21. Canadian public officials who interact with Canadian companies operating abroad can be a source of detecting foreign bribery, as recognised by the Anti-Bribery Recommendation. Of the nine reported foreign bribery cases since and including Phase 3, two involved reports from public officials (one from a Trade Commissioner in ***Cryptometrics (India)*** and the other through an official from the Ministry of Foreign Affairs (Global Affairs Canada or GAC) in ***Niko Resources Ltd. (Bangladesh).*** The RCMP considers public officials, particularly Trade Commissioners and embassy officials, as an important source of detection of foreign bribery (see section 2.2 below on the role of overseas diplomatic missions).

22. Canadian law enforcement has taken positive steps to raise awareness of foreign bribery among Canadian public officials:

- Since 2017, the RCMP Sensitive & International Investigations (SII) unit has conducted a series of awareness raising activities (new website on reporting corruption, foreign corruption awareness videos, and social media posts) and engaged proactively with numerous departments, including on raising awareness around reporting suspicions of foreign bribery. This includes officials from GAC, Canadian Ombudsperson, Health Canada, Public Services and Procurement Commission (PSPC), PPSC, EDC, and Canadian Commercial Corporation (CCC).
- The RCMP also provides targeted training to government departments (Trade Commissioners, PSPC and Health Canada) on foreign bribery red flags and encouraging reporting by public officials. Prior to this, the RCMP had focused much of its awareness raising on GAC and Trade Commissioners.

This broader engagement with various federal departments is a positive development. During the on-site visit, representatives from the public sector displayed a high awareness of foreign bribery and were aware of their internal reporting obligations.

23. The duty on public officials to report foreign bribery has not substantively changed since Phase 3. Canadian public officials' obligation to report allegations of crime is based in policy, rather than legislation. A general policy directive requires supervisors to inform the Chief Security Office of the government of any issues of "suspected or alleged criminal activities", while employees are also directed to report suspected criminal activity through appropriate departmental channels. According to Canada, this broad directive would cover the crime of foreign bribery. Canadian federal departments then implement their own policies on reporting misconduct and reporting channels. Canada therefore has a patchwork of internal policies concerning reporting of suspicions of foreign bribery to law enforcement authorities. Relevant government entities such as GAC, EDC, PSPC and the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC, Canada's Financial Intelligence Unit (FIU)) have adopted guidelines related to internally reporting misconduct. As further discussed in section 2.7, Canada provides limited whistleblower protection to public officials that report foreign bribery against the private sector.

24. Various department entities (EDC, GAC, Trade Commissioners, reporting entities) have dedicated internal reporting channels. Canadian authorities, however, were unable to provide any statistics on internal reporting specific to foreign bribery.

2.1.2. Extractive Sector Transparency Measures Act has had limited impact on detecting foreign bribery

25. As mentioned by Canada in its responses to the Phase 4 Questionnaire, Canada enacted the Extractive Sector Transparency Measures Act (ESTMA), in 2015, which requires mining, oil, and gas companies that are active in Canada to disclose certain payments made to governments anywhere in the world.[28] The ESTMA disclosure requirement applies to (i) all publicly listed entities in Canada and (ii) private companies that do business in Canada if certain asset, revenue and employee thresholds are met (section 8(1) of ESTMA). Natural Resources Canada (NRCan) maintains a public data portal with ESTMA data from the last five calendar years, and links to company annual ESTMA reports. NRCan also implements a programme that identifies companies that are at "high risk" of non-compliance. Canada indicates that, if any of the compliance verification activities undertaken by NRCan indicate possible corruption or criminal activity, then this information will be transferred to the RCMP or another competent authority. Therefore, NRCan could play a potential role in the detection of foreign bribery committed by Canadian companies in the extractive industry sector.

26. ESTMA appears to have had no significant impact on detecting foreign bribery in the extractives industry in relation to concluded cases. The RCMP did not consider officials from NRCan as a source of detection in the responses to Canada's Phase 4 Questionnaire. Further, no officials from NRCan were present at the on-site visit. NRCan may not be adequately integrated with key stakeholders, including law enforcement, limiting its impact and usefulness in the fight against foreign bribery.

Commentary

The lead examiners welcome the steps taken by Canadian authorities, particularly the RCMP, to raise awareness of foreign bribery among relevant public officials. The adoption of the ESTMA also has the potential to enhance prevention and detection of foreign bribery in a sector particularly

[28] The ESTMA addresses Canada's commitment, made alongside other countries at the 2013 G8 Leaders' Summit, to raise transparency and reduce corruption in the global oil, gas and mining sectors. Although Canada does not implement the Extractive Industries Transparency Initiative (EITI), it is a strong supporter of the initiative, a contributing board member, and meets core aspects of EITI Standard through the information made public under ESTMA.

prone to corruption risks. However, limited statistics are available on foreign bribery reports submitted by public officials through these internal channels; this, combined with the lack of detailed information available on detection sources for law enforcement, makes it difficult to assess the efficiency in practice of reporting mechanisms for Canadian public officials. The lead examiners thus recommend that Canada continue to take steps to raise awareness of the foreign bribery offence among public officials and of their related reporting obligations, including with NRCan.

2.2. Overseas diplomatic missions

27. Overseas embassies and missions, under the responsibility of GAC, [29] have an important role to play in enhancing awareness of companies that seek advice when investing or exporting abroad. In addition, members of these agencies are well placed to monitor foreign media for foreign bribery allegations that may involve Canadian companies or individuals and report them to law enforcement authorities.

28. At least two concluded foreign bribery cases were detected through GAC officials, including one Trade Commissioner. Canadian law enforcement authorities detected the ***Cryptometrics (India)*** *case* in part from the Trade Commissioner who had received a report from the company's agent. In ***Niko Resources Ltd. (Bangladesh)***, the RCMP investigation reportedly began after GAC officials alerted the RCMP about news stories regarding suspicions of foreign bribery.

29. Since Phase 3, Canada reports significant outreach between the RCMP SII and GAC. GAC oversees Canada's overseas embassy missions, including the Canadian Trade Commissioner Service (TCS). Outreach and training for Trade Commissioners posted abroad includes training on the TCS strategy on *Responsible Business Conduct Abroad*[30] and the CFPOA, including reporting channels. According to Canada this ensures better awareness both from the Trade Commissioners and from the companies served by the TCS on how to assist client companies of the TCS and how to report allegations.

30. The TCS training incorporates best practices that include, inter alia, recommendations for Trade Commissioners to collaborate with colleagues from other sections at overseas missions in order to monitor host country and other foreign media for information concerning Canadian companies operating in their country/countries of responsibility, including allegations of foreign bribery implicating Canadian companies. GAC maintains a TCS Policy for reporting allegations of foreign bribery and related offences internally, which is then assessed and forwarded to law enforcement. GAC relies on certain exceptions in the Privacy Act to proactively share personal information with the RCMP. During the on-site visit, representatives from GAC and TCS demonstrated particularly high awareness of the foreign bribery offence, red flags and processes for reporting back to capital. Notably, TCS training and awareness raising has covered the removal of the facilitation payment exception under the CFPOA, which came into force in 2017.

Commentary

The lead examiners commend the efforts by Canada since Phase 3 to train its representatives posted abroad on foreign bribery matters and in turn, the efforts by representatives of GAC and the TCS to effectively detect and report foreign bribery allegations to law enforcement authorities.

[29] In 2015, the public designation of the Department of Foreign Affairs, Trade and Development (DFAIT) was renamed GAC. However, the legal name of the Ministry of Foreign Affairs remains DFAIT.

[30] *Responsible Business Conduct Abroad: Canada's Strategy for The Future* developed by the TCS of Canada's Ministry of Foreign Affairs' (GAC) is a five-year strategy (2022–2027) that sets out priorities for the Government of Canada to support Canadian companies active abroad (https://www.international.gc.ca/trade-commerce/rbc-cre/strategy-2022-strategie.aspx?lang=eng).

2.3. Tax measures to detect foreign bribery

2.3.1. Detection and training

31. Tax officials who detect possible instances of foreign bribery are allowed to report these to law enforcement authorities, as per internal policy and subject to confidentiality provisions, but are not obligated to do so. As public officials, they are also subject to reporting obligations under the Public Servants Disclosure Protection Act (PSDPA), but the Act does not cover foreign bribery (see section 2.7). Should they decide to report, they would refer to the Criminal Investigation Directorate, which has a communication line with law enforcement authorities. Tax officials who attended the on-site visit indicated that they would systematically report suspicions of foreign bribery, if identified. However, to date, no foreign bribery case has been detected through tax authorities and, to the knowledge of the Canada Revenue Agency (CRA) representatives met on-site, no suspicion of foreign bribery has ever been reported by a CRA auditor.

32. In Phase 3, the Working Group recommended that Canada provide specific training for tax auditors on whether a payment comes under the defence for reasonable expenses incurred in good faith or the facilitation payments defence (Phase 3 recommendation 8.a.). At the time of the Phase 3 follow-up report, the CRA's approval was being sought to roll out a new training for tax auditors to address, inter alia, the non-deductibility of bribe payments and to provide specific guidance regarding facilitation payments. Even though the facilitation payment defence has since been repealed, such guidance would still be useful to ensure that tax auditors can detect bribe payments. However, information shared before and during the Phase 4 on-site visit showed that, while CRA does provide general training to its auditors and investigators, no awareness raising activities or training has been provided to CRA auditors and investigators to detect foreign bribery red flags. Representatives of the CRA met during the on-site visit were not aware, for instance, of the Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors.[31]

2.3.2. Information sharing with law enforcement authorities

33. Tax authorities remain bound by a general prohibition on sharing taxpayers' information with law enforcement under subsection 241(1) of the Income Tax Act (ITA). As was the case in Phase 3, paragraph 241(3)(a) allows for disclosure, once charges have been laid, of information enabling support for the prosecution of an individual or legal person charged with an offence under the CFPOA. Following a 2014 amendment to the ITA, subsection 241 (9.5) provides that "an official may provide to a law enforcement officer of an appropriate police organization taxpayer information, if the official has reasonable grounds to believe that the information will afford evidence of an act or omission in or outside of Canada that, if committed in Canada, would be an offence under […] section 3 of the [CFPOA]." The CRA confirmed that, if it were to encounter a case of bribery, it would refer it to the proper law enforcement authorities accordingly. This amendment addresses long-standing concerns of the Working Group and implements Phase 3 recommendation 8.b. To the knowledge of the CRA representatives met on-site, a request was made from the RCMP to the CRA once in the context of a foreign bribery investigation, and the request was granted, and information released to the RCMP. Representatives of the RCMP at the on-site visit, on the other hand, did not seem to know that they are legally entitled to make such requests, nor that any such request has ever been made, thereby pointing to a clear lack of awareness. Following the on-site visit, the RCMP further clarified that rather than a lack of awareness, not resorting to this instrument is a conscious choice, as they consider it potentially burdensome in light of criminal disclosure implications and not useful in foreign bribery investigations.

[31] OECD (2013), Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors, OECD Publishing, https://doi.org/10.1787/9789264205376-en.

34. Section 462.48 of the Criminal Code of Canada (CC) provides that, on application by the Attorney General of Canada (AG), a judge may order the disclosure of tax information requested in the application where there are reasonable grounds to believe that it is in the public interest to do so, having regard to the benefit likely to accrue to the investigation. This measure is limited to certain offences. On 22 June 2023, after the on-site visit and as this report was being written, Canada adopted "An Act to implement certain provisions of the budget tabled in Parliament on 28 March 2023"[32], which adds "an offence against subsection 3(1) of the CFPOA, or a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, such an offence" to the offences for which this measure can be used. At the time of writing this report, the Act had yet to come into force as it awaited Royal Assent (expected in September 2023), and could still be subject to amendments.

Commentary

No foreign bribery case has been detected through tax authorities to date. The lead examiners therefore reiterate the Phase 3 recommendation that Canada develop guidance and train auditors of Canada Revenue Agency to identify foreign bribery red flags and report suspicions to law enforcement authorities.

The lead examiners welcome the 2014 amendment of the ITA that allows tax officials to share taxpayers' information with the police in the context of a CFPOA investigation. They recommend that Canada take appropriate measures, including by raising awareness as necessary of the RCMP, to ensure that access to tax information held by the CRA can be effectively relied on in foreign bribery investigations as needed. The lead examiners also welcome the amendment of the Canadian CC allowing the AG to apply for a court to order the disclosure of tax information regarding a CFPOA offence. With a view to improving collaboration between the CRA and RCMP in the context of foreign bribery investigations, they recommend that Canada undertake awareness raising activities for CRA officials.

2.4. Export credits

35. Export credit agencies (ECAs) deal with companies that are active in international business; they thus have an important role in preventing, detecting and reporting potential foreign bribery allegations involving these companies. ECAs can also sanction individuals and companies that have committed foreign bribery by denying them support. Measures that ECA can take are described in Recommendations V-VIII of the 2019 Recommendation of the Council on Bribery and Officially Supported Export Credits (Export Credits Recommendation). In Canada, the official export credit agency is EDC.

2.4.1. Due diligence measures to prevent and detect foreign bribery

36. EDC's internal policy and procedures appear to be largely in line with the 2019 Exports Credit Recommendation. This was demonstrated through information provided on their processes as well as in-depth knowledge of issues during discussions at the on-site visit. EDC's risk management framework includes baseline due diligence, risk assessment, enhanced due diligence and ongoing monitoring. In application forms, exporters and applicants declare in anti-corruption declarations that they and persons acting on their behalf have not committed and will not commit bribery. Every project and transaction undergoes a due diligence process prior to approval that considers credit worthiness and non-credit factors (such as relevance to EDC mandate, risks related to business ethics, financial crimes, the environment, human rights and other social factors). EDC continues to monitor applicants through the life cycle of a transaction. This involves utilising a risk assessment tool that determines ratings and provides triggers for

[32] https://www.parl.ca/DocumentViewer/en/44-1/bill/C-47/royal-assent.

transactions that require *enhanced* due diligence. Enhanced due diligence measures may include conducting open-source intelligence investigations, leveraging data analytics and external screening solutions and services. Additionally, EDC will typically engage in outreach with relevant counterparties in the course of enhanced due diligence. EDC's risk assessment methodology is based on various sources including the Working Group on Bribery's monitoring reports, Transparency International's corruption index, Basel Institute's AML country rankings, and International Financial Institution (IFI) debarment lists. The presence of a SOE in a financial transaction also triggers enhanced due diligence.

37. Customers, particularly those with an elevated risk profile, are expected to have reporting protocols in place to allow for the confidential reporting of misconduct. EDC provides various Anti-Bribery and Corruption resources to their customers and business partners, including SMEs and SOEs. These materials are available in EDC's Anti-Corruption Resource Centre and includes materials on the Convention and the CFPOA. EDC also publishes guidance to exporters on how to manage the risks of financial crime in international trade: Financial Crime in International Trade.

38. EDC staff receive mandatory anti-corruption financial crime training on an annual basis. EDC also provides enhanced training for those working in "specialised areas." EDC indicates that it raises awareness of its internal reporting channels as well as associated reporting protocols and Wrongdoing Policy.

2.4.2. Reporting foreign bribery to law enforcement authorities[33]

39. The EDC's internal reporting protocol is governed by the EDC Code of Conduct, the PSDPA and other internal policies. EDC states that its internal Wrongdoing Policy includes protection of EDC personnel against reprisals. EDC outlines that these policies set expectations for all EDC employees who become aware of wrongdoing and provide information on internal reporting channels. Wrongdoing can be reported to an employee's supervisor, EDC senior officer (for internal disclosures), EDC's anonymous third-party disclosure reporting system or the Public Sector Integrity Commissioner.

40. EDC may then disclose information to law enforcement in certain circumstances, such as when (i) EDC has become aware of credible allegations or evidence of bribery; (ii) EDC reasonably suspects that any person has committed or is about to commit a criminal offence; (iii) EDC reasonably suspects that an attempted or executed transaction or underlying commercial transaction involves or relates to a financial crime. While EDC is not an obliged reporting entity under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA), it can make voluntary disclosures to authorities.

41. In practice, EDC has made three voluntary disclosures to authorities since Phase 3 which met at least one of the criteria outlined above. In these instances, EDC detected irregularities through risk assessments, ongoing monitoring and/or allegations made by third parties. At the on-site, the RCMP SII unit cited public officials, including EDC, as important sources of detection for its foreign bribery investigations. As Canadian authorities did not discuss ongoing or closed investigations, and as no detailed data is maintained on detection sources, it is not possible to assess if these allegations were proactively investigated.

42. The Working Group's own media monitoring efforts show that at least four foreign bribery allegations emerged in projects supported by EDC. These allegations relate to allegations of foreign bribery in EDC supported contracts in Angola, India, Mongolia and South Africa against Canadian engineering, construction, aviation, and resource companies. In two of these cases, media sources indicated that EDC took actions to address misconduct allegations including (i) civil action in foreign jurisdictions based on contractual defaults and (ii) commissioning an independent review of EDC's underwriting insurance policy to rule out staff misconduct. EDC did not provide specific details on these "legacy matters", citing

[33] 2019 Export Credits Recommendation IV(6), VII(1) and VIII(1).

confidentiality obligations; thus, it is not known if they detected and reported these specific irregularities to law enforcement.

2.4.3. Bribery discovered in a supported transaction

43. If an ECA becomes aware that bribery may be involved in a supported transaction, then it should "undertake further due diligence". If a party is convicted of bribery in relation to a supported transaction, then the ECA should "take appropriate action […] such as enhanced due diligence, denial of payment, indemnification, or refund of sums provided".[34] The Anti-Bribery Recommendation IV.ix further provides that public advantages "could be suspended or denied as a measure to combat foreign bribery in appropriate cases, and compliance incentives provided for appropriate remediation." This could include the denial of export credits.[35]

44. EDC conducts enhanced due diligence through the life cycle of a transaction based on risk factors. EDC indicated that when allegations or findings of wrongdoing arise, they implement enhanced due diligence measures to understand them and take appropriate actions. EDC's ability to "exit a transaction" may be limited due to the nature of financing agreements with a counterparty. Therefore, EDC may opt to terminate or pause additional or future support involving the customer. Regarding the three voluntary disclosures referenced above, EDC conducted additional monitoring and enhanced due diligence but there was no denial of payment, indemnification or refund of sums. EDC reports that one counterparty remediated risks identified and became subject to the "highest level of enhanced monitoring and oversight at EDC." EDC was unable to provide further information on the specific due diligence measures undertaken, citing confidentiality obligations.

45. Where a prospective client has a bribery conviction or is on a debarment list, EDC states that this client would be subject to enhanced due diligence. EDC is not listed as one of the departments and agencies which has signed a memorandum of understanding with PSPC to apply the Integrity Regime and the Ineligibility and Suspension Policy (see section 4.2.2. on Canada's regime for public procurement debarment). Thus, entities debarred from public procurement under the Integrity Regime would not necessarily be denied export credits. At the on-site visit, EDC explained that debarment lists, including the Integrity Regime, would be screened as part of baseline due diligence and monitoring processes. Eligibility for EDC support would then be assessed through enhanced due diligence processes, which would determine eligibility for EDC support.

Commentary

The lead examiners welcome the various measures taken by EDC to prevent and detect foreign bribery, particularly in relation to risk assessments, enhanced due diligence and ongoing monitoring. Further, the lead examiners note that in practice EDC officials have detected and reported bribery allegations to law enforcement. While EDC implemented enhanced due diligence in these matters, EDC did not use other tools such as denial of payment, indemnification, or refund of sums provided given the circumstances and nature of the support. Thus, the lead examiners recommend that Canada consider using the denial of payment, indemnification or refund of sums in EDC-supported transactions to ensure conformity with Export Credits Recommendation VIII.2.

[34] 2019 Export Credits Recommendation VIII(3).

[35] For example, see Netherlands Phase 4 Report, paras. 282-284.

2.5. Official development assistance

46. Government agencies responsible for official development assistance (ODA) are "the first line of defence in preventing corruption and managing corruption risks in the disbursement of aid." The OECD 2016 Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption (ODA Recommendation) calls on countries to encourage their international development agencies to ensure effective measures to manage risks of, and respond to, actual instances of corruption in development co-operation. Canada's ODA processes include significant due diligence to assess and prevent corruption risks. Nevertheless, based on information provided by Canada, none of Canada's concluded foreign bribery cases to date have been detected by Canada's ODA agencies, notwithstanding Canada's substantial ODA programme in high-risk jurisdictions.

2.5.1. Canadian ODA: statistics and institutional setup

47. Canada has a significant ODA programme. In 2022, Canada ranked 16th among DAC countries, providing USD 7.8 billion (CAD 10.33 billion and EUR 7.16 billion) in total ODA, representing 0.37% of gross national income (GNI).[36] Canada's ODA priority action areas include gender equality, human dignity, growth that works for everyone, environment and climate action, inclusive governance and peace and security. In 2020, Canada focused most of its bilateral ODA on country programmable aid (23.1%), refugees in donor country (16.1%), humanitarian and food aid (15.3%) and support to NGOs (6.4%). In 2020, social infrastructure and services (43.2%, EUR 1.29 billion) was the largest focus of Canada's bilateral ODA, followed by humanitarian assistance (13.8%). The top five ODA recipient countries over 2011 to 2021 were Afghanistan, Ethiopia, Haiti, Mali and Tanzania.

48. GAC leads Canada's development co-operation efforts related to bilateral ODA, institutional support to multilateral organisations, humanitarian assistance and support for security and stabilisation in fragile and conflict affected countries. The average distribution of ODA by department from 2017 to 2021 was as follows: GAC (75.2%), Finance Canada (8.8%), Immigration Refugees and Citizenship (3.7%) and International Development Research Centre (2.2%) and Development Finance Institute Canada (0.7%).[37] Under the Official Development Assistance Accountability Act (ODA Act), various departments report to Parliament on ODA efforts including the Minister for International Development, the Minister of Finance, the Minister of Foreign Affairs (GAC). GAC reports annually to Parliament on ODA activities and publishes a statistical report on international assistance.

2.5.2. Measures to prevent and detect corruption in ODA contracts

49. GAC uses various tools to assess corruption risks and conduct due diligence where ODA is provided. As part of the due diligence process for ODA projects, an assessment of the organisation and project-level risks are conducted. Project officers are encouraged to check the exclusions lists of various international financial institutions (IFIs), including the World Bank, and regional development banks. Project officers also conduct a risk evaluation based on the organisational anti-corruption policy or similar policies, adequacy of anti-corruption procedures, and reports of fraud and corruption. The financial compliance unit

[36] OECD (2022), Development Cooperation Profiles. Note: ODA amount based on Canada reports to the OECD-DAC reported in USD. Canada ranked 6th in terms of ODA volume and 16th among DAC countries when ODA is taken as a share of GNI.

[37] Finance Canada manages Canada's relationship with the World Bank Group, the International Monetary Fund, the European Bank for Reconstruction and Development, and multilateral and bilateral debt relief. The International Development Research Centre invests in knowledge, innovation and solutions to improve lives and livelihoods in developing countries. Immigration, Refugees and Citizenship Canada and the provinces and territories support refugees arriving in Canada.

further conducts compliance audits on a "risk-based sample of projects". GAC organises financial capacity building activities at the beginning of a project with new recipients, high risk projects or at the recommendation of project officers.

50. ODA funding agreements include standard terms and conditions on fraud and corruption that ensure that recipients: (i) certify that no bribes have been or will be paid in relation to the funding agreement; (ii) self-declare any past convictions and sanctions for offences related to fraud, bribery and corruption by the organisation or its employees (by Canadian or foreign courts, as well as those imposed by international government organisations or organisations providing development assistance); (iii) self-declare that they have taken "all reasonable steps" to ensure their local partners and subcontractors have not been convicted or sanctioned for fraud and corruption; (iv) remain subject to declare any convictions and sanctions that arise throughout the life cycle of a project; (v) have to include the general terms and conditions (including the fraud and corruption clauses) in any sub-contracts and agreements. Canada states that bidders receiving ODA through funding agreements (i.e. grants and contributions) have to disclose corruption convictions at the due diligence stage, not at the proposal submission stage.

51. GAC follows the Government of Canada's Integrity Regime and applies the Ineligibility and Suspension Policy to its contracts (see section 4.2.2.)

2.5.3. Reporting and whistleblowing mechanisms in ODA

52. GAC has internal reporting channels to facilitate reporting of corruption in ODA. GAC's intranet page contains a dedicated email address as well as information on reporting misconduct in ODA. Programme representatives are responsible for reporting misconduct allegations to GAC's "grants and contributions fraud management unit". Recipient organisations also have a contractual obligation to report misconduct allegations to the fraud management unit's reporting email. Whistleblowing protection and remedies under the Public Servants Disclosure Protection Act (PSDPA) applies to GAC officials, although as outlined in section 2.7 below, this Act is not applicable to reports concerning the private sector, and would not cover reports or complaints concerning the private sector relating to suspicions of foreign bribery.

53. In 2020, the GAC's Grants and Contribution Fraud Management Unit was put in place to deal with corruption, including foreign bribery, in ODA funded projects. This unit is responsible for receiving and assessing allegations of fraud and corruption, including foreign bribery allegations, and will determine a recommended course of action based on its findings. A corresponding committee provides oversight over activities, including support for recommended courses of action for highly sensitive cases, which would include suspicions of foreign bribery in ODA-funded projects. GAC may proactively share information with the RCMP on an ad-hoc basis, relying on exceptions under the Privacy Act. GAC does not have a formal MOU with the RCMP, and these disclosures would be made on an ad-hoc basis.

54. GAC's Grants and Contribution Fraud Management Unit started tracking statistics for fraud and corruption in 2020. In 2021-2022, the unit managed approximately 113 cases; however, the vast majority of their portfolio focuses on fraud. At the on-site, the ODA representative indicated that the unit would also cover foreign bribery and recognised the importance of focusing on foreign bribery. GAC was unable to confirm if any foreign bribery allegations have been detected in the context of its ODA-programme.

55. GAC outlines various training provided to officials administering ODA globally. This includes: (i) training offered by the Canadian Foreign Services Institute on ethics and anti-corruption; (ii) specialised training of GAC personnel through the U4 Anti-Corruption Resource Centre (U4) involving various online courses, (iii) targeted in-country U4 workshops for ODA staff which can include training on sectors vulnerable to corruption; and (iv) a helpdesk operated by U4 and Transparency International. For example, GAC provided an anti-corruption training to ODA stakeholders in Ghana in relation to agriculture

programmes. Canada's anti-corruption training provided to its public officials in ODA activities can be considered a good practice.[38]

2.5.4. Sanctioning regime in ODA

56. Engaging in corruption is considered a default under ODA's funding agreements with implementing partners. In its responses to the Phase 4 Questionnaire, Canada indicates that contribution agreements include a default and remedy provision under which the Department may declare a default which includes reasons related to fraud, corrupt practices and misuse of funds, "as determined by the Department in its sole discretion." These contract terms flow down to subcontractors as well. In the event of a default, GAC reserves the right to reduce the contribution level, rescind the contract and/or require the repayment of amounts already paid. Grant agreements provide GAC with a right to withhold payment or request reimbursement of the grant. There is no information whether these clauses have been used in relation to a foreign bribery case.

Commentary

The lead examiners welcome the steps to strengthen the anti-corruption measures in its ODA programme particularly since 2020. While still in the early stages, the newly dedicated unit on fraud management could play an important role in detecting foreign bribery, provided adequate awareness-raising and training is provided on foreign bribery red flags. The lead examiners recommend that the Working Group follow up on the detection and reporting of corruption, including foreign bribery, in particular by GAC's Grants and Contribution Fraud Management Unit.

2.6. Self-reporting by companies

57. The limited information available on foreign bribery enforcement shows that the foreign bribery offence was detected through the company's self-reporting (term used interchangeably with "voluntary disclosure" in the present section) in at least one case (***IMEX Systems (Botswana))***. In that case, the external legal counsel for the company's new management self-reported foreign bribery allegations involving the company's former CEO to the RCMP. The RCMP opened an investigation into the former CEO. The case ultimately ended in an acquittal and no charges were brought against the company. Canadian law enforcement authorities report that self-reporting by companies has "significantly increased" with the entry into force of NTRs (Remediation Agreements or RAs); however, no data or figures could be provided in respect of this assertion.

2.6.1. Lack of clarity surrounding voluntary disclosure in the context of the Remediation Agreement

58. In the last decade, an increasing number of countries have developed incentives to encourage voluntary disclosure, including by making it a mitigating factor or a condition to have a case resolved through an NTR. In its responses to the Phase 4 questionnaire, Canada reported that "the Remediation Agreement (RA) is the legislation that encourages corporations to self-report allegations relating to financial crimes, including offences pursuant to the CFPOA". Introduced in 2018, the RA is an NTR system akin to a deferred prosecution agreement with the objective, among others, "to encourage voluntary disclosure of the wrongdoing".[39] (See below section 3.6.3. on Non-trial resolutions)

[38] The 2016 Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption – Compendium of existing practices report reached a similar conclusion [DCD/DAC(2017)39].

[39] CC, section 715.31(d).

59. In its 2021-2022 Annual Report to the Parliament on the Fight Against Foreign Bribery, the government contends that the first RA, approved in 2022 by the Quebec Superior Court in a domestic bribery case, "will undoubtedly have a positive impact on international corruption. More companies are self-reporting and cooperating with the RCMP in the investigative process".[40] However, as observed by the evaluation team and emphasised by several private sector and civil society stakeholders during the on-site visit, the government makes very limited enforcement data available, and in particular does not publish figures on voluntary disclosure and how these have progressed. Canada indicates that it compiles such information but is not able to share it. During the on-site visit, the RCMP said that the number of voluntary disclosures had increased since the introduction of the RA framework but statistics on progression was not shared. A representative said that five companies had disclosed since 2021, although they did not specify if this referred solely to foreign bribery cases.

60. Although voluntary disclosure is not a condition to be invited to negotiate an RA, Canada's Criminal Code makes it clear that it is a factor that must be considered by a prosecutor in deciding whether to invite a legal person to enter into a remediation agreement.[41] However, it is unclear how the stated purpose of encouraging voluntary disclosure translates into policy, and what the incentives for companies to self-report are. As further examined under 3.6.3., the two RAs concluded to date in a domestic and a foreign bribery case (***Ultra Electronics Forensic Technology Inc. (Philippines) ("Ultra Electronics (Philippines)")***) bring little clarity.

2.6.2. A combination of factors deters voluntary disclosure in practice

61. According to representatives of the defence bar and civil society both in their written submissions under this Phase 4,[42] and during the on-site visit, several elements come into play that may deter voluntary disclosure or at least undermine incentives to self-report.

62. First, *the extent of the leniency conceded to a self-reporting offender, and how such self-reporting weighs on the prosecution's decision to invite a company to negotiate a RA, is unclear*. Foreign bribery cases concluded since Phase 3 suggest that courts have exerted leniency toward companies that self-reported misconduct. For example, in the ***Griffiths Energy International Inc. (Chad)*** case, the company disclosed the findings of its internal investigation to the PPSC, RCMP and US enforcement authorities. Although Canadian authorities initially became aware of the allegation through the media, the decision provides that "the fine takes into consideration the full and extensive cooperation shows by GEI in bringing this matter to the attention of authorities and disclosing the detailed findings of its comprehensive internal investigation". The extent to which this disclosure weighed on the amount of the fine is unknown. Similarly, as explained above, it is unclear how voluntary disclosure weighs on the prosecution's decision to invite a company to negotiate an RA. Civil society organisations and the defence bar have repeatedly expressed the need for enhanced predictability on what can be expected from self-reporting, but the PPSC indicated clearly that it does not intend to issue guidance to that effect. While some PPSC and MOJ representatives met on-site recognised that they have "a role to play" in encouraging companies to self-disclose, others appeared resolute not to issue guidance. They argued that offenders are not entitled to "certainty" and expressed concerns about limiting PPSC discretion when deciding whether to invite an entity to enter into an RA or otherwise restricting later decision making by either the PPSC or the Courts. However, if

[40] https://www.international.gc.ca/transparency-transparence/bribery-corruption/2021-2022.aspx?lang=eng.

[41] 715.32 Ss. (2) CC: "For the purposes of paragraph (1)(c), the prosecutor must consider the following factors: a) the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities."

[42] Submissions by the private sector and civil society to the WGB.

encouraging self-reporting is a primary objective of the RA regime, stakeholders expected to do so shared compelling views that guidance currently available does not achieve this aim, but rather discourages it.

63. Second, *guidance on how a company should proceed to self-report is lacking*. Information on the channel to self-report bribery is available on the RCMP website.[43] However, according to Transparency International Canada (TI Canada) and as emphasised by other stakeholders at the on-site, "there is no information about how organizations should approach enforcement authorities […]. This is one area where further guidance is urgently needed".[44] Canada uses a "voluntary disclosure protocol", the first step of which consists in having the company fill a template. During the on-site visit, the RCMP explained that it obtained the template from another Party to the Convention for this purpose and has adjusted it to the Canadian landscape. RCMP further explained that the protocol may vary depending on the negotiations with each company, and that it therefore cannot publish it online. Similar to the authorities' response regarding guidance on what to expect from voluntary disclosure, Canada clearly stated that it does not intend to issue guidelines to clarify the self-reporting process.

64. Third, *limited enforcement undermines Canada's efforts to encourage voluntary disclosure*, as noted repeatedly during the on-site visit by representatives of civil society and the defence bar. Canadian companies are more concerned with foreign enforcers such as the US and the UK, for those whose activity fall under their purview. When making the determination of whether to self-report, a company weighs in the risk that the misconduct be detected, and the subsequent risk of being prosecuted and sanctioned. Limited enforcement naturally reduces this risk, thereby deterring self-reporting.

65. Lastly, the *threat of being automatically debarred under Canada's Integrity Regime upon a CFPOA conviction*, combined with the lack of clear and transparent criteria regarding the use of remediation agreements, including voluntary self-disclosure of misconduct, further deters self-reporting (section 4.2.2. examines in further detail the Regime).[45] Representatives of civil society and the defence bar met on-site consider that this Regime has a chilling effect on voluntary disclosure and called for more consistency across policies.[46] According to TI Canada, "the automatic debarment might be a death knell for a company who is otherwise looking to make amends for past wrongs".[47] During the on-site visit, Canada acknowledged that the Integrity Regime in its current form might undermine policies promoting voluntary disclosure. As examined under section 4.2.2., Canada has been giving serious consideration to amending the regime, all the while ensuring that it continues to protect the government from doing business with unethical suppliers.

Commentary

Voluntary disclosure by companies remains limited in Canada, due in particular to the lack of clarity and predictability on the modalities and potential benefits of self-reporting, as well as the very limited threat of enforcement of the CFPOA. Canada reports that the number of voluntary disclosures has increased since the introduction of the RA framework in 2018, but does not provide figures to substantiate this statement. It is unclear how the RA framework will in practice

[43] https://www.rcmp-grc.gc.ca/en/prevent-corruption-reporting.

[44] Written submission by TI Canada, p. 6. Submissions by the private sector and civil society to the WGB.

[45] Anti-Bribery Recommendation XVIII.ii. recommends that countries "develop clear and transparent criteria regarding the use of non-trial resolutions including, where appropriate, voluntary self-disclosure of misconduct, cooperation with law enforcement authorities, and remediation measures".

[46] Written submission by ACT International Consulting, pp. 2-3 and by Transparency International, p.30 Submissions by the private sector and civil society to the WGB. See also: Tillipman and Block, Canada's Integrity Regime: the Corporate Grim Reaper, 53 Geo. Wash. Int'l L. Rev. 475 (2022), p. 488, available here: https://ssrn.com/abstract=4081297.

[47] Written submission by TI Canada, p. 30. Submissions by the private sector and civil society to the WGB.

incentivise companies to self-report, given the absence of guidance on the process for self-reporting as well as on its impact on decisions to enter into RAs. This lack of predictability undermines in practice efforts by Canada to encourage self-reporting and cooperation. While the PPSC argues that they cannot provide "certainty" through guidance, greater predictability may be achieved without undermining PPSC discretion.

The lead examiners, while acknowledging that providing certainty in an outcome at the outset cannot be guaranteed, nevertheless recommend that Canada issue guidance on voluntary disclosure, with a view to increasing clarity and transparency on the process of self-reporting and the enforcement outcome, in line with the 2021 Anti-Bribery Recommendation on NTRs.

2.7. Whistleblowing and whistleblower protection

66. While Canadian authorities state that whistleblowers (also referred to as "reporting persons") can be an important source of detection for foreign bribery cases, only limited information is available on the number of whistleblower reports received in connection with foreign bribery allegations. None of Canada's concluded foreign bribery cases since Phase 3 have been detected by a whistleblower report. Canadian law enforcement authorities mention that many files are initiated through tips by anonymous sources or insiders, who are not willing to provide the sufficient information needed to proceed. This may be due in part to an inefficient framework to protect whistleblowers that report foreign bribery in Canada, which appears fragmented and only provides very limited protection.

67. In Phase 3, Canada had recently amended the CC to introduce an offence of retaliation against employees in the private and public sectors (section 425.1(1) CC). At the time, no case practice existed. The Working Group had noted the negative perceptions of this law by representatives of the private sector and decided to follow up on the case practice related to this offence. Since 2011, Canada has not prosecuted a case related to whistleblower retaliation under section 425.1(1) of the CC for foreign bribery or corruption cases.

68. In 2021, the Anti-Bribery Recommendation XXII, "in view of the essential role that reporting persons can play as a source of detection of foreign bribery cases", introduced a number of standards to recommend that member countries establish strong and effective legal and institutional frameworks to protect and/or to provide remedy against any retaliatory action to reporting persons. In this regard, Canada's framework for the protection of whistleblowers in the public and private sector for foreign bribery appears generally not in line with these new standards, as described in further detail below. The main areas for concern are the following:

- The definition of reporting person under the CC does not include persons pre- or post-employment, the types of retaliatory actions listed are limited, and the provision does not provide remedies for the reporting person (section 425.1 CC);
- Other than the general criminal protection against retaliation, there is no federal legislation that mandates whistleblower protection frameworks for private sector workers reporting foreign bribery;
- The whistleblower legislation covering federal public sector workers has limited application for reports of foreign bribery as it does not apply to reports involving the private sector.

2.7.1. Scope of application

69. The Anti-Bribery Recommendation XXII.ii. recommends that countries afford protection to the "broadest possible range of reporting persons in a work-related context including as appropriate to those whose work-based relationship has ended, to persons who acquire information on suspected acts of foreign bribery during advanced stages of the recruitment process or the contractual negotiations" and that Parties should consider "extending protection to third parties connected to the reporting person."

Very limited protection for reporting persons in the private sector

70. *Section 425.1 (1) CC offers a general provision against retaliation,* that applies to private and public sector 'employees'. It does not include reporting persons post-employment, or in the advanced stages of the recruitment process, nor third persons connected to the employee. There is no other *general* federal legislation that provides whistleblower protection to private sector workers. Indeed, civil society stakeholders, like Transparency International, have previously underscored the "almost complete lack of coverage of the private sector."[48]

71. On 23 June 2023, Canada amended the PCMLTFA and introduced *sectoral specific whistleblowing protection for private sector employees that report information to FINTRAC* (section 77.2(1), PCMLTFA). While this section outlines that retaliating against private sector employees that report information to FINTRAC is a criminal offence, the prohibition against whistleblower retaliation mirrors the language of section 425.1(1) CC. Thus, the shortcomings outlined for section 425.1(1) CC in this section and subsequent sections apply to the newly introduced PCMLTFA provision. Furthermore, they only apply to reports made to FINTRAC.

Inadequate protection for reports on foreign bribery in the public sector

72. Canada's legislative framework does not provide adequate protection for whistleblowers who report foreign bribery. Canada's Public Servants Disclosure Protection Act (PSDPA) is intended as a reporting mechanism to ensure protection to all federal public sector workers that disclose in good faith alleged wrongdoing committed in the Canadian federal public sector (section 2 of PSDPA).[49] As pointed out by Canada, the PSDPA's purpose is not to uncover foreign bribery instances. The Working Group indeed previously found that the PSDPA has limited application for active foreign bribery allegations because it does not apply to reports of misconduct by private sector companies or individuals and is limited to reports of illegal acts or misconduct committed by the domestic public sector.[50] The situation is unchanged from Phase 3 in this respect. At the on-site visit, a representative of Public Sector Integrity Commissioner (PSIC) (the Commission that accepts complaints of retaliation under the PSDPA) stated that PSIC could hypothetically receive a disclosure of wrongdoing or retaliation complaint from employees of SOEs related to active foreign bribery. PSIC does not disclose the subject matter of the complaints in its annual reports, citing confidentiality obligations. As a consequence, Canada was unable to provide statistics on foreign bribery or corruption allegations submitted to PSIC.

73. In addition, the legislative framework under the PSDPA (that would govern reports of passive foreign bribery)[51] would also fall short of the 2021 Anti-Bribery Recommendation as it relies on a "good faith" standard not contemplated under the Anti-Bribery Recommendation. In 2017, the PSIC submitted recommendations to the government to review the PSDPA, including to "remove the disincentive of the 'good faith' requirement in making a disclosure of wrongdoing." As of the time of this report, no changes to the PSDPA have been enacted (see section 2.7.3 on federal task force to review the PSDPA).

74. Furthermore, while the PSDPA applies to almost all public sector workers in public administration (federal departments, agencies, boards, tribunals, court administrations, RCMP and SOEs), it does not

[48] TI Canada submission to the Government of Canada on Open Government (2017), available here.

[49] All provinces and two territories have also enacted whistleblower protection laws for provincial public sector workers, which operate similarly to the PSDPA.

[50] Canada Phase 3 Report, para. 169.

[51] *Ibid*. The Act could be used by public sector employees (or certain private sector workers) to report Canadian public sector employees in receipt of bribes.

apply to certain persons working for the public administration.[52] The PSDPA applies to all federal parent SOES but not their subsidiaries; workers of the military and intelligence services are exempt, although they have their own internal procedures for disclosing wrongdoing. The PSDPA prohibits federal public sector workers from terminating third party's contracts or refusing to enter a contract based on the information provided about wrongdoing to PSIC (sections 42.1 and 42.2); however, PSIC does not have jurisdiction to accept these complaints and recourse must be pursued through courts or labour tribunals. Further, the PSDPA does not cover those who would be in the advanced stages of the recruitment process or the contractual negotiations to become a public sector employee, or third persons connected to a reporting person.

2.7.2. Limited prohibited acts of retaliation and lack of remedies available to reporting persons for reprisals

75. Anti-Bribery Recommendation XXII.vi recommends that countries "provide a broad definition of retaliation against reporting persons that is not limited to workplace retaliation and can also include actions that can result in reputational, professional, financial, social, psychological, and physical harm." Further, countries should "ensure appropriate remedies are available to reporting persons to compensate direct and indirect consequences of retaliatory action following a report that qualifies for protection, including financial compensation, and interim relief pending the resolution of legal proceedings."

76. The types of retaliatory action listed under section 425.1(1) CC are limited and the provision does not provide remedies for the reporting person. Section 425.1(1) CC prohibits employers from taking "a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so" with the intent to retaliate against the employee because the employee has provided information of unlawful conduct. This raises concerns in several respects:

- Firstly, while the definition includes a broad definition of adversely affecting the employee's employment, it is less clear that it would cover reputational, social or psychological harm. No jurisprudence exists on this. Prosecutorial action would also be necessary for an employee to benefit from this protection. An employer found guilty of this crime would be liable to imprisonment not exceeding five years or an offence punishable on summary conviction.
- Secondly, the CC provides no *remedies for the reporting person.*
  - In the private sector, a patchwork of federal and provincial employment standards legislation protects workers from unfair termination, including due to whistleblowing, and workers can pursue remedies through administrative or civil litigation (such as wrongful dismissal litigation). However, in actions of wrongful dismissal, the burden of proof is on the employee, contrary to Anti-Bribery Recommendation XXII.ix.
  - Further, a concern with this framework for private sector workers is the need for whistleblowers to rely on civil litigation. Requiring private sector whistleblowers to bring litigation underscores the absence of other efficient remedies for retaliation. At the on-site, representatives from the legal community and academia highlighted the remedies available to reporting persons provided by provincial securities commissions, such as the Ontario Security Commission whistleblowing program, for violations of provincial securities laws.[53] However, the provincial securities commissions have no jurisdiction over the enforcement of foreign bribery offences,

[52] Schedules 1 and 2 of the PSDPA; Schedules 1 and I.1 to V of the Financial Administration Act.

[53] OSC Whistleblower Program launched in 2016 accepts complaints on possible violations of Ontario securities law, offers protection for reporting persons as well as a reward of up to CAD 5 million (EUR 3.46 million and USD 3.77 million) for tips that lead to enforcement action.

and no similar types of remedies or incentives are available to reporting persons in foreign bribery cases.

77. In the federal public sector, the administrative remedies and interim relief available to reporting persons under the PSDPA are of limited application in relation to active foreign bribery, as outlined above. Moreover, in practice, the PSIC has referred few cases to the administrative tribunal dealing with these matters. At the on-site, representatives from the PSIC emphasised that the Commission attempts to resolve cases through conciliation, resolving over 30 retaliation complaints. According to Canada, PSIC referred nine cases of retaliation to the administrative tribunal, of which, six were resolved through confidential settlements that included remedies for the complainants. While conciliation and mediation certainly have its merits, in practice, it is concerning that, in 16 years, limited remedies have been granted to reporting persons in the public sector by the administrative tribunal.[54]

2.7.3. Competent authorities, resources, and awareness raising and training

78. Anti-Bribery Recommendation XXII.i. recommends that the whistleblower protection framework be implemented by competent authorities sufficiently resourced and trained to receive, investigate and process complaints of retaliation.

79. Canada did not provide specific information about investigative and prosecutorial resources dedicated to the types of actions envisaged under section 425.1(1) CC. At the on-site, RCMP representatives were well-versed in the CC whistleblower protection provision and stated that such protection is referenced when working with sources. In terms of awareness raising, the RCMP SII coordinator highlights section 425.1(1) of the CC in its foreign bribery training presentations to the public sector (TCS, Health Canada, PSPC) and private sector (Canadian Bar Association).

80. Other than the recent amendment to the PCMLTFA that relate to whistleblowing protection for employees of reporting entities, there are no federal legislative bills nor any legislative projects reviewing effectiveness of the legal and institutional framework for the protection of reporting persons in the private or public sector in relation to reports of *active* foreign bribery. In November 2022, Canada announced that it was exploring revisions to the PSDPA through a task force, whose work remains ongoing. Previously, as noted above, public stakeholders – such as the PSIC – submitted proposals to remove the 'good faith' reporting requirement, establish a reverse onus of proof at the Tribunal and expand the definition of reprisal.[55] To date, no recommendations or draft amendments have been issued with regard to these matters by the task force on PSDPA revisions.

2.7.4. Statistics and reporting channels

81. Canada has reporting channels for the public to submit allegations of foreign bribery. The RCMP provides reporting information and dedicated email for foreign bribery complaints on its website. A tip line is also coordinated by the PPSC, the Competition Bureau (for competition offences) and the RCMP. In its responses to the Phase 4 Questionnaire, Canada states that complaints received by PPSC are triaged and foreign corruption allegations would be redirected to the RCMP's SII foreign corruption team.

82. The RCMP does not keep statistics on the number of reports received in relation to foreign bribery or corruption and recording of such numbers is done on an ad-hoc basis. At the on-site visit,

[54] Public Servants Disclosure Protection Tribunal, "All Cases" (June 2023). Only two decisions from the Tribunal have been issued based on the merits of the case and both were dismissed. Canada reports that six other cases were resolved through mediation and one case is ongoing.

[55] PSIC, Review of the PSDPA – Proposal of the Public Sector Integrity Commission for legislative amendments, submitted to House of Commons Standing Committee on Government Operations and Estimates (14 February 2017).

representatives of the RCMP stated that at least five reports had been received from whistleblowers and/or companies in relation to foreign bribery, the distinction between the two being unclear.

Commentary

In Phase 3 the Working Group noted that the whistleblowing protection framework afforded to public sector workers under PSDPA had limited application to reports of active foreign bribery. The Working Group had further expressed doubts but considered it premature to consider whistleblower protection under section 425.1(1) CC as ineffective. Since Phase 3, there has not been any case practice under section 425.1(1) CC and a very limited number of foreign bribery cases have been detected by whistleblowers. This raises serious concerns that Canada does not have a comprehensive framework in place to protect private and public sector whistleblowers who report allegations of foreign bribery or related offences.

Thus, the lead examiners recommend that Canada promptly enact strong and effective legal and institutional frameworks to protect and to provide remedy against retaliatory action to persons working in the private or public sector who report on reasonable grounds suspected acts of foreign bribery and related offences in a work-related context, in line with Anti-Bribery Recommendation XXII.

2.8. Media reports

83. The 2021 Anti-Bribery Recommendation welcomes efforts by the media to contribute to the fight against foreign bribery, and encourages law enforcement authorities to proactively gather information from diverse sources, such as the media, to increase detection of foreign bribery and enhance investigations. Canada did not provide information in relation to how the RCMP monitors media reports, including through the use of alerts. Given Canada's stated position that it can only provide details about investigations on concluded cases that are available in the public domain, it is not possible to assess whether Canada is using media reports as an effective tool to detect foreign bribery cases.

2.8.1. With the exception of Trade Commissioners, government agencies do not monitor media reports

84. The RCMP does not systematically monitor media reports to detect foreign bribery, and it is unclear whether these are used as an effective tool to detect and pursue cases. In the Phase 4 questionnaire, Canada stated that where the RCMP SII foreign corruption team is informed of alleged foreign bribery reported in the media, it will conduct initial queries to assist in assessing whether or not there is a nexus to Canada which may support commencing an in-depth investigation. However, during the on-site visit, representatives of the RCMP explained that a media report on allegations of foreign bribery was insufficiently tangible to prompt an inquiry without any tangible corroborative evidence.

85. It appears that only one case reported in the media has resulted in a successful outcome to date. According to Canada, the RCMP became aware of the ***Griffiths Energy International Inc. (Chad)*** case after two media reports in 2011 indicated that the company disclosed, during an Initial Public Offering, references to an internal investigation relating to bonus payments. This was followed up by a self-disclosure from the company almost a year later. Media monitoring by the WGB indicates that there are potentially at least 46 allegations where Canadian authorities could have conducted initial queries to assist in assessing the matter and thereafter commencing an in-depth investigation. However, it is not possible to determine whether this has been done in relation to these allegations. On-site discussions did not provide any further information on this subject.

86. As noted above (see section 2.2.) Trade Commissioners collaborate with colleagues from other sections at overseas missions in order to monitor host country and other foreign media for information concerning Canadian companies operating in their country/countries of responsibility, including allegations of foreign bribery implicating Canadian companies. On-site discussions did not make it clear that other government agencies similarly monitor the media.

2.8.2. Challenges to access information hampers investigative journalism in Canada on economic crime

87. The one journalist and several civil society organisations met on-site in separate sessions gave the same account on access to economic crime information in Canada. As further detailed under section 3.6.1., concluded CFPOA cases are publicly available but difficult to access in practice, as requests must be made in the court where the decision was filed and can be denied. Information on on-going investigations is not accessible, which complicates reporting on the subject. Challenges to access enforcement information is compounded by a general opacity of the business community, fuelled by limited disclosure requirements of listed companies. These factors hamper reporting by the media, despite an interest from the public on these matters. When questioned about this opacity, several panellists, including the journalist, shared views that the business community in Canada is very close-knit, and historically reluctant to sharing information. Some posited that this inclination is a function of a general complacency toward corporate misconduct, which they argue is both a cause and a consequence of lax rules and practices on access to information.

Commentary

The RCMP does not systematically monitor media to detect foreign bribery. Media reports do not seem to be used as an effective tool to detect and pursue foreign bribery cases in Canada. Only one case has been detected through the media to date. The lead examiners therefore recommend that the RCMP enhance its capacity to detect foreign bribery cases by deploying additional means for monitoring Canadian and international media for foreign bribery allegations involving Canadian companies or individuals.

2.9. Anti-money laundering measures

88. In March 2023, Canada updated its National Inherent Risk Assessment (NIRA), which provides an overview of the money laundering and terrorist financing threats, vulnerabilities and risks in Canada.[56] The NIRA was first published in 2015 and found that the corruption and bribery threat was "Very High", citing risks concerning the payment of bribes to foreign public officials, the ability of organised crime to infiltrate public procurement processes, and the use of professionals and public officials to facilitate the laundering of corruption-related proceeds. The updated NIRA continues to find the corruption and bribery threat to be “Very High” citing the previously noted risks. Although FINTRAC reports that they make disclosures to law enforcement, nevertheless, to date, not one foreign bribery case was detected through Canada’s anti-money laundering (AML) framework. Referrals where bribery is the suspected predicate offence are made to the RCMP SII by FINTRAC, but the statistics available do not differentiate between domestic and foreign bribery.

89. Canada’s money laundering framework is covered primarily by the PCMLTFA. In its responses to the Phase 4 questionnaire, Canada explains that it creates reporting obligations for a wide range of Reporting Entities (REs), including accountants and accounting firms and real estate brokers, sales representatives and developers, who are required to report suspicious transactions to FINTRAC, including

[56] Updated assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada - Canada.ca.

suspicions relating to corruption and bribery offences. However, the legal profession is still not specifically covered by the requirement to report, a long-standing issue already noted by the Working Group during its Phase 2 evaluation of Canada in 2004; instead, Canada relies on lawyers' professional code of conduct obligations. The Financial Action Task Force (FATF), in their mutual evaluation in 2016, found this lack of reporting by the legal profession to be a significant loophole in Canada's AML/CFT framework.[57]

90. FINTRAC provides guidance to REs to assist in detection and reporting suspicions of ML/TF, which in turn feeds into the quality of the transaction reports that are reported to FINTRAC that may eventually get disclosed in regard to a bribery investigation. Corruption in general is included as a risk factor to be considered in the guidance provide to REs, for instance by highlighting corruption risks linked to PEPs or to specific jurisdictions. However, no guidance or training has been provided on money laundering specifically predicated on foreign bribery.

91. In 2019, a provincial Commission of Inquiry (Cullen Commission) was established to inquire into money laundering in the Canadian province of British Columbia. The final report was delivered in mid-2022 and, inter alia, found that the federal AML regime is not effective and that "*Law enforcement bodies in British Columbia cannot rely on FINTRAC to produce timely, useful intelligence about money laundering activity that they can put into action*".[58] Canada reports that – although the report applied only to British Columbia – it has been carefully examining the Cullen Commission's final report and will continue working with the Government of British Columbia and other partners to review and improve Canada's AML/ATF Regime. For example, the Canadian Budget in 2022 provided CAD 89.9 million (EUR 62.3 million and USD 67.8 million) and over five years and CAD 8.8 million (EUR 6.1 million and USD 6.6 million) ongoing to FINTRAC being a 24 % funding increase and a 13 % increase in new staff. The report also prompted discussions on the creation of a Canadian Financial Crimes Agency to address the issues identified at in the Cullen report, a project mentioned multiple times by representatives of the Canadian government during the on-site. Civil society representatives strongly support this project, noting serious economic crime offences, including foreign bribery, should be included as part of the mandate of this new Agency, a point also emphasised by a TI Canada white paper on the subject.[59]

Commentary

To date, no foreign bribery case has been detected through Canada's anti-money laundering system. This may be due to insufficient training provided to reporting entities to identify and report suspicions of money laundering predicated specifically on foreign bribery to FINTRAC, Canada's FIU. Furthermore, as noted by Canadian authorities themselves in a provincial inquiry (Cullen report), there is concern that FINTRAC cannot produce timely, useful intelligence about money laundering activity in Canada. Additionally, the legal profession is still not required to report suspicious transactions to FINTRAC.

The lead examiners therefore recommend that reporting entities receive training and guidance to enhance detection of money laundering predicated on foreign bribery. They also recommend that Canada take necessary measures to ensure that FINTRAC develops its expertise to enhance referrals and intelligence sharing of suspicions of money laundering predicated on foreign bribery with the RCMP. In line with the findings of the 2016 FATF report, the lead examiners recommend that Canada ensure that the legal profession is subject to a reporting obligation under Canada's AML regime, including for money-laundering predicated on foreign bribery.

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[57] FATF mutual evaluation of Canada 2016, Executive Summary Key Finding 2.

[58] Commission of Inquiry into Money Laundering in British Columbia (cullencommission.ca), Executive Summary p.3.

[59] TI Canada (2023), https://transparencycanada.ca/news/white-paper-on-establishing-a-canadian-financial-crime-agency.

2.10. Detecting foreign bribery through accounting and auditing

92. None of Canada's concluded foreign bribery cases have been detected by accounting or auditing professionals despite some developments in the applicable framework since Phase 3. Furthermore, Canada did not provide responses to related questions in the Phase 4 questionnaire on changes to relevant regulatory standards since Phase 3, did not provide data or statistics on reporting, and did not indicate any actions undertaken to address outstanding recommendations on external auditing.

2.10.1. Accounting standards

93. Canadian companies and other commercial businesses are subject to obligations to keep accounting records pursuant to the federal Canadian Business Corporations Act (CBCA), provincial securities legislation, and professional accounting standards. These obligations vary depending on the nature of the entity and the dimensions of the business. The Canadian Accounting Standards Board (AcSB) requires publicly accountable enterprises to use International Financial Reporting Standards (IFRS) in the preparation of all interim and annual financial statements. Private companies also have the option to adopt IFRS for financial statement preparation.

2.10.2. Auditing standards

94. In Phase 3, the WGB made a series of recommendations concerning Canada's external auditing standards in relation to (i) requirements on companies to submit to external audit; (ii) improving auditor independence; and (iii) reporting to law enforcement (recommendations 4(e)(ii)-(iv)). These recommendations were considered partially implemented at the time of Canada's Phase 3 follow up report in 2013.

95. Canada's auditing standards have changed since Phase 3. In 2017, the Auditing and Assurance Standards Board (AASB) adopted the International Standards on Auditing (ISA) issued by the International Auditing and Assurance Standards Board (IAASB), as Canadian Auditing Standards (CAS). Chartered Professional Accountants (CPA) Canada publishes the CPA Handbook (Handbook), which contains the accounting and assurance standards and guidance, including CAS, developed and/or adopted by the AASB (as well as the Accounting Standards Board and the Public Sector Accounting Board).

Canada maintains exemptions for entities subject to external audit

96. The Anti-Bribery Recommendation XXIII.B.i recommends countries to consider whether requirements on companies to submit to external audit are adequate. Under Canada's federal corporation legislation, private companies retain the ability to exclude themselves from external audit with the unanimous consent of the shareholders (section 163(1)-(3), CBCA). The Working Group recommended in Phase 3 that Canada consider whether the requirements to submit to independent external audit are adequate, in view of the rule that permits large private companies to exempt themselves from the requirement (recommendation 4(e)(ii)). At the time of the Phase 3 follow up report, Canada stated that it continued to review the CBCA. The Working Group deemed the recommendation partially implemented.

97. The relevant CBCA provisions remain unchanged since Phase 3. Canada provided no response on any steps taken to consider this exemption. At the on-site visit, representatives of the accounting profession confirmed that shareholders can choose to exempt a private company from external audit.

Canadian professional regulatory bodies adopt international standards on auditor independence

98. The Anti-Bribery Recommendation XXIII.B.ii recommends that "countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of companies' accounts, financial statements and internal controls".

99. Broadening the prohibitions for participating in audits in order to improve auditor independence has been an outstanding recommendation for Canada since Phase 2. Canada's corporations' legislation contains rules on the independence of auditors for federal corporations (CBCA section 161(1)-(2)). In Phase 3, the Working Group noted that the law remained the same but that Canada was incorporating international standards in its auditing standards to include provisions related to auditor independence. Thus, the Working Group recommended that Canada consider broadening the prohibitions for participating in audits in order to improve auditor independence (Phase 3 recommendation 4(e)(iii), deemed partially implemented at the time of the Phase 3 follow up).

100. While the provisions related to auditor independence in the CBCA remain the same, since Phase 3, Canadian accounting and auditing regulatory bodies have incorporated ISA standards. This includes standards related to the independence of auditors in the CAS, found in the CPA Handbook. CAS contains relevant provisions on auditor independence, including the ISA 200 (Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with International Standards on Auditing) and ISA 700 (Forming an Opinion and Reporting on Financial Statements).

Reporting foreign bribery to management and competent authorities

101. Anti-Bribery Recommendation XXIII.B.(iii)-(v) recommends countries to (a) require external auditors to report foreign bribery to management and, as appropriate, corporate monitoring or governance bodies, (b) encourage companies that receive such reports to respond actively and effectively; and (c) consider requiring external auditors to report suspected acts of foreign bribery to "competent authorities independent of the company, such as law enforcement or regulatory authorities." In Phase 3, the CAS already required the auditor to report non-compliance to the audit committee and those charged with corporate governance. Since Phase 3, the CAS has adopted ISA standards to reinforce these obligations.

102. At the time of Phase 3, there was no legal requirement for external auditors to report suspected acts of foreign bribery to competent authorities, including law enforcement. The Working Group therefore recommended that Canada consider amending the law to require external auditors to report indications of foreign bribery to competent authorities (recommendation 4(e)(iv)). At the time of the Phase 3 follow up, Canada was considering the provisions under its corporation legislation (CBCA) and the recommendation was deemed partially implemented.

103. As of the present Phase 4, there is still no obligation on external auditors to report suspicions of foreign bribery to competent authorities. The federal corporation legislation (CBCA) remains unchanged in this respect, and no other legislation requires external auditors to report indications of foreign bribery to competent authorities. At the on-site visit, representatives of the accounting and auditing profession confirmed that there is no obligation under any Canadian standards to report suspicions of foreign bribery to law enforcement. The auditors noted that in most cases, they would be engaged under legal privilege and these findings would be provided to the law firm and/or management of the company. Canada indicates that provincial regulatory bodies govern reporting obligations by CPAs and generally, establish a duty of confidentiality on the part of regulated accounting professionals. At present, only Quebec has a law that allows (but does not require) regulated accountants in the province to set aside their duty of confidentiality to report allegations of wrongdoing, including corruption, to the province's anti-corruption police service.

Training and awareness-raising

104. Since Phase 3, Canadian authorities do not report any steps to engage with the professional regulatory bodies for accountants and auditors, which could explain in part the lack of reports of foreign bribery in practice. CPA Canada and the provincial professional regulatory bodies provide training to auditors and accountants, and external auditors are required to undergo continuous professional training as part of the regulations that govern membership to provincial CPA regulatory bodies.[60] However, no such training appears to have addressed foreign bribery risks. Canada indicates that such training and awareness-raising is in the purview of the provincially regulated bodies. At the on-site, auditors and accountants from large firms appeared aware of foreign bribery red flags and had high general awareness of the offence in general, and explained that all training and awareness raising on the topic of foreign bribery was provided by the firm's professional education programmes. On-site participants did not think that this type of training would be available to accountants in smaller firms or independent practice.

Commentary

Since Phase 3, Canada has incorporated international auditing standards in the Canadian Auditing Standards that regulate auditors. The lead examiners thus find Phase 3 recommendation 4(e)(iii) on auditor independence to be fully implemented. The lead examiners, however, reiterate Phase 3 recommendation 4(e)(ii) and (v) and recommend that Canada (a) consider whether the requirements to submit to independent external audit are adequate, in view of the rule that permits large private companies to exempt themselves from the requirement and (b) consider amending the law to require external auditors to report indications of foreign bribery to the competent authorities. The lead examiners also recommend that Canada take additional measures to raise awareness of, and provide training on, foreign bribery red flags among accountants and auditors.

2.11. Detection of foreign bribery cases through MLA and international cooperation

105. International cooperation constitutes an effective detection tool. Up to 2017, 7% of bribery schemes resulting in sanctions have been detected through mutual legal assistance (MLA) requests.[61] The Canadian authorities involved in MLA may detect evidence through the MLA request itself or the documentation sent in support of the request.[62] At the on-site, a representative of the Ministry of Justice's International Assistance Group (IAG) confirmed that in cases where possible criminal conduct is detected in a MLA request, the point of contact at IAG will let the requesting party know that this will be forwarded to law enforcement, and the RCMP may request to use this information. The RCMP recognises that MLA requests are an important source of detection. Additionally, in relation to concluded cases, Canada detected three foreign bribery cases through international financial institution (IFIs) and foreign law enforcement authorities.

106. The first case involved a referral from the Integrity Vice Presidency of the World Bank Group (INT). In the **SNC-Lavalin (Bangladesh)** case, INT referred foreign bribery allegations and irregularities in the bidding process in 2011. The RCMP subsequently investigated the allegations that company representatives were planning to pay bribes to foreign public officials in order to be awarded an IFI-financed

[60] For example, mandatory continuous professional development (CPD) requirements exist for active members of CPA Ontario, which are aligned with the International Federation of Accountants' CPD standards.

[61] OECD (2017), *The Detection of Foreign Bribery*, OECD Publishing, Paris, p. 137, https://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery-ENG.pdf.

[62] *Ibid*., p. 138.

bridge construction contract in the foreign country. Five individuals were charged with CFPOA offences in connection with this matter. Ultimately, none of the individuals were convicted. The World Bank's referral was the subject of a Supreme Court of Canada case on whether the World Bank was subject to a Canadian production order given the IFI's privileges and immunities.[63] The accused filed motions to access the IFI's archives and personnel as part of their motion challenging the wiretap authorisation used in the investigation. In 2016, the Supreme Court of Canada upheld the World Bank's privileges and immunities, The Supreme Court of Canada recognised the importance of global cooperation in transnational bribery, as "corruption often transcends borders." The court further acknowledged that when IFIs "share information gathered from informants across the world with the law enforcement agencies of member states, they help achieve what neither could do on their own." Trial proceeded against three individuals on foreign bribery charges. In January 2017, the three accused were acquitted after the court ruled to exclude the wiretap evidence from the RCMP investigation and the prosecution elected to call no evidence (see also section 3.3.1., investigative techniques). Despite some of the challenges and delays that resulted from this referral, Canada indicates that it views international organisations as an important source of detection for foreign bribery investigations. The RCMP maintains a contact point with the World Bank.

107. In the second case, ***Ultra Electronics (Philippines)***, the parent company reported the misconduct to the UK Serious Fraud Office in 2018. The RCMP SII initiated a foreign bribery investigation in August 2018.[64] In February 2023, a Canadian court approved an RA with the company to resolve CFPOA and fraud charges under the CC in Canada's first-ever RA for CFPOA charges, resulting in a fine of CAD 6.59 million (EUR 4.57 million and USD 4.97 million) (see further below section 3.6.3, Non-trial resolutions). As of the time of this report, trial was still pending against four individuals.

108. In the third case, ***Canadian General Aircraft (Thailand)***, media reports indicate that the case was discovered by the US Federal Bureau of Investigation, who subsequently informed the RCMP, who initiated an investigation. In December 2016, the president of a Canadian aviation company was charged with foreign bribery under the CFPOA for allegedly offering to pay bribes to foreign public officials in order to secure the sale of a commercial jet from the country's national airline. However, the charges were stayed in November 2017 based on the "reassessment of the available evidence" following a preliminary inquiry.

Commentary

The lead examiners commend the RCMP for promptly initiating foreign bribery investigations that resulted in foreign bribery charges against several individuals based on the information it received from international organisations and foreign authorities.

[63] World Bank Group v. Wallace, 2016 SCC 15.

[64] RCMP news release (21 September 2022).

3. Enforcement of the foreign bribery offence

3.1. Foreign bribery offence and defences

109. Since Phase 3, Canada has amended its foreign bribery offence and defences under the CFPOA, and courts provided judicial interpretation of certain elements of the offence.

110. In Phase 3, the Working Group expressed concerns on some aspects of the foreign bribery offence as well as defences under the CFPOA. These related to (i) the definition of "business" in the foreign bribery offence (recommendation 1) (ii) the facilitation payments defence (recommendations 5 and 6), (iii) the "reasonable expenses" defence under the CFPOA (follow up issue 10a), and (iv) nationality jurisdiction over the foreign bribery offence (recommendation 3). In the Phase 3 Written Follow-Up Report, Canada had introduced Bill S-14, Fighting Foreign Corruption Act (FFCA) that, among other things, amended the definition of "business", repealed the facilitation payment defence in the CFPOA, and expressly provided for nationality jurisdiction over the foreign bribery offence.[65] Subsequently, these amendments to the CFPOA were enacted and the WGB found that Canada had fully implemented recommendations 1, 3, 5 and 6.[66] The WGB agreed to keep following-up on defence of "reasonable expenses incurred in good faith" (follow-up issue 10a).

3.1.1. Elements and definitions of the offence

111. Overall, the amendments to Canada's foreign bribery offence and repeal of the facilitation payment exemption are positive. Some concerns, however, have arisen due to jurisprudence of the interpretation of the certain elements of the offence as outlined below. Questions also remain regarding the application in practice of the defence of reasonable expenses in the CFPOA.

112. While the foreign bribery offence in section 3(1) of the CFPOA remains unchanged, in 2013, Canada amended the definition of "business" in section 2 of the CFPOA to clarify that the offence of foreign bribery applies to all businesses, regardless of profit ("any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere"). Previously, the definition had been defined with a "for profit" qualification. This is a positive development as the Working Group had long-standing concerns on the "business for profit" requirement of the foreign bribery offence.

[65] Canada Phase 3 written follow-up report, summary of findings, para 2.

[66] Canada Phase 3 additional follow-up report (March 2014), pp. 10-11.

High evidentiary bar to prove the mental knowledge in cases with foreign SOE officials

113. Since Phase 3, the definition of a foreign public official in the CFPOA remains unchanged. However, jurisprudence since Phase 3 shows that Canadian courts have adopted a high evidentiary bar on the specific knowledge needed of the public official's status, particularly for employees of foreign SOEs.

114. While the CFPOA covers the bribery of officials of a foreign SOE, in 2021, judicial interpretation in the ***Cryptometrics (India***) case significantly raised the *mens rea* requirement for an offence under section 3(1) of the CFPOA.[67] In the trial decision, one of the individuals had been accused of paying bribes to employees of an airline company, an Indian SOE. The trial judge held the accused did not have the requisite *mens rea* in relation to this agreement, as the accused was not aware that the airline officials were foreign public officials as defined under the CFPOA.[68] The individuals were nevertheless convicted of CFPOA offences, but only in relation to the agreement to pay bribes to the cabinet minister (as the court had found that the individuals knew that bribes would be paid to a cabinet minister). Firstly, the court of appeal upheld that section 3(1) of the CFPOA, like domestic bribery, is a specific intent offence. Secondly, when clarifying the mental element required, the court of appeal stated:

> "in a case where the person bribed or offered a bribe is employed by a corporation, to have the necessary *mens rea*, the accused must know *not only that the person was employed by the corporation, but that the corporation was established to perform a duty or function on behalf of a foreign state, or is performing such a duty or function*. The accused need not know that this is how the CFPOA defines a foreign public official, nor that bribing the person is illegal." [emphasis added]

115. The trial judge did not find that the accused knew that the SOE was established to perform a duty or function on behalf of the foreign State. The court did not consider whether the defendant took any independent steps to enquire into the alleged bribe recipient's status as a public authority. Further, according to the court of appeal, a corporation that has the name of a country in it is not necessarily one that carries out a duty or function of the government. At the on-site visit, several lawyers and law professors expressed the view that this set an unduly high threshold for prosecutors to bring foreign bribery cases and could hinder Canada's ability to prosecute foreign bribery cases.[69] In practice, the type of direct evidence that may be necessary to prove the accused knew the official nature of an SOE official may raise challenges for law enforcement in bringing foreign bribery cases against SOE officials. Representatives of judicial authorities were not able to participate in the on-site.

Quid pro quo requirement to establish liability and standard of proof

116. Since Phase 3, the majority of concluded foreign bribery cases with sanctions against natural and legal persons have been only under section 3(1)(b) of the CFPOA (***Griffiths Energy International Inc. (Chad)***, ***Cryptometrics (India)*** and ***SNC-Lavalin (Libya)***) and no court jurisprudence existed on section 3(1)(a) of the CFPOA.[70] In 2023, a trial court issued the first decision interpreting section 3(1)(a) of the CFPOA in the ***IMEX Systems (Botswana)*** case. The court held that section 3(1)(a) of the CFPOA sets a *quid pro quo* requirement for liability by including the words "as consideration for" and requires proof of a link between the advantage given to a foreign official and a specific act (or omission) undertaken by the

[67] The court of appeal upheld the trial judge's findings with respect to the underlying bribery offence. However, the court of appeal acquitted both defendants on procedural grounds (mistrial based on delayed disclosure by the prosecution) and a new trial was ordered. The PPSC declined to bring a new trial against the two individuals.

[68] R v. Barra and Govindia, 2018 ONSC 57, para 43-46.

[69] Written submission by TI Canada. Submissions by the private sector and civil society to the WGB.

[70] The recent RA with ***Ultra Electronics (Philippines)*** includes offences under both section 3(1)(a) and (b) of the CFPOA.

official.[71] The court stated that section 3(1)(b) is, arguably, broader as it requires only that the accused induce an official to use their position to influence acts or decisions.

117. In ***IMEX Systems (Botswana)***, the trial court acquitted the founder of a Canadian software development company of committing foreign bribery. The case involved alleged financial benefits provided to a foreign public official and his family in exchange for letters certifying that the company would be retained for a government electronic services contract. The company ultimately did not receive the contract. Following the founder's resignation, the new management of the company self-disclosed the information to the RCMP. The individual was charged with foreign bribery only under CFPOA section 3(1)(a). The trial court found that there was an insufficient link between the advantage or benefit given to the foreign public official and the specific act (or omission) performed by the official.

118. The trial court set out a four-part test under section 3(1)(a), requiring that the accused:

i. directly or indirectly gives, offers or agrees to the advantage or benefit,
ii. offers the advantage or benefit to the foreign public official for the benefit of the official,
iii. offers the advantage or benefit in order to obtain or retain an advantage in the course of business, and
iv. offers the advantage or benefit as consideration for an act or omission in connection with the performance of the official's duties or functions.[72]

The judge found that each element of the offence requires subjective fault as the requisite mental knowledge (*mens rea)*. The trial court relied on jurisprudence of the domestic bribery offence (section 121 CC)[73] and the ***Cryptometrics (India)*** court of appeal case in deciding that the foreign bribery offence requires specific intent for each element.

119. Based on the facts of ***IMEX Systems (Botswana)***, the court was not convinced that the advantage provided to the foreign public official was planned and arranged "as consideration" for the letters. The temporal connection as well as the fact that the letters were "generally helpful" for the company did not constitute "a consideration" under CFPOA section 3(1)(a).[74] The trial court did not accept that the evidence provided by the prosecution was sufficient to establish a "quid pro quo" (such as the evidence related to the relationship between the accused and the official; timing of the advantage provided; the nature and advantage of the benefit – including direct evidence of various expenses paid by the accused for the official; and the situation at the company at the time of these benefits). While the application of standard of proof and the use of circumstantial evidence is complex in practice, Canadian courts can use direct or circumstantial evidence to prove elements of an offence.[75] The trial court cautioned against "too readily" drawing inferences of guilt when the elements of the offence depend largely or exclusively on circumstantial evidence.

120. As of the time of the present report, the PPSC was appealing this decision and Canadian authorities were not at liberty to discuss the case, including the grounds for the appeal. At the on-site visit, several law professors stated that, absent confessions or whistleblower testimony, the evidentiary threshold under this case for the foreign bribery offence will make prosecutions nearly impossible. At the time of this report, no decision had been issued by the appeal court.

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[71] R v. Arapakota, 2023 ONSC 1567, para 83.

[72] *Ibid*, para 56.

[73] Sections 120 and 121 of the CC deal with bribery of officers and frauds on government.

[74] R v. Arapakota, 2023 ONSC 1567, para 231.

[75] R v. Villaroman, 2016 SCC 33, paras. 37-43.

121. As previously mentioned, the evaluation team was not able to meet with any representatives of judicial authorities during the on-site. A wide array of Canadian stakeholders at the on-site visit, including representatives from law firms, academia, civil society and law enforcement, stated that judges assigned to CFPOA cases may have no previous experience with foreign bribery, corruption or economic crime. There are no specialised courts in Canada dealing with economic crime, nor an express practice to assign CFPOA cases to judges with foreign bribery or economic crime expertise. While some judges may have previous experience with international aspects of economic crime, such assignment is ad-hoc.

Other general evidentiary issues: expert evidence often required to prove that bribe recipient holds an official position as defined in foreign legislation

122. In Canada, courts do not accept foreign legislation as admissible evidence to show the law of another country. An issue seen in foreign bribery cases is the cumbersome practice of requiring an expert witness to establish the fact that the bribee (foreign public official) holds an official position as defined in the legislation of that foreign jurisdiction. While under Canada's *Evidence Act*, courts may accept court records or judicial proceedings from a foreign country as admissible evidence, subject to certification requirements (section 23), there is no corresponding provision allowing the introduction of foreign legislation under the same conditions. Canada indicates that this is due to well-grounded common law, which has held that foreign law is admitted as a finding of fact, and that expert evidence is essential for providing a full understanding of foreign law.

123. In practice, prosecutors must retain an expert on the law of the foreign jurisdiction to introduce the factual evidence that the person holds a public position in accordance with the CFPOA definition. Such an approach has obvious drawbacks as experts are often located in the country where the bribe is alleged to have been paid and individuals may fear for their safety or future economic prospects. The PPSC did not indicate that any foreign bribery prosecutions had been stayed or impacted by this, but acknowledged this is a challenge for international cases, which is not just unique to CFPOA matters.

Commentary

The lead examiners consider that, viewed collectively, the decisions issued by courts so far on elements of the foreign bribery offence and standard of proof required seem unduly high. Several stakeholders at the on-site visit expressed concerns that the limited court decisions on the CFPOA hinder Canada's ability to investigate, prosecute and sanction foreign bribery cases.

In particular, the lead examiners are concerned about the restrictive interpretation of the mental knowledge needed to prove that the accused knew SOE officials were foreign public officials, as well as the type of evidence that will be necessary to prove such an element. In relation to the interpretation of section 3(1)(a) of the CFPOA, the lead examiners are also concerned by the narrow approach taken to prove quid pro quo, which is compounded by the court's approach to its assessment of circumstantial evidence. The lead examiners note that this CFPOA case is still under appeal. To this end, the lead examiners recommend that the Working Group on Bribery follow up on (i) the investigation, prosecution, and sanctioning of foreign bribery cases involving officials of SOEs; (ii) jurisprudence of section 3(1)(a) of the CFPOA; and (iii) treatment of circumstantial evidence in foreign bribery cases.

The lead examiners recognise that these are complex issues and express their utmost respect for the independence of the Canadian judiciary. However, the lead examiners note that the concerns outlined above relate to the interpretation of the foreign bribery offence and standard of proof required by courts, and not necessarily the CFPOA legislation text itself. Further, a wide array of Canadian stakeholders at the on-site visit – lawyers, academia, civil society and law enforcement – raised concerns about the judiciary's familiarity with foreign bribery cases. Thus, the lead examiners recommend that Canada provide training and/or guidance to judges on (i) the foreign bribery offence, including Article 1 of the Convention, and (ii) the evidentiary threshold for the

foreign bribery offence, including the type of circumstantial evidence and/or direct evidence required to prove a briber's mental knowledge with respect to elements of the foreign bribery offence.

Finally, while the Convention does not require States to consider foreign judgments on the same matter[76] or foreign legislation, they can be a beneficial source of evidence and should be given due consideration in foreign bribery cases. Thus, the lead examiners also recommend that Canada consider taking appropriate measures, including if necessary amending the Evidence Act, to ensure that the evidentiary requirements for introducing foreign legislation to show the law of another country in proceedings is not unduly onerous in foreign bribery cases.

3.1.2. Defences to the CFPOA

Facilitation payments exception repealed since Phase 3

124. In 2017, Canada repealed the "facilitation payments" defence under the CFPOA, which had been an enduring concern of the Working Group. [77] The legislative change was part of Bill S-14 FFCA that amended several provisions of the CFPOA. The repeal of the facilitation payment defence came into effect in October 2017. At the on-site, representatives of GAC and TCS indicated that training around the repeal of the facilitation payment exemption had been provided to various private sector stakeholders, including Canadian companies that operate abroad.

No CFPOA case practice on the defence of reasonable expenses incurred in good faith

125. The "reasonable expense" defence to the offence of foreign bribery in the CFPOA remains unchanged since Phase 3 (section 3(3)(b) of the CFPOA). In Phase 3, the "reasonable expense" defence had not been applied or interpreted. Consistent with Canada's longstanding practice of not issuing advisory opinions on criminal matters, Canada determined that it would not issue guidance on the operation of "reasonable expenses." The Working Group had decided to continue following up on the application of this defence.

126. To date, the "reasonable expenses" defence has not been raised in any of Canada's concluded CFPOA cases. In the absence of application of this defence in practice, it remains an open issue.

Commentary

The lead examiners welcome Canada's repeal of the facilitation payment exemption in the CFPOA, and the good practice of raising awareness with the private sector around this legislative change by Trade Commissioners and GAC.

In relation to the "reasonable expenses" defence, no case information or practice yet exists for the application of this in foreign bribery cases. The lead examiners therefore recommend that the Working Group continue to follow up on how the defence is applied in practice.

3.1.3. Jurisdiction to prosecute foreign bribery

127. In June 2013, Canada enacted a legislative provision to extend the jurisdictional scope of the CFPOA to prosecute its nationals for the bribery of foreign public officials committed abroad (section 5(1) of CFPOA). Following the passage of Bill S-14 FFCA, the Working Group's Phase 3 recommendation on

[76] See, e.g., Finland Phase 4 Report, para 88.

[77] Government of Canada, SI/2017-69 (15 November 2017).

nationality jurisdiction was deemed fully implemented. [78] Previously, the Working Group considered Canada's long-standing jurisprudence on territorial jurisdiction, requiring a "real and substantial" link to Canada, to be inadequate for foreign bribery cases.[79] There has been no court jurisprudence on section 5(1) for a Canadian national, permanent resident, or company since the enactment of the new provision. At the on-site, investigators and prosecutors had high awareness of the amendments to the CFPOA regarding nationality jurisdiction.

128. Canadian courts also confirmed that *territorial* jurisdiction can be applied to *foreign nationals* working on behalf of Canadian companies, using the "real and substantial" test on territorial jurisdiction (*R v. Libman*). In ***Cryptometrics (India),*** the Ontario Court of Appeal agreed that territorial jurisdiction had been established over two foreign national defendants who had a real and substantial link to Canada (US and UK nationals). This was based on the links to Canada such as the individuals representing or working for a Canadian company and contractual benefits to the company would be obtained in Canada, rather than a focus on where the individuals were located at the time of making the corrupt agreement or which financial markets they would use to flow through bribe payments.[80] Previously, a lower court had ordered a stay in one of the proceedings in the ***SNC-Lavalin (Bangladesh***) case due to lack of jurisdiction against a foreign national (a former foreign public official allegedly involved in the scheme)***.*** [81]

Commentary

The lead examiners welcome the legislative amendment expressly introducing nationality jurisdiction for foreign bribery and related offences under section 5(1) of the CFPOA. As there has been limited jurisprudence on the application of section 5(1) of the CFPOA since its enactment, the lead examiners recommend that the Working Group follow up on the application of nationality jurisdiction as case practice develops.

The lead examiners also note that while one lower court stayed a case against a foreign national, subsequently, a court of appeal in Canada has taken a broad approach to interpreting territorial jurisdiction when determining a 'real and substantial' connection in foreign bribery cases. Subsequent case practice will be important to determine whether the 'real and substantial' link is sufficient to investigate, prosecute and sanction foreign bribery cases against foreign nationals. Thus, the lead examiners recommend that the Working Group also follow up on the application of territorial jurisdiction and the application of the "real and substantial" test in CFPOA cases against foreign nationals.

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[78] Canada Phase 3 additional follow-up report (March 2014), pp. 10-11.

[79] Canada Phase 2 Report, paras. 75-77 on *R v. Libman* [1985] 2 S.C.R. 178).

[80] R. v. Barra and Govindia, 2021 ONCA 568, paras. 53-60. See Section 3.1.1: the court of appeal ultimately acquitted both defendants and ordered a new trial based on procedural grounds (delayed disclosure). The PPSC declined to bring a new trial against the two individuals.

[81] Chowdhury v. H.M.Q., 2014 ONSC 2635, paras 37-58. The individual, the former Interior Minister of Bangladesh, had been charged with a foreign bribery offence under the CFPOA for his role in the foreign bribery scheme. The court found that Canada had jurisdiction over the offence but not over the individual under the CFPOA. The court did not analyse territorial jurisdiction under the real and substantial link, since according to the court, this applied to jurisdiction over the offence and not the person. The court stated that Canada *could* gain jurisdiction to try the individual under the CFPOA if the person entered Canada. Ultimately, the case was stayed.

3.2. Investigative and prosecutorial framework

3.2.1. Royal Canadian Mounted Police (RCMP)

129. At the time of Phase 3, it was widely accepted that CFPOA cases were investigated by the RCMP. In 2013, legislative amendments to the CFPOA expressly granted the RCMP exclusive ability to investigate foreign bribery and related offences under the CFPOA (section 6 of CFPOA). The main mandate of the International Anti-Corruption Team within the RCMP SII unit remains largely the same as in Phase 3: investigating Canadian natural and legal persons in relation to CFPOA offences or the CC (fraud, money laundering, breach of trust); and assisting foreign jurisdictions with formal MLA requests to Canada regarding foreign bribery (see section 3.4 on international cooperation).

Resources, outreach and international relationship building

130. Following a review of federal policing priorities in 2019, the RCMP SII unit was organised to focus on domestic corruption, foreign corruption (international anti-corruption) and war crimes. As part of this process, the RCMP SII unit merged its two previous foreign bribery investigative teams (then located in Calgary and Ottawa) to one central team in Ottawa. According to the RCMP SII, as well as civil society representatives, this has been a positive step as it has promoted the development of a centralised knowledge hub.

131. The number of RCMP SII investigators has significantly increased since Phase 3. The international anti-corruption team has 35 full-time officers, an increase from 15 full-time officers in 2013. At the on-site, the RCMP indicated they can also draw on additional SII resources to assist with foreign corruption investigations, if necessary. Significantly, these additional resources include access to specialist forensic accountants, additional investigators from the wider SII team and other RCMP specialists such as surveillance experts and undercover operatives. Representatives from the SII note that they receive good co-operation from other RCMP colleagues. In addition to providing a centralised knowledge hub, the current model also incorporates operational flexibility. At the on-site visit, lawyers raised concerns in relation to lack of staff continuity in the international anti-corruption investigation team, which hinders building the SII's expertise. Continuity is also beneficial to cooperation with foreign counterparts. The RCMP indicated that they do not have a mandatory rotation for members and the average turnover in the SII has been around four or five years.

132. Since Phase 3, the RCMP SII designated a foreign bribery outreach coordinator who has a wide range of responsibilities. They can receive referrals of cases; oversee the RCMP's foreign corruption webpage; provide outreach on RAs including through flyers; and, notably, implement the RCMP SII's outreach strategy for government agencies (see section 2.1) and the private sector (domestically and overseas, see section 4.3). Since at least 2017, the RCMP SII has maintained an active presence internationally by participating in several in-person and online events, often coordinated through GAC's Trade Commissioners.

133. The RCMP, along with various "five eyes" agencies[82], is a member of the International Foreign Bribery Taskforce (IFBT) which was established in 2013 and sets out the framework for cooperation between the participants in combating international foreign bribery. The IFBT Operational Working Group meets in person annually to discuss foreign corruption investigations, share best practices, challenges, and collaborate/leverage police-to-police exchange of information.

[82] Comprised of international police partners from Australia, Canada, New Zealand, United Kingdom and United States.

Opening and terminating investigations

134. A range of sources can provide information for opening investigations. The RCMP does not keep statistics on sources of information, nor can it share information not already in the public domain, which makes it difficult to assess their level of proactivity in the opening of investigations. In discussions at the on-site visit, the RCMP SII representatives indicated that primary sources of foreign bribery investigations include whistleblowers (former employees), MLA requests from other countries, self-reporting, and referrals from public officials such as TCS, EDC and provincial anti-corruption units. Since 2021, the RCMP SII unit reports that it has received at least five self-reports by companies, three complaints from whistleblowers, and two referrals from foreign authorities. As of 2023, the RCMP reports that there are approximately 17 ongoing foreign bribery investigations (which may exclude any cases opened or concluded in the last year).

135. Media reports can be relied upon to start investigations, though in practice this appears to be underutilised by the SII team. The RCMP SII team does not have a dedicated analyst to monitor media globally, but will rely on referrals that come in from GAC officials posted abroad. The Working Group's own media monitoring exercise identified at least 46 allegations of foreign bribery related to Canadian natural or legal persons. No information was provided on whether investigative steps were conducted in relation to these cases. While the SII notes it has an intelligence function within their organisation, this does not include active monitoring of media as a form of detection (see also section 2.8. on detection by the media.). The SII acknowledges the value in expanding the intelligence function in general.

136. Once a full investigation has been conducted, the PPSC will be consulted on decisions to terminate cases. The RCMP indicates that in the last five years (2018-2022), it has opened 31 new foreign bribery investigations. In the same period, it concluded 33 foreign bribery investigations. Considering that only five natural persons and one legal person were charged with CFPOA offences in the last five years (nearly all of these charges in the context of ***Ultra Electronics (Philippines)***), most investigations since 2018 are therefore closing without charges. Common reasons for closing foreign bribery cases cited by the RCMP include insufficient evidence; investigation not meeting mandate; and/or information requested from another country not being received. Since the evaluation team was not able to access any data, including in aggregate form, nor any case information or timelines of investigations, it is difficult to assess whether law enforcement is proactively investigating and pursuing cases, including evidence located nationally and abroad.

137. As noted above, recent cases that went to trial in Canada may impact the type of evidence that is required to prove certain elements of the foreign bribery offence (***IMEX Systems (Botswana) and Cryptometrics (India)***, see section 3.1.1.)***.*** At the on-site, the RCMP agreed that the bar was high for CFPOA cases but stated that it continues to work closely with the PPSC subject-expert on the CFPOA at the early stages of its investigations (see section 3.2.3).

3.2.2. Public Prosecution Service Canada (PPSC)

138. The PPSC is the national, independent and accountable prosecuting authority whose main objective is to prosecute federal offences, including the CFPOA, and provide legal advice and assistance to law enforcement. The institutional framework of the PPSC has not substantively changed since Phase 3. The PPSC prosecutes cases under federal statutes that are referred to it by the RCMP, other federal investigative agencies, and provincial and municipal police forces. The PPSC maintains a network of regional and local offices. In total, over 250 federal statutes contain offences that fall under the PPSC's jurisdiction to prosecute; however, the PPSC regularly prosecutes offences only under approximately 75 of those statutes.

139. The PPSC has dedicated regulatory and economic prosecution teams across the country with experience in prosecuting offences pursuant to over 75 regulatory and economic statutes and regulations

including the CFPOA; there are no specialised units or designated prosecutors dealing specifically with foreign bribery or related offences. In 2013, the Working Group deemed Phase 3 recommendation 4(c) – aimed at urgently dedicating resources to CFPOA prosecutions in light of an expected increase in CFPOA prosecutions – as fully implemented since Canada had by then "created a special cadre of prosecutors with expertise in high profile and complex cases, including foreign bribery". The expected CFPOA prosecution caseload noted in Phase 3 did not materialise.

140. In 2023, a "cadre" of prosecutors with expertise in high profile and complex cases, including foreign bribery" is also not apparent from the resources dedicated to foreign bribery cases or the make-up of the PPSC. PPSC indicates that it has dedicated regulatory and economic prosecution teams, but that "*CFPOA prosecutions are not "special" and therefore specialised training and resources are not needed on an ongoing basis*". The PPSC reports that the volume of CFPOA cases has not justified prosecutorial resources be dedicated exclusively to foreign bribery prosecutions. Foreign bribery cases are prosecuted in PPSC's regional offices and assigned to the most appropriate counsel when they arise (i.e. criteria includes extensive litigation experience, training in criminal procedure and evidence, experience dealing with complex regulatory and economic crime statutes, etc.). Whenever possible, senior prosecutors that have prosecuted CFPOA matters are assigned to new cases. No specific written PPSC policy governs this assignment. In practice, PPSC prosecutors are often assigned to different types of "complex" regulatory and economic crime prosecutions purposefully (i.e., economic crime to drug trafficking). Canada did not provide the number of prosecutors available to the PPSC that could be assigned to foreign bribery matters.

141. The limited CFPOA enforcement record raises concerns as to whether the PPSC is placing sufficient priority on foreign bribery prosecutions, including through dedicating sufficient resources and expertise to these matters. Furthermore, whilst the conviction rate is certainly not the determining metric of effectiveness for a criminal offence, it is concerning that 11 out of 13 CFPOA charges against individuals in concluded cases resulted in stays of proceeding or acquittals since Phase 3 (with the other 2 resulting in sanctions against an individual for a CFPOA offence).[83] While the PPSC has senior and general counsel to ensure national coordination of complex economic and regulatory crime, to date, the PPSC has not yet undertaken any review on how it could strengthen its prosecutorial approach to CFPOA cases, as the PPSC deems foreign bribery no different from other complex economic and regulatory cases. Following the on-site visit, the PPSC indicates that (i) it provides formal and informal mentorship on CFPOA cases and (ii) foreign bribery expertise is disseminated though the PPSC's prosecutorial training programme. However, the content and frequency of these trainings were not provided to the evaluation team.

142. The evaluation team was also concerned that the PPSC was systematically not pursuing appeals in foreign bribery cases on errors of law or conducting new trials (where convictions set aside and new trials ordered) (i.e., two natural persons in ***Cryptometrics (India***), one natural person in ***IMEX Systems (Botswana))*** which could reflect a lack of sufficient resources or priority given to CFPOA cases. These concerns have been partly assuaged by the PPSC's appeal in the ***IMEX Systems (Botswana)*** case on an error of law. The PPSC indicates that each foreign bribery appeal was carefully reviewed by regional appeal committees and decided in a "reasoned and principled manner." PPSC was unable to disclose any case-specific factors that governed this analysis, based on confidentiality obligations.

3.2.3. Coordination between RCMP and PPSC, and other relevant authorities

143. In Phase 3, the Working Group identified four issues to follow up regarding effectiveness of Canada's coordination in practice of (i) the RCMP inspector in Ottawa who manages the RCMP anti-

[83] In concluded cases against *individuals* reported by Canada, 13 CFPOA charges since 2011 resulted in two convictions, five in stays, six in acquittals on substantive or procedural grounds. This does not include the CFPOA charges against two individuals brought (and stayed) before Phase 3 (***Hydro-Kleen Group Inc. (United States***) nor the four cases against individuals that are ongoing in ***Ultra Electronics (Philippines)***.

corruption programme and provides support to the two RCMP Anti-Corruption teams; (ii) the PPSC subject-matter position who works with and advises the RCMP Anti-Corruption teams on ongoing investigations; (iii) the IAG and the RCMP's Legal Services Unit, with designated individuals to liaise with the International Anti-Corruption teams; and (iv) the Integrated Market Enforcement Teams (Phase 3, follow up issue 10.d)

144. First, as outlined above, the RCMP consolidated the regional foreign bribery teams in 2019 to one team in Ottawa. The SII International Anti-Corruption Unit is managed and overseen by the RCMP inspector in Ottawa. At the on-site, representatives of the RCMP believed that this change, so far, has allowed them to foster a centralised knowledge hub and facilitates consultations with other experts, such as forensic accountants located in the same office.

145. Second, the RCMP continues to fund one PPSC subject matter expert in order to be co-located with the RCMP to provide timely advice on foreign bribery matters. Despite the increase in RCMP SII investigators dealing with foreign bribery, the number of dedicated PPSC advisory counsel has not increased from Phase 3. Nevertheless, the RCMP SII indicates that it works closely with the PPSC subject-expert on the CFPOA at the early stages of its investigations. The RCMP also works with foreign bribery experts from GAC, and with Ministry of Justice (Department of Justice Canada, MOJ) lawyers from the Criminal Law Policy Section and from the RCMP's Legal Services Unit. At the on-site, RCMP and PPSC noted that they were able to access timely advice from the co-located PPSC expert on foreign bribery matters.

146. Third, the RCMP and IAG, in practice, liaise on international assistance matters as seen in cases arising since Phase 3. At the on-site, representatives of the RCMP SII and IAG indicated that they are in regular contact for foreign bribery matters and consult at the earliest instance of a case. Since the RCMP Anti-Corruption Unit and PPSC are the competent authorities for investigating and prosecuting respectively CFPOA cases, either may seek MLA from abroad in relation to the relevant investigation or prosecution under this legislation. The importance of liaising with IAG at the early stages of a foreign bribery matter, however, has become more relevant in light of the Supreme Court ruling in the Jordan case related to time limits to bring a case from charge to trial (see section 3.3.3. on time limits). However, limited statistics on timelines for MLA requests exist (as discussed further in section 3.4.1)

147. Finally, in Phase 3, the Working Group noted the existence of RCMP's Integrated Market Enforcement Teams (IMET), which are mandated to investigate serious fraud offences. At the time, it was not clear if these teams would be used for foreign bribery matters. Since 2011, IMET teams have not been used for foreign bribery cases by the RCMP SII or the PPSC. In fact, the PPSC states that, in general, its involvement in IMET is minimal in the last five years. Thus, the importance of coordination with IMET investigations does not arise in practice.

3.2.4. Jurisdiction and coordination of federal and provincial law enforcement authorities

148. As outlined above, the CFPOA was amended to expressly grant the RCMP exclusive ability to lay foreign bribery and related offences in 2013 (section 6 of CFPOA). In addition to the legislation change, the RCMP SII foreign corruption investigation team continued its outreach over the past years to provincial and municipal police authorities in Canada regarding the foreign bribery offence. Close coordination is maintained with provincial police forces in Quebec and Ontario, and efforts continue to be made to raise the awareness of the CFPOA, and the RCMP SII foreign corruption investigative team's role in the enforcement of the CFPOA, through meetings. In addition, the RCMP foreign corruption unit have made contact with other enforcement authorities and securities regulators and provided education on the RCMP foreign corruption mandate and referral procedures. This is to ensure they were informed in the event they were to come across potential allegations that would fall within RCMP SII's foreign corruption mandate. Examples of such agencies include: a domestic law enforcement unit in the province of Quebec (*Unité Permanente Anticorruption)*, provincial securities regulators such as the Ontario Security Commission

(OSC), Toronto Stock Exchange (TSX), and FINTRAC. The TSX, OSC and FINTRAC have sent referrals to SII but ultimately, they were redirected as they did not fall within SII's foreign corruption mandate.

Commentary

Since Phase 3, the RCMP SII has substantively increased its resources and specialisation in foreign bribery matters. Further, the RCMP SII international anti-corruption team progressively increased its engagement with the private sector as well as public government agencies on foreign bribery. The lead examiners, however, note more work could be done around outreach and awareness raising since the introduction of the Remediations Agreements in Canada (see section 3.6.3).

Despite positive steps by the RCMP SII, the lead examiners are concerned regarding Canada's limited enforcement of foreign bribery in light of the foreign bribery risks faced by Canadian companies and individuals operating abroad. Concerns remain that Canada is not placing sufficient priority in proactively detecting and investigating foreign bribery cases by the RCMP on one hand, and prosecuting these matters by the PPSC on the other hand. As outlined in section 2.8, the RCMP does not systematically use its intelligence unit to monitor media to detect foreign bribery. Therefore, the lead examiners recommend that the RCMP enhance its capacity to detect foreign bribery, and more proactively gather information from diverse sources to enhance detection and investigations of foreign bribery, including by deploying means for monitoring Canadian and international media for foreign bribery allegations involving Canadian companies or individuals. Further, due to the very limited investigation and prosecution case information provided by Canadian authorities, the lead examiners were unable to identify precisely the reasons for this low level of enforcement, including whether, cases are being closed for technical legal reasons, or whether cases are not being proactively opened, investigated or prosecuted due to obtaining evidence located abroad or domestically. They therefore recommend that law enforcement authorities in Canada, in particular the RCMP and PPSC, (1) conduct an analysis of their foreign bribery enforcement actions to date to identify the challenges that may have impeded effective enforcement of the foreign bribery and related offences in Canada, including relating to investigative techniques (see section 3.3.1) and enforcement against legal persons (see section 4.2), and (2) develop an action plan to address these challenges.

The lead examiners are also concerned that foreign bribery specialisation and expertise is not a priority for the PPSC. The CFPOA jurisprudence has been evolving since Phase 3 and the high rate of acquittals or stay of proceedings against individuals in CFPOA cases, and limited CFPOA enforcement against legal persons (see section 4.1.4), demonstrates the legal and evidentiary complexity of foreign bribery proceedings. Thus, the lead examiners recommend that Canada (i) promptly take appropriate measures to ensure that PPSC prosecutors dealing with foreign bribery cases have the necessary resources and training to deal with these matters effectively and in a timely manner, and (ii) ensure that foreign bribery cases are assigned to PPSC prosecutors with sufficient specialisation and expertise. Finally, the lead examiners recommend that the Working Group continue to follow up on the PPSC subject-matter experts available to the RCMP SII for ongoing investigations to ensure foreign bribery investigations receive sufficient support and advice.

3.3. Conducting foreign bribery investigations and prosecutions

149. As noted in section 1.4. of the Introduction, assessing the exact challenges encountered by Canadian authorities in enforcing the foreign bribery offence was difficult in the context of this evaluation. Discussions were restricted to the very limited information in the public domain, and no data was available on foreign bribery enforcement, even in anonymised form, on, e.g. detection sources, investigative tools used, reasons for closing investigations, etc. As noted by several private sector and civil society

interlocutors met on-site, this translated into discussions mostly based on anecdotal evidence and/or general, unverifiable statements.

3.3.1. Investigative techniques

150. Under the law, the full range of investigative techniques are available in the context of CFPOA investigations, but, due to lack of data and case information, the evaluation team was not able to assess if they are used proactively in practice. The RCMP has access to financial, banking and company information by serving judicial authorisations such as Production Orders and Search Warrants. Law enforcement can also send a Voluntary Information Record (VIR) to FINTRAC, for FINTRAC to provide financial suspicious transaction reports and generate financial intelligence. The RCMP has access to forensic accounting services as provided by PSPC's Forensic Accounting Management Group on a cost recovery basis. Furthermore, law enforcement can request above noted information housed in other countries via the formal MLA process. However, as explained under section 2.3. on tax measures to detect foreign bribery, on-site discussions revealed that the RCMP does not appear aware of the possibility to request information from the tax authorities in CFPOA investigations, even though it has been entitled to do so since a 2014 amendment of the ITA. In practice, this tool is seldom used by law enforcement in the investigation of foreign bribery. Canada argues that, since the latter do not file tax returns in Canada, the tool provides limited value, from an evidentiary standpoint, in identifying and tracing such payments. In addition, due in particular to the Jordan doctrine and the investigative time limits this imposes (see below section 3.3.3), requesting information from the CRA could be lengthy and possibly uncover tax offences, which, in turn, could prolong the investigative process.

151. Canada did not disclose information in responses to the Phase 4 Questionnaire on special investigative techniques. During the on-site visit, Canadian authorities explained that because wiretapping is considered the most invasive technique, a request for the issuing of a wiretap warrant before a judicial authority carries an "extremely high" burden. Although the option of wiretap warrants is available to the SII, it has not been used often notably for this reason. The challenges associated with obtaining and relying upon wiretap evidence was highlighted in the ***SNC-Lavalin (Bangladesh)*** case (as examined under section 2.11.). SNC executives and representatives, charged with violating the CFPOA, were acquitted after the defence brought a successful application to exclude the wiretap evidence.[84]

152. Neither in the Phase 4 questionnaire nor during the on-site visit was the evaluation team able to obtain information regarding investigative techniques in ongoing cases. Indeed, due to Canada's position that it can only comment on cases finalised and in the public domain, this information was not provided, even in anonymised form. While evaluated countries bound by confidentiality rules would usually provide aggregate numbers to help the Working Group form an opinion on this issue, Canada did not share such figures, in spite of a request to this effect by the evaluation team. Information was shared only on concluded cases, with Canada indicating that "many" investigative techniques had been used in the few concluded cases, including search and seizure, forensic audits and forensic examination of digital evidence, witness interviews, information from FINTRAC and other domestic agencies, interception of private communications, production orders, and MLA." However, this information was of a general nature, rather than a breakdown of each technique used per concluded case. Accordingly, the manner in which Canadian authorities apply various investigative techniques in practice cannot be assessed.

Commentary

The lead examiners are satisfied that the RCMP has access to a wide range of investigate techniques to conduct foreign bribery investigations. However, Canada only provided general information on techniques used in concluded cases. Without a breakdown on the use of these techniques by concluded case, and in the absence of information on those used in ongoing cases,

[84] R v Wallace, 2017 ONSC 132.

the lead examiners are not able to assess the degree to which investigative techniques are being used in practice. They therefore recommend that the Working Group follow up on the use of investigative techniques in foreign bribery investigations as practice develops, including as part of the action plan to be developed by Canadian law enforcement authorities (see commentary after section 3.2).

3.3.2. Independence of investigations and prosecutions: Article 5 of the Anti-Bribery Convention

153. Article 5 of the Convention requires that the investigation and prosecution of foreign bribery are not influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. The Working Group raised in the past concerns about the implementation of Article 5 of the Convention in Canada as it relates to prosecutorial guidelines. In Phase 3, the WGB made one recommendation in this regard which was assessed as partially implemented at the time of the Written Follow-up Report in 2013 (recommendation 4.a). Further, the prosecutorial independence framework concerning foreign bribery prosecutions came into sharp focus due to events around the prosecution of the ***SNC-Lavalin (Libya)*** matter.[85] Following this, steps taken by Canada have addressed some of these concerns.

Efforts to address Article 5 concerns in prosecutorial guidelines that apply to foreign bribery cases

154. Since Phase 2, the Working Group had expressed concern regarding the prosecutorial guidelines that allow prosecutors to consider factors that are contrary to Article 5 (namely, potential effect upon relations with another State) when making their decision to prosecute.[86] In Phase 3, the Working Group found that these factors had not been clarified and reiterated its recommendation that Canada clarify that in investigating and prosecuting offences under the CFPOA, considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, are never proper. At the time of the Phase 3 written follow-up report, Canada was revising the PPSC Deskbook, and this recommendation was therefore deemed partially implemented. Further revisions have since been introduced to address the WGB's concerns.

155. *PPSC Deskbook and DPP Guidelines in CFPOA prosecutions*. The PPSC Deskbook has been significantly amended since Phase 3. The PPSC Deskbook was published on 2 September 2014 and applies concurrently with the guidelines issued by the Director of Public Prosecutions (DPP) and the AG. With respect to Article 5 considerations in CFPOA cases, the following sections of the revised PPSC Deskbook are relevant: (i) public interest considerations to proceed with prosecution (chapter 2.3, PPSC Deskbook), (ii) guidelines on prosecuting CFPOA offences (chapter 5.8), (iii) prosecutorial discretion for RAs (chapter 3.21), and (iv) duty to inform the AG (chapter 1.2).

156. The PPSC Deskbook sets out the principles that all federal prosecutors must follow and provides directives for prosecutors in the exercise of their prosecutorial discretion. This includes guidance that prosecutors must only proceed with prosecutions when two conditions are met: there is reasonable prospect of conviction and the prosecution would serve the public interest.[87] The previous Deskbook contained 18 enumerated public interest factors, including "whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national

[85] See 2019**,** OECD will follow Canadian proceedings addressing allegations of political interference in foreign bribery prosecution.

[86] Canada Phase 2 Report, paras. 78-80, recommendation 5.d.

[87] PPSC Deskbook, chapter 2.3, section 4.

security or that should not be disclosed in the public interest," which the Working Group found to be a factor that is prohibited by Article 5.[88] Under the current PPSC Deskbook, guidance to determine "public interest" is structured as (i) a list of factors to consider, (ii) irrelevant factors that must not influence the determination, and (iii) duty to protect private or privileged information. This latter category includes, inter alia, information that may be injurious to national security, international relations, or national defence.[89] Disclosure of sensitive or privileged information, however, is not absolute and may be justified depending on the nature and seriousness of the case.[90] Prosecutors must weigh the seriousness of the case with the harm that may result in disclosure and will consult with the investigating agency and their chief federal prosecutor when considering these factors. At the on-site visit, prosecutors stated that the exercise of this would be "exceptional" and would likely involve conferring with national intelligence authorities.

157. At the same time, the PPSC Deskbook contains an updated guideline specific to prosecuting CFPOA cases with an express reference to Article 5 (CFPOA Guideline). The CFPOA guideline complements other sections of the PPSC Deskbook and "calls attention to the unique aspects of the [CFPOA] and the Convention".[91] The CFPOA guideline, last updated in 2015, instructs prosecutors who have conduct of a CFPOA case to be mindful of Article 5 of the Convention and provides "they shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." At the on-site, representatives from the PPSC confirmed that the CFPOA Guideline would be considered when prosecutors exercised their discretion under chapter 2.3 to open or not open a prosecution, as the PPSC Deskbook must be read "as a whole". The evaluation team's concerns related to reference to international relations in chapter 2.3 of the PPSC Deskbook are assuaged by the CFPOA prosecutorial guidelines that specifically instruct prosecutors to be mindful of Article 5 of the Convention in CFPOA proceedings, as well as the explanations and knowledge of the prosecutors at the on-site regarding the CFPOA directive prohibiting Article 5 considerations.

158. *Training and awareness raising among prosecutors on Article 5.* Despite these positive updates to the PPSC Deskbook, prosecutors are not specifically provided any training or awareness raising specific to Article 5 in foreign bribery cases. In Canada's responses to the Phase 4 Questionnaire, PPSC stated it does not deem these cases "special", or fundamentally different from other complex economic and regulatory prosecutions (see also section 3.2.2. above). At the on-site, prosecutors stated that no specific training for CFPOA cases is provided. Following the on-site visit, PPSC indicates that the prosecutor training programme provides training and presentations on CFPOA cases, and prosecutors are required to be familiar with the PPSC Deskbook. No specific PPSC courses or training specifically cover the prohibitions under Article 5 of the Anti-Bribery Convention.

Legislative and institutional framework: DPP Act and role of Attorney General of Canada

159. The main legislative framework of prosecutorial independence remains unchanged since Phase 3. The Minister of Justice is a politician and sits in the federal cabinet. By statute, the Minister of Justice is also the AG.

160. Since 2006, the responsibility for federal prosecutions, including under the CC and CFPOA, was transferred from the AG to the DPP under the Act Respecting the Office of the Director of Public

[88] Canada Phase 3 Report, para. 108.

[89] PPSC Deskbook, chapter 2.3, section 4.2.3.

[90] While the heading of the PPSC Deskbook refers to "private or privileged information" the text of the Deskbook makes reference to sensitive and privileged information. As such, the PPSC appears to treat "private" and "sensitive" information interchangeably in this section.

[91] PPSC Deskbook, chapter 5.8.

Prosecutions (DPP Act) to protect prosecutorial independence and further separate the federal prosecution authorities and the executive.[92] The PPSC is an independent organisation, reporting to Parliament through the AG. The DPP is appointed by the AG and acts on their behalf (sections 3 and 4, DPP Act). The DPP holds office for a seven-year term and cannot be terminated by the AG. The DPP can only be removed for cause if there is a resolution by the legislature (section 5(1), DPP Act). The DPP has the power to make binding and final decisions to prosecute offences under the CFPOA. The decision to pursue or discontinue prosecutions, or to undertake a specific appeal, rests solely with the DPP (and delegated agents), subject to certain AG powers under the DPP Act (sections 10,14 and 15) as described below.

161. *Role of AG and Shawcross doctrine*. As a well-established constitutional principle, the AG cannot act based on partisan considerations. The Supreme Court of Canada has held that the AG "must act independently of partisan concerns when supervising prosecutorial decisions" and cannot be subject to "interference by other arms of government".[93] At the same time, Canadian AGs (federal and provincial) and jurisprudence have adopted the "Shawcross principle", a common law doctrine originating from the UK, on the relationship between the AG and cabinet colleagues.[94] Under the Shawcross doctrine, the AG may consult with cabinet colleagues before exercising their powers under the DPP Act in respect of any criminal proceedings.[95]

162. On 24 July 2023, in response to the "Review of the Roles of the Minister of Justice and Attorney General of Canada" (McLellan Report) which followed allegations of government interference in the ***SNC-Lavalin (Libya)*** foreign bribery case (see below for background), the AG issued the "Protocol for the Conduct of Ministerial Public Interest Consultation by the [AG] in the exercise of the [AG]'s authority under the [DPP Act]" (AG Protocol).[96] Prior to this, no other legislation, directive, or protocol outlined the scope of Shawcross consultations (or whether discussion of specific prosecutions is permissible). The 2023 AG Protocol reiterates the Shawcross doctrine, stating that the AG "receives requests for information on prosecutions conducted by the [DPP], most often in high-profile matters. In exceptional circumstances, ministers or officials within the public service may seek to raise public interest concerns about the conduct of ongoing or potential prosecutions." Due to the nature of Shawcross consultations, the AG Protocol applies to ministers personally, including the Prime Minister (PM), the office of the clerk of the privy council and the public service.

163. The 2023 AG Protocol provides written guidance on the initiation of ministerial public interest consultations, including clarification on who may request these consultations (i.e. the AG or cabinet ministers, not by their political staff), and guidance surrounding process, form, scope and classification of consultations. Positive aspects of the protocol include: expressly limiting the involvement of political staff; prohibiting such consultations at political meetings; stipulating that consultations occur primarily through written representations with relevant and supporting information; [97] reiterating the prohibition of partisan

[92] PPSC Deskbook, chapter 1, section 1.1.

[93] Alberta v. Krieger, 2002 SCC 65, paras 30, 32, 45.

[94] *Ibid*., See also: PPSC Deskbook, chapter 1.1, section 2.

[95] PPSC Deskbook, chapter 1.1, section 1.2.

[96] Protocol for the Conduct of Ministerial Public Interest Consultation by the Attorney General of Canada in the Exercise of the Attorney General of Canada's Authority under the Director of Public Prosecutions Act (24 July 2023). *Note:* the AG Protocol was not mentioned as forthcoming during the on-site visit, and was published afterwards. The evaluation team did not therefore have an opportunity to discuss it with stakeholders on-site.

[97] *Ibid*. AG Protocol stipulates that consultations should be done via written representations, which may be supplemented by discussions with ministers (also to be documented in writing) and will not normally include political staff. Further, public interest consultations shall not occur during cabinet meetings or committee meetings. The written

considerations in these consultations;[98] and clarifying that the AG's decision (to intervene or not under the DPP Act) is final and will be communicated via writing to ministers involved in the consultation.[99]

164. While the AG protocol is largely a welcome development, at least two concerns may arise in relation to foreign bribery matters. First, these consultations do not explicitly prohibit Article 5 considerations in the prosecution of foreign bribery cases. Second, the AG Protocol does not indicate how the Shawcross consultations will be communicated to the public or to members outside of the cabinet, even after a foreign bribery case is concluded. While, in practice, such consultations may be rare, a lack of public transparency surrounding Shawcross consultations between the AG and cabinet ministers may give rise to the impression that decisions made by the AG to assume conduct of a prosecution under the DPP Act (as explained below) are politically motivated and take into account considerations prohibited under Article 5 of the Convention. Concern surrounding such consultations and lack of transparency has been raised by the Working Group in the context of its evaluations of other countries with a similar model.[100] This transparency concern is compounded as the DPP Act does not require the AG to provide reasons for assuming cases under section 15 of the DPP Act.

165. *DPP Act and section 13 notices*. Under section 13 of the DPP Act, the DPP has a duty to inform the AG of any prosecution or intervention that the DPP intends to make that raises important questions of "general interest". This is a broader duty than public interest, and includes cases with "international dimensions".[101] The notice provides the AG with information on cases of significance and enables the AG to decide whether to exercise their authority under the DPP Act to assume conduct of cases. At the on-site, prosecutors confirmed that currently all CFPOA prosecutions result in a section 13 notice to the AG. According to a government report, most section 13 notices do not prompt the AG to take any further action but the AG "may nevertheless contact the DPP to learn more about evidence in the case or reasons for the decision the DPP has made."[102]

166. On 6 July 2023, also in response to the McLellan Report, the AG issued the "Duty to Inform the AG under section 13 of the DPP Act" guideline (Section 13 guideline), incorporated as chapter 1.2 of the PPSC Deskbook.[103] The Section 13 Guideline is a positive development as it clarifies what is expected of the DPP in providing section 13 notices to the AG, timing of such notices, and provides transparency of the type of case information that is communicated to the AG. The Section 13 Guideline outlines: (i) the types of cases that should be reported under section 13 (foreign bribery cases are not expressly included in the case examples but, as mentioned above, are likely to be concerned due to their international

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and in-person meetings will be classified based on "applicable privileges and immunities and maintained by the [AG] in accordance with relevant rules and policies."

[98] *Ibid*. AG Protocol prohibits discussion that subjects the AG to direction or pressure, and reiterates the express prohibition on partisan considerations in the decision to prosecute, including the electoral future of a political party, individual politicians, ministers, or the AG.

[99] *Ibid.* AG Protocol specifies that the AG's decision on public interest consultations is final and ministers will not have further communication with the AG on the prosecution or intervention in question The AG Protocol clarifies that the AG will communicate their decision ("take no action, issue a specific direction, intervene, or assume conduct of the prosecution in question") in writing to the minister(s) that were part of the consultation. The AG does not have to provide reasons for their decision.

[100] See, e.g., the UK Phase 4 Report (and previous) evaluation(s)).

[101] PPSC Deskbook, Part 1.

[102] McLellan Report, Review of the Roles of the Minister of Justice and Attorney General of Canada (28 June 2019), p. 19.

[103] PPSC Deskbook, Chapter 1.2. The guideline was issued by the AG under section 10(2) of the DPP Act. Similar to the AG Protocol, the guideline was not discussed during the on-site visit.

dimension); (ii) that notice will be given to the AG at the pre-charge stage, potentially including *ex parte* prosecutorial applications for certain special investigative techniques such as special search warrants (such notices are expected to be 'exceedingly' rare) as well as decisions not to prosecute; (iii) the timing of notice will vary on a case-by-case basis but must give the AG "sufficient opportunity" to react (iv) the notice will provide the AG a contextual explanation of why they are being informed of the matter; and (v) section 13 notices are privileged, "insofar as they contain legal advice or other privileged information." [104] Notably, the Section 13 Guideline clarifies that the AG may share information from section 13 notices as part of the "Shawcross doctrine" consultations with ministers.[105]

167. *General and specific directives under the DPP Act*. Under the DPP Act, the AG may issue directives relating to initiation or conduct of any specific prosecution (section 10(1)) or, after consulting with the DPP, may issue directives on initiation or conduct of prosecutions generally (section 10(2)). These directives would be published in the Canada Gazette. Since the DPP Act was passed, no *case-specific* directive has ever been issued. General directives issued by the AG, on the other hand, are not uncommon and have been issued at the federal level for specific types of prosecutions as part of the PPSC Deskbook.[106] Notably, however, the general guideline of CFPOA prosecutions incorporated in the PPSC Deskbook was issued as a DPP Guideline, not by the AG.[107]

168. *Assuming conduct of a prosecution or intervening under the DPP Act*. Under the DPP Act, the AG may also assume conduct of a prosecution after first consulting with the Director (section 15(1)). If such action was taken, this would require a notice to be published on the Canada Gazette but publication may be delayed if the AG or DPP considers it to be in the interests of the administration of justice (section 15(1)-(3)). Representatives of the MOJ and PPSC stated that a notice published in the Gazette would likely just be the text of the notice of intent to assume conduct of the prosecution. The AG may also intervene in proceedings that raise questions of public interest, after notifying the DPP (section 14). Since the introduction of the DPP Act, the AG has never intervened or assumed conduct of a criminal prosecution.

Attempt by government actors to influence a foreign bribery prosecution based on Article 5 considerations in the context of Remediation Agreements: the SNC-Lavalin (Libya) case

169. Since Phase 3, Canada has introduced RAs to resolve certain criminal cases, including CFPOA offences, against legal persons (see section 3.6.3.). In this respect, Canada's prosecutorial independence framework came into sharp focus during the ***SNC-Lavalin (Libya)*** case. The events concerning the CFPOA prosecution of SNC-Lavalin and allegations of political interference around an RA in this specific case raised concerns among the Canadian public[108] concerning the safeguards in place for prosecutorial independence, and triggered a public statement from the Working Group on 11 March 2019. Following these events, several government reports were published, which led Canada to introduce new safeguards in 2023 (AG Protocol and Section 13 Guideline in particular).

170. In the ***SNC-Lavalin (Libya)*** case, prosecutors declined to enter into an RA with SNC-Lavalin in relation to alleged CFPOA offences, having determined that the company had not met the criteria under

[104] *Ibid*.

[105] *Ibid*. The AG may share section 13 notices with the Deputy Minister of Justice or "others" for deciding to issue directives, intervene in proceedings, or assume proceedings.

[106] PPSC Deskbook, chapter 5: specific types of prosecutions (youth criminal justice, victims of crime, parental child abduction, non-disclosure of HIV).

[107] PPSC Deskbook, chapter 5.8.

[108] Written submissions of TI Canada, p. 10 and Prof. Johanna Harrington, University of Alberta, p. 6. Submissions by the private sector and civil society to the WGB.

the newly introduced RA regime (the case was ultimately resolved against SNC-Lavalin through a plea agreement on fraud charges – see section 4.2.1 and Annex A for case summaries). Allegations surfaced in media outlets that officials in the Prime Minister's Office (PMO) had pressured the AG to instruct the PPSC to negotiate an RA with the company, with a view to protecting the national economic interest. The AG stated that she ultimately deferred to the DPP on the decision to enter into an RA. The ensuing political scandal resulted in the resignation of one of the PM's key aides and resignation of two cabinet ministers including the former AG. In February 2019, the Federal Conflict of Interest and Ethics Commissioner (Ethics Commissioner) and parliament launched inquiries into the allegations of political interference in a criminal prosecution. Subsequently, a special advisor was appointed by the PM to examine prosecutorial independence.

171. On August 2019, the Ethics Commissioner issued his report finding that the PM contravened the Conflict of Interest Act when he used his position to seek to influence a decision of the AG relating to the foreign bribery criminal prosecution involving SNC-Lavalin (Trudeau II Report). In the course of the inquiry, the PM stated that he was concerned that a criminal prosecution could have wide ranging consequences for the employees, shareholders, customers and suppliers of a major Canadian company and could threaten the continued viability of the firm, and jeopardise national infrastructure projects. Based on the Shawcross doctrine and the CC provisions related to RAs, the Commissioner found that considerations "of a narrow political nature, particularly those advanced by ministers [,,,] relating to an individual's or to a party's political fortunes", cannot be used to guide the AG in their role, including in the exercise of prosecutorial discretion for RAs. [109]

172. The Ethics Commissioner concluded that the PM "used his position of authority over [the AG] to seek to influence, both directly and indirectly, [the AG's] decision on whether she should overrule the [DPP]'s decision not to invite SNC-Lavalin to enter into negotiations towards a remediation agreement." Contraventions under the Conflict of Interest Act do not contain any sanctions. Nevertheless, these proceedings were widely reported in Canadian media.[110] Indeed, at the on-site, representatives from the media, civil society, academia and the legal community raised this incident when discussing CFPOA enforcement and possible lack of trust in the RA regime by the public.

173. Following issuance of the Commissioner's report, the PM stated that, while he accepted part of the Commissioner's report, he disagreed that "any contact with the [AG] on this issue was improper." Further, he stated that the Executive must uphold prosecutorial independence "but we need to talk about the impacts on Canadians right across the country of decisions being made. I *can't apologize for standing up for Canadian jobs*."[111] This is contrary to Article 5 of the Anti-Bribery Convention which prohibits consideration of, inter alia, national economic interest in the investigation and prosecution of foreign bribery cases.

174. Subsequently, a special government advisor issued a report on the "Review of the Roles of the Minister of Justice and Attorney General of Canada" (McLellan Report). On June 2019, the McLellan Report concluded that no structural change was required to separate the role of Minister and AG to protect prosecutorial independence but issued a series of recommendations, including that the AG develop a detailed protocol to govern ministerial consultations in specific prosecutions; provide further clarification in the PPSC Deskbook around section 13 notices on aspects such as privilege and AG consultations; encouraging the AG to explain their reasons for issuing directions or taking over prosecutions, or declining to do so; and ministerial training programmes. The Report recommended amending the guidelines for the PM and Ministers (Open and Accountable Government) to make clearer that "virtually all prosecutorial

[109] Trudeau II Report, para. 328.

[110] CBC News (13 February 2019) ; MacLean's (14 August 2019); Canadian Lawyer (26 August 2019); CBC News (14 August 2019).

[111] CBC News (14 August 2019).

decisions are made by the DPP and their designated agents, without any involvement by the AG." At the on-site, representatives of the MOJ indicated that the report was still under consideration.

175. As a first step to respond to concerns around prosecutorial discretion and independence following the ***SNC-Lavalin (Libya) case***, on 23 January 2020, a guideline was added to the PPSC Deskbook to outline the criteria applied by the DPP when determining whether to consent to the negotiation of an RA and the procedure for prosecutors to follow when making a recommendation for an RA as well as the process of an agreement. Notably, the guideline instructs prosecutors that Article 5 considerations should not be considered when assessing whether to enter into an RA for CFPOA offences. The guideline enumerates the "public interest" factors that prosecutors should consider, based on section 715.32(2) CC, and reiterates that:

> "Note that if the organization is accused of an offence pursuant to the [CFPOA], *consideration must not be given to the national economic interest, the potential effect on relations with a foreign state or the identity of the organization or any individual involved"*.

This express reference to Article 5 in the CC as well as the prosecutorial guideline governing RAs is a welcome development. Representatives from civil society and academia largely supported this view during discussions at the on-site visit.

176. Following the on-site visit, in July 2023, Canada further issued the AG Protocol and the Section 13 Guideline, in response to two of the key recommendations put forth in the McLellan Report.[112] As explained above, the AG Protocol and Section 13 Guideline provide a framework for Shawcross consultations in Canada as well as clearer instructions to the DPP on issuing section 13 notices, respectively. Canada plans to conduct Article 5 awareness-raising among relevant parts of the government.

177. In practice, the framework governing prosecutorial independence in Canada, under the DPP Act and common law, proved robust in the face of political pressure in a foreign bribery case. Prosecutors present at the on-site indicated that the incident made the perception of prosecutorial independence "stronger" and showed that they took a reasoned and principled approach to exercising their discretion. This was echoed by several representatives of civil society and academia during the on-site visit, with one academic stating that they had "zero concerns" about prosecutorial independence in Canada as a result of this case. However, one media representative lamented the case as "tragic" and possibly undermining public confidence in the justice system.

Commentary

The lead examiners welcome the updates to the PPSC Deskbook and DPP Guidelines that clarify that Article 5 considerations must not be given consideration in prosecuting foreign bribery cases or when inviting legal persons to enter into an RA. They consider this fulfils Phase 3 recommendation 4.a as it relates to prosecutorial authorities.

The lead examiners further acknowledge that the prosecutorial independence framework in Canada proved robust during the SNC-Lavalin (Libya) case. They are encouraged by recent developments to address important recommendations from relevant government reports, such as developing the AG Protocol that governs "Shawcross principle" consultations, and guidance in the PPSC Deskbook concerning section 13 DPP Act notices.

Nevertheless, and despite these positive steps, Canada has not yet engaged in awareness raising and/or training with relevant governmental entities on the prohibition of Article 5 in foreign bribery cases, including as it has been reflected in the new guidance documents issued. The lead examiners welcome Canada's expressed intention to proceed with this awareness-raising, and

[112] *Ibid*., See also: AG Protocol and PPSC Deskbook, chapter 1.2.

recommend that Canada raise awareness among relevant parts of the government that foreign bribery investigations and prosecutions shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Furthermore, the lead examiners recognise that the DPP Act provides various institutional safeguards to ensure prosecutorial independence, including requiring the AG to inform the DPP when issuing directives or taking over a case, as well as publishing such decisions in the Canada Gazette. As the AG has never taken conduct of a case, it is not clear the content of the notice that would be published in the Gazette. The lead examiners therefore recommend that the Working Group follow up on the application of section 15 of the DPP Act if necessary.

Finally, while the lead examiners welcome actions by Canada to develop the AG Protocol surrounding consultations under the "Shawcross principle", concerns remain about a lack of transparency and guidance around Article 5 considerations in foreign bribery cases. The Working Group has previously held that consultations of government ministers about individual criminal cases, as may be conducted under the Shawcross principle, may generally not be appropriate in foreign bribery cases as the national economic interest or relations with other states will frequently be involved.[113] The lead examiners therefore recommend that Canada take measures to ensure that any use of Shawcross exercises in foreign bribery cases is publicised and transparent, as the circumstances permit.

3.3.3. Statute of limitations and time limits for trials

178. As noted in previous Phases, Canada does not have a statute of limitation for indictable offences and, therefore, this does not pose a problem for investigations and prosecutions under the CFPOA. In Phase 3, it was noted that this framework should allow ample time for the investigation and prosecution of complex cases, requiring for example obtaining of legal assistance from overseas.

179. However, in the 2016 Jordan case, the Supreme Court set time limits on the time allowed from *charge* to the actual or anticipated *end of trial* in all criminal cases, which may cause issues in CFPOA cases, which, by nature, can be complex and therefore time-intensive. [114] This new time framework is understandably intended to ensure the constitutional right of an accused person to be tried within a reasonable time under the Canadian Charter of Rights and Freedoms (section 11b).[115] Under the *Jordan* jurisprudence, the time allowed from *charge* to the actual or anticipated *end of trial* is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). In practice, for CFPOA cases, the 30 month ceiling would presumably apply, since past CFPOA cases would suggest that they generally fall in the category of complex cases. Beyond these time limits any delay is presumed to be unreasonable, unless exceptional circumstances justify it. Once the presumptive ceiling is exceeded, the burden is on the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so, a stay will follow, as happened in the ***SNC-Lavalin (Libya)*** case where the charges against a former SNC-Lavalin executive, were stayed in February 2019 due to a finding of delay. The question arises whether pending

[113] UK Phase 4 Report, paras. 95-96, commentary after para. 106.

[114] R. v. Jordan, 2016 SCC 27, [2016] 1 SCR 631. In this case, which involved drug trafficking, the Supreme Court held that the Crown failed to discharge its burden demonstrating that a delay of 44 months from charge to the end of the trial was reasonable. Note a minority of the Supreme Court thought the previous law should not be overruled as reasonableness cannot be captured by a number, that any timeframe requirement should be a matter for Parliament to legislate and that the introduction of time limits would potentially result in thousands of cases being stayed.

[115] Section 11(b): Any person charged with a criminal offence has the right to be tried within a reasonable time

charges against four natural persons in the ***Ultra Electronics (Philippines)*** case may be similarly affected, given charges were laid in September 2022, that courts have a very heavy calendar, and that no trial date has been set yet. Regarding the latter, the PPSC indicates that it has made consistent and concerted efforts to ensure that the matter will conclude within the Jordan deadlines, including by proceeding through a direct indictment.[116]

180. According to the Supreme Court decision, exceptional circumstances fall under two categories: discrete events and particularly complex cases (noting this does not include the seriousness or gravity of the offence nor include chronic institutional delays). Whilst there is some flexibility built into deciding whether a case could be considered complex, prosecution authorities met on-site stated that they cannot presume that all foreign bribery cases will be considered so. Ultimately, the determination of whether circumstances are exceptional will depend on the trial judge's good sense and experience. Only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay. During the on-site visit, law enforcement authorities expressed the view that the requirement of foreign evidence and the delays in obtaining MLA are factors the court may consider in making its assessment as to reasonableness (see also section 3.4.1. below on outgoing MLA requests).[117] In practice, rather than relying on possible but uncertain extensions, Canadian law enforcement authorities are taking steps to mitigate the impact of the *Jordan* doctrine on CFPOA cases. The RCMP explained that it ensures charges are laid only once the investigation is completed (including obtaining evidence through MLA). The PPSC also works constantly on proactively moving matters forward. In particular, the PPSC has established a working group to discuss issues, published a Deskbook chapter on delay, enters the Jordan date in the file when charges are laid, generates quarterly reports of all files that have exceeded or are at risk of exceeding Jordan deadlines, and collects statistics on Jordan application. By their own admission, law enforcement could nevertheless face potential issues with the application of the Jordan doctrine in CFPOA cases, since their complexity and international nature may sometimes require further evidence post-charge. The RCMP noted that the combined effects of the Jordan and Stinchcombe decisions,[118] related to the prosecutor's obligation to disclose evidence to the accused, means they should effectively stop investigating at the point of charge.

Commentary

In light of the Jordan jurisprudence which has resulted in at least one stay of proceedings in a foreign bribery case, the lead examiners recommend that the Working Group follow up to ensure that the steps taken by Canadian law enforcement authorities are sufficient to mitigate the effects of the Jordan jurisprudence and ensure sufficient time is available for the effective investigation and prosecution of cases of foreign bribery and related offences.

[116] Section 577 of the *Criminal Code* (Code) permits the DPP to send a case directly to trial without a preliminary inquiry where it is in the public interest to do so, including when the delay in bringing the matter to trial has led to the conclusion that the right to trial within a reasonable time guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms* may not be met unless the case is brought to trial immediately.

[117] Notably the Supreme Court stated that cases with an international dimension, such as those requiring extradition from a foreign jurisdiction, may meet the definition of discrete events *R v Jordan* para 72 (see also section 3.4.5 of this Report).

[118] R v. Stinchcombe [1991] 3 SCR 326.

3.4. International co-operation

3.4.1. Mutual legal assistance

Legal and procedural framework

181. Canada's legislation governing MLA is largely the same as in Phase 3. Legislative mechanisms to permit the implementation and use of financial data warrants and orders, however, have been strengthened under the *Mutual Legal Assistance Act in Criminal Matters Act.*

182. The responsible authorities for MLA remain the same since Phase 3. IAG is the central authority for incoming and outgoing MLA requests in Canada. The RCMP and PPSC may seek MLA for CFPOA-related investigations or prosecutions. Execution of incoming MLA requests in relation to foreign bribery are processed by the IAG and may be executed by the RCMP if no Canadian court order is required for execution (e.g., interviewing a suspect in Canada). The RCMP SII Unit assists foreign jurisdictions with incoming requests regarding foreign bribery. If a Canadian court order is required, the request will be sent by the IAG to the appropriate provincial or federal AG's office within Canada, whose counsel will be responsible for obtaining the appropriate court orders, and overseeing the execution of the request.

183. Bilateral and multilateral treaties are the principal legal basis for seeking and providing MLA in Canada. In addition to the Convention, Canada has also ratified the UN Convention against Corruption (UNCAC), OAS Inter-American Convention against Corruption (OAS Convention), and OAS Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLA Convention), which provide a broad legal basis for requests in foreign bribery cases. In addition, Canada maintains 35 bilateral MLA treaties. Canada is currently engaged in negotiating new or revised treaties, but did not specify with which State parties.

Resources concerning MLA have increased

184. Since Phase 3, the IAG has more than doubled in size – from 30 to 70 personnel – due to the increased number of requests for MLA and extradition. Of these 70 IAG staff, 34 are engaged full time on MLA matters and an additional 6 legal counsel assist as needed on MLA matters. As was the case in Phase 3, the IAG maintains a primary point of contact within its section to ensure that priority is given to outgoing and incoming requests for MLA in corruption cases.[119] At the on-site, IAG representatives indicated that no specific personnel are exclusively dedicated to foreign bribery cases but that all IAG counsel could potentially work on a foreign bribery request.

185. IAG maintains a public facing website, including a Step-by-Step Guide for making requests to Canada and contains easily accessible contact information for the Canadian Central Authority. This website is intended for the use of foreign central authorities to make requests for MLA and extradition to Canada. Canada utilises an electronic method of communication and transmission of requests. Outgoing requests will routinely be made, and incoming requests received, in digital format as the preferred method, unless the foreign state has other requirements.

Mutual legal assistance in practice: Insufficient data to determine efficiency for incoming and outgoing mutual legal assistance in foreign bribery cases

186. At the time of the Phase 3 evaluation, there was limited information to evaluate the efficiency of the legal mechanisms for incoming and outgoing MLA due to the lack of incoming requests concerning foreign bribery and the inability of authorities to share information about outgoing requests during Phase

[119] Canada Phase 3 Report, para. 156.

3.[120] Thus, the Working Group decided to follow up on this matter. Since 2011, Canada is still not able to provide detailed statistics on the time taken to seek and provide MLA on foreign bribery cases.

- **Incoming MLA requests in foreign bribery cases**

187. Canada does not have detailed statistics on the time taken to provide MLA in foreign bribery cases, nor is it able to provide information on the grounds for refusal. Without detailed statistics on the types of assistance sought and time taken, it is difficult to assess the efficiency of Canada's ability to execute MLA in foreign bribery cases. Canada states, in its responses to the Phase 4 Questionnaire, that the "time taken to execute a request will vary depending on the nature of the assistance requested as well as the resource demands required towards its execution and whether those resources were readily available."

188. Since Phase 3, Canada received 47 incoming MLA requests concerning legal and natural persons for bribery and corruption cases. Canada was unable to specify how many related to foreign bribery specifically. The majority of these requests were made pursuant to bilateral treaties. According to Canada, the type of assistance sought included the service of documents, witness interviews, and bank records. No detailed breakdown of information sought was provided.

189. Bank secrecy is not a basis for refusal of request made to Canada. Requests for legal persons are not treated any differently than natural persons for the purposes of MLA. In its responses to the Phase 4 questionnaire, Canada states that the RCMP SII is required to go through the Foreign Information Risk Advisory Committee (FIRAC) process, which conducts a risk assessment and determines which actions may jeopardize the safety of any party involved, when sharing information with a foreign agency. The RCMP SII does not keep statistics regarding FIRAC assessments in relation to foreign bribery via MLA requests, however.

190. The questionnaire sent to WGB members on international cooperation in the context of the present Phase 4 evaluation shows that overall Canada appears to be performing adequately in facilitating MLA to WGB member countries. The majority of the 11 responding countries indicated that Canada provided timely and responsive information. Of the responding countries, only four countries had specific experience in requesting information from Canada for foreign bribery cases. The time frame for executing MLA requests in relation to these foreign bribery cases varied from 3 months to 2 years.

191. However, two countries raised concerns about repeated delays in receiving necessary information in a foreign bribery case and a complex money laundering case. One country (*Portugal*) noted that the execution of their MLA requests had been "very slow" and opaque, including a pending request for bank account information from October 2021. A second country (*Switzerland*) noted a similar delay in obtaining information to trace funds in a complex money laundering case. Execution took over 14 months with not all requested documentation being provided.

- **Outgoing MLA requests in foreign bribery cases**

192. Canada does not maintain (or is unable to provide) comprehensive statistics on outgoing MLA requests, including State parties involved, request execution times, legal basis for requests, type of assistance sought and reasons for refusal in its concluded cases.

193. Further, Canada provides conflicting responses regarding the number of outgoing MLA requests since Phase 3. In Canada's response to the Phase 4 Questionnaire, it states that it sought four MLA requests in foreign bribery cases, which were received within months and were fully executed. However, information and timelines from concluded cases indicate that Canada made at least six MLA requests in two foreign bribery cases (***SNC-Lavalin (Libya)*** and ***Cryptometrics (India)).*** Execution of these requests ranged from 3 to 21 months. The information sought included witness interviews, obtaining evidence by

[120] Canada Phase 3 Report, paras. 158-159, commentary.

video conference, evidence from foreign investigations, and banking and financial information. The 2023 survey of WGB countries also indicates that Canada has pending MLA requests for foreign bribery matters.

194. Most foreign bribery cases will require evidence located in foreign jurisdictions. At the on-site, representatives from the RCMP identified receiving evidence from abroad as one of the main contributions to delays in foreign bribery investigations. This delay is particularly relevant based on the time limits imposed in Canada from *charge* to the actual or anticipated *end of trial*, with a presumptive ceiling of 30 months for CFPOA cases (see section 3.3.3 on time limits for trials). Under the *Jordan* doctrine, it is up to the prosecutor to satisfy the court that the delay in the case has been reasonable. The requirement of foreign evidence is a factor the court may consider in making its assessment as to reasonableness. In practice, however, the RCMP indicated it will only lay charges once they have completed their investigation (including obtaining evidence through MLA). Canada indicates that the IAG and RCMP SII discuss options to reduce delays at the earliest opportunity, such as engaging in police-to-police contacts to clarify requirements, proceeding with materials on a police-to-police basis, and if necessary, seeking MLA. An advisory prosecutor reviews every MLA request that deals with foreign bribery for quality control. According to Canadian authorities at the on-site, no cases have been dismissed because of undue delay in obtaining foreign evidence for foreign bribery nor have there been any post-charge MLA requests.

Commentary

Detailed statistics on incoming and outgoing MLA requests are important to assess Canada's performance in international co-operation. At the time of the Phase 3 evaluation, limited information and statistics on MLA requests existed. Since 2011, the situation remains the same.

Canada does not have an institutionalised process to collect information from competent authorities that can produce comprehensive information on MLA requests, including information regarding the request execution times, legal basis for requests, type of assistance sought and reasons for refusal. Thus, the lead examiners recommend that Canada maintain comprehensive and detailed statistics on incoming and outgoing foreign bribery related MLA.

3.4.2. International cooperation related to the identification, freezing, seizure,

195. Canada's MLA regime allows Canada to provide formal assistance in criminal proceedings related to confiscating assets located in Canada, executing searches and seizures, and gathering evidence in relation to bribery and money laundering offences. Canada also provides for conviction-based asset forfeiture. Canada does not appear to maintain statistics on how often these measures have been applied in foreign bribery cases, or otherwise; and none were provided to the evaluation team.

196. The legislative and procedural regime for identification and freezing assets remains unchanged since Phase 3. In its responses to the Phase 4 questionnaire, Canada indicates that it provides detailed information to foreign jurisdictions about the legal requirements to obtain asset restraint, forfeiture and recovery, and will review draft requests, explain next steps and provide status updates on the execution of files. Canada did not provide any case practice or statistics on instances in which it cooperated with competent authorities in foreign jurisdictions on the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials, citing confidentiality.

Commentary

The lead examiners note the overall lack of statistics in relation to international cooperation. The lead examiners thus recommend that Canada maintain detailed and comprehensive statistics on the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials, so as to allow for an assessment of the effectiveness of these measures in practice.

3.4.3. Other forms of international cooperation in the context of foreign bribery

197. The RCMP is a member of the IFBT which sets out the framework for cooperation between the participants in combating international foreign bribery. The RCMP proactively engages in international police-to-police cooperation, which can then be followed up through formal processes (i.e. Central Authorities and MLA requests). In two foreign bribery cases, the RCMP indicated that it received assistance through police-to-police requests or from its own RCMP liaison officer posted abroad (***IMEX Systems (Botswana)*** and ***SNC-Lavalin (Bangladesh)).*** In instances when there are separate but parallel investigations, the RCMP will consider providing material from its investigation, be it informally or formally, if sharing that information would not negatively impact the RCMP investigation. In the 2023 survey of WGB Parties, one country highlighted the RCMP's cooperation in a successful foreign bribery investigation, using informal (police to police) and formal (Mutual Assistance Request, MARs) methods starting in 2013 and ongoing as of the time of this report. Such police-to-police cooperation allowed the country to achieve its first MAR and receive key telecommunications interception products. The investigation in the foreign jurisdiction is still ongoing. The RCMP's cooperation with other WGB police jurisdictions is a good practice.

3.4.4. Consultations on most appropriate jurisdiction for prosecution

198. Foreign bribery cases often span multiple jurisdictions and accordingly, multijurisdictional resolutions have significantly increased throughout the world. Article 4.3 of the Convention calls for member countries to consult with one another in case of competing jurisdiction, and Anti-Bribery Recommendation XIX.C. addresses in greater detail multijurisdictional cases. To date, Canada has not been part of a multijurisdictional criminal resolution in a foreign bribery matter*.*

199. In practice, the RCMP SII assesses the Canadian nexus of alleged offences of foreign bribery. In cases where there are separate but parallel investigations, the RCMP SII will consider providing material from its investigation, informally or formally, as described above. The PPSC uses the principles outlined in Supreme Court jurisprudence (Cotroni analysis) to determine the most appropriate jurisdiction for prosecution.[121] This includes factors such as residence or nationality of the investigated party, the place where most of the acts in furtherance of the crime committed, competent jurisdiction to obtain evidence (where evidence is located; whether evidence is mobile), stage of procedure (where charges laid; which police force played a major role in the development of the case; number of accused and ability to gather accused in one place for trial; which jurisdiction is ready to proceed to trial) and place where consequences of the crime occurred, among others.

3.4.5. Extradition

200. The framework for extradition in foreign bribery cases has not substantially changed since 2011. Canada is able to extradite for the offence of bribery of foreign public officials in the CFPOA based on the *Extradition Act* as well as on bilateral or multilateral treaties that Canada has ratified. The IAG processes extradition requests. Since Phase 3, Canada has successfully extradited at least two foreign nationals in relation to CFPOA proceedings in the ***Cryptometrics (India***) case, and had individuals surrender voluntarily in the ***SNC-Lavalin (Libya)*** case.

201. Canadian authorities, however, did not provide statistics on incoming and outgoing extradition requests in relation to foreign bribery cases, including timelines or reasons for granting or refusing requests. The time taken to extradite an individual to stand trial for foreign bribery is particularly relevant in light of the *Jordan* principle. In 2021, a court of appeal recognised that the time required for extradition be counted as a "discrete event" that is not counted in the 30 month-presumptive ceiling. In ***Cryptometrics***

[121] United States of America v. Cotroni [1989] 1 S.C.R. 1469.

(India), the prosecution sought extradition of the accused from the United States and the United Kingdom. One individual surrendered voluntarily, while the other was extradited from the United Kingdom in January 2016.[122] The individuals challenged the time taken to be tried, as the trial court had subtracted the entire time required for extradition as a 'discrete event', along with defence delays. The court of appeal agreed that the extradition process is a 'discrete event' and should be subtracted in the *Jordan* calculation. The court, however, concluded that four months should count against the prosecution because the Canadian authorities "*did not appear to be diligently pursuing extraditions during that period of time*."[123] The court found that the case had been tried within the 30-month presumptive time limit under *Jordan*; in the end, the appeal was granted but not on the grounds of delay (see section 3.1 on the foreign bribery offence). The court of appeal's finding underscores the importance of "diligently" pursuing extraditions in foreign bribery cases.

Commentary

The lead examiners recommend that Canada (i) maintain detailed and comprehensive statistics on extradition requests in relation to foreign-bribery cases, with a view to allowing for a proper assessment of the efficiency of processes in practice, and (ii) take steps to ensure Canadian authorities proactively pursue extradition requests in foreign bribery cases.

3.5. Offences related to foreign bribery

3.5.1. Money laundering offence

202. The money laundering offence was not discussed in Phase 3. Article 7 of the Convention requires that the bribery of a foreign public official is a predicate offence for money laundering. Section 462.31 CC contains the money laundering offence. Section 462.3(1) defines a designated offence (or predicate offence) as any indictable offence under any Act of Parliament other than offences established by regulations. Foreign bribery offences under the CFPOA are indictable offences and can therefore constitute the predicate offence for money laundering. The penalty for an indictable money laundering offence is a term of imprisonment not exceeding ten years (s.462.31(2)(a) CC). In Canada, legal persons may be held liable for money laundering offences where foreign bribery is the predicate offence. The FATF rated the offence as "compliant" in the 2016 mutual evaluation and follow-up report in 2021.[124]

203. Canada did not provide statistics on the number of money laundering convictions as a whole. To date, no legal or natural person was convicted for money laundering predicated on the foreign bribery offence. Two money laundering cases were predicated on domestic bribery. On-site visit discussions with the Canadian authorities did not allow the evaluation team to pinpoint the reason for this absence of money-laundering cases predicated on foreign bribery, but explained that the bribery and money laundering offences would not be pursued concomitantly in a same case. Representatives of the PPSC explained that the enforcement strategy when it comes to money laundering is to focus on "professional money launderers", which would explain why pursuing the underlying offence in this context is secondary. In contrast, when proceedings are engaged under the CFPOA or domestic bribery, the money laundering case would often be "bargained away" or, at the very least, examined after the predicate offence. Upon reading a first draft of this report, the RCMP shared views that due to the movement of monies to a foreign country in a foreign bribery case, it would be "more appropriate for the receiving country to conduct money laundering investigations". Furthermore, the Jordan decision (examined in detail under section 3.3.3.) has

[122] R v. Barra and Govindia, 2021 ONCA 568, para 23.

[123] *Ibid.*, para 36.

[124] See FATF website Canada (fatf-gafi.org).

had an impact on the pursuit of the money laundering offence, as the time remaining to pursue the offence has often lapsed. The PPSC notes that it would be feasible in theory to pursue the money laundering charge concomitantly if it were laid at the same time as the predicate offence charge (on the same information) or that it could be pursued at a later date as a separate and distinct matter.

Commentary

In the absence of data on enforcement of the money laundering offence, the lead examiners cannot objectively assess Canada's proactivity to pursue it. They are concerned that, to date, foreign bribery was not once the predicate offence in a money laundering case. While figures are slightly more encouraging when it comes to domestic bribery, with two cases predicated on that offence, they reinforce the notion that Canada should tackle money laundering and bribery offences concomitantly when they occur in the same case, rather than giving the priority to one offence, often at the detriment of the other. The lead examiners therefore recommend that Canada take measures to enforce the money laundering offence more effectively in connection with foreign bribery cases and ensure that in practice alleged offenders are simultaneously prosecuted and convicted of money laundering and foreign bribery, where appropriate.

3.5.2. False accounting offence

Challenges in enforcing the false accounting offence in practice

204. In 2013, Canada enacted a false accounting offence in the CFPOA as part of Bill S-14 FFCA that revised several sections of the CFPOA.[125] Thus, following the Phase 3 follow up report, the Working Group found that Canada had fully implemented Phase 3 recommendation 4(e)(i) to prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation for purposes that would include bribing foreign public officials or of hiding such bribery.

205. Section 4(1) of the CFPOA establishes specific criminal offences for bookkeeping violations committed for the purpose of bribing foreign public officials or hiding such bribery. This applies to establishing or maintaining accounts; making transactions that are not recorded in books and records or that are inadequately identified in them; records non-existent expenditures in those books and records; enters liabilities with incorrect identification of their object in those books and records; knowingly uses false documents; or intentionally destroys accounting books and records earlier than permitted by law. The offence is subject to a sanction of not more than 14 years, the same as the foreign bribery offence (section 4(1) of the CFPOA). The false accounting offence is equally applicable to natural and legal persons (section 2(b) of the CFPOA).

206. Since the enactment of the false accounting offence in the CFPOA, there have been no cases where a natural or legal person is charged or convicted with a false accounting offence under the CFPOA. In practice, prosecutors would have to prove the foreign bribery offence to bring the false accounting offence, which renders the offence nearly ineffective. Since criminal sentences, including under the CFPOA are imposed concurrently and not cumulatively, there is limited incentive to pursue these types of cases separately from the foreign bribery offence.

207. At the on-site, lawyers stated that the books and records offence is not effective and seen as an "impossible bar to meet". Following the on-site visit, the PPSC asserted that the effectiveness of the books and record offence is not measured by convictions and further indicated that "sanctions are never an incentive to pursue an offence regardless of whether they are cumulative or concurrent." In practice, law enforcement representatives indicated they rely upon the offence for production orders in foreign bribery cases.

[125] Bill S-14, An Act to amend the CFPOA (FFCA). https://www.parl.ca/LegisInfo/en/bill/41-1/S-14.

Lack of statistics on false accounting in relation to foreign bribery

208. In Phase 3, the Working Group decided to follow up on the statistics compiled on convictions under the CFPOA and related omissions and falsifications of book, records and accounts of companies. As outlined above, no convictions related to false accounting offences under the CFPOA have been concluded. Statistics of any concluded false accounting offences under the CFPOA would be reported as part of the annual report to Parliament on the implementation of the Convention.

Commentary

Canada has yet to sanction a natural or legal person for false accounting in relation to foreign bribery. The introduction of the false accounting offence in the CFPOA has not proven to be effective in pursuing books and records offences in relation to foreign bribery. The lead examiners, however, note that law enforcement have utilised this provision to investigate and advance their foreign bribery cases. The lead examiners recommend that the Working Group continue to follow up on the application of the false accounting offence in investigating, prosecuting and sanctioning foreign bribery cases.

3.5.3. Non-tax deductibility of bribes and sanctions, and enforcement

209. The rules regarding the non-tax deductibility of bribes and sanctions are set forth, respectively, in subsection 67.5 (1) (Non-deductibility of illegal payments) and section 67.6 (Non deductibility of fines and penalties) of the ITA. During the on-site visit, the evaluation team aimed to assess whether tax returns of legal and natural persons sanctioned for foreign bribery are systematically reassessed for the purpose of enforcing the non-deductibility of bribes, as well as whether and how the non-deductibility of sanctions is enforced in practice. To the knowledge of the CRA representatives met on-site, and as further confirmed by Canada after the visit, the CRA is not systematically informed of foreign bribery resolutions. Furthermore, Canada has not indicated that any of the companies sanctioned for foreign bribery to date have had their tax returns reaudited.

Commentary

With a view to enhancing the enforcement of the non-deductibility of bribes and sanctions imposed under the CFPOA in practice, the lead examiners recommend that Canada take measures to ensure that the CRA is systematically made aware of CFPOA resolutions, and reaudits the tax returns of legal and natural persons who were sanctioned.

3.6. Concluding and sanctioning foreign bribery cases

210. Seven foreign bribery proceedings were concluded with sanctions in Canada to date, in six cases: four against companies through a plea deal (including the ***SNC-Lavalin (Libya)*** case, in which the company pleaded guilty for fraud), one against a company through an RA, and two against an individual through trial. After reviewing challenges to access concluded foreign bribery cases, the present section examines how cases are concluded in Canada, focusing on resolution mechanisms, sanctions, and confiscation against natural persons (sanctions against legal persons are addressed under section 4.2).

3.6.1. Accessing concluded cases remains a challenge

211. The 2021 Anti-Bribery Recommendation recommends that member countries “make public and accessible, consistent with data protection rules and privacy rights, as applicable, and through any appropriate means, important elements of resolved cases of bribery of foreign public officials and related offences under Articles 7 and 8 of the OECD Anti-Bribery Convention, including the main facts, the natural

or legal persons sanctioned, the approved sanctions, and the basis for applying such sanctions".[126] Making foreign bribery resolutions accessible allows in particular for public oversight, thereby supporting accountability on the adequacy, fairness, and consistency of such resolutions.

212. None of the foreign bribery cases concluded to date, regardless of the type of resolution (trial, plea deal, or remediation agreement) are accessible on a government-supported website. While the public has a right to access concluded cases, requests must be made in person before the court where the decision was filed. This rule applies to the same extent to judgements following a trial, and court decisions validating a plea deal or remediation agreement. Input from written contributions and representatives of civil society and the defence bar met on-site stressed the seriousness of this issue. As emphasised in previous evaluations by the Working Group, "making […] decisions available on demand is not an adequate substitute for publication", as "only individuals who already know of a resolution would request it".[127]

213. In Canada, the hurdle of on-demand access rather than systematic publication is compounded by the size of the country, unharmonized rules across provinces and the absence of a one-stop shop to obtain resolutions within each province. For instance, both the ***Hydro-Kleen Group Inc. (United States)*** and ***Niko Resources Ltd. (Bangladesh)*** cases were concluded in Alberta, but in different courts. In the absence of a centralised point of access at the provincial level, obtaining a copy of these resolutions requires making an in-person request to the Red Deer Court for the former, and to the Calgary Court for the latter. The website of Alberta's court system, similarly to other provinces, provides a link with addresses and phone numbers for individual court locations.[128] A fee applies to make copies of decisions, as pictures cannot be taken. Some panellists explained during the on-site visit that they were denied access to a decision, either because it was in the court's chamber when the demand was made, or because the clerk arbitrarily decided that the person did not have a legitimate interest in seeing it. One person said it took them up to six years to obtain a copy of a case, and another called the system "broken".

214. The only source of limited information on concluded foreign bribery cases provided by the Canadian government is the website of GAC, a requirement built into the CFPOA. As per section 12 of the Act, "within four months of the end of each fiscal year, the Minister of Foreign Affairs, the Minister for International Trade and the Minister of Justice and Attorney General of Canada shall jointly prepare a report on the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and on the enforcement of this Act and the Minister of Foreign Affairs shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is completed".

215. This GAC report contains a brief description of concluded and ongoing cases and, in a footnote, an overview of successfully concluded cases.[129] However, only part of the enforcement information is provided. In particular, and as emphasised by commentators,[130] the report does not account for charges that later resulted in acquittals or stays in proceedings, or a State's cooperation with multijurisdictional efforts that have helped secure convictions elsewhere. The report thus seemingly provides an incomplete picture of CFPOA enforcement in Canada, thereby raising questions on its compliance with section 12 of the Act. More importantly, the summary of facts in concluded cases is very brief, and a range of relevant elements are missing, such as the estimated proceeds of the bribe and method for calculating fines.

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[126] Anti-Bribery Recommendation XV. iii.

[127] Italy Phase 4 report, para. 237.

[128] See court system websites for Alberta and Ontario.

[129] See the Annual Report on Canada's Fight against Foreign Bribery to Parliament 2021-2022.

[130] Written submission by Prof. Johanna Harrington, University of Alberta, pp. 4-5. Submissions by the private sector and civil society to the WGB.

216. Copies of some foreign bribery resolutions can be found on CanLII, a non-profit organisation founded by the Federation of Law Societies of Canada, whose mandate is to provide online access to judicial decisions and legislative documents.[131] According to its website, "by doing so, CanLII supports members of the legal profession in the performance of their duties while providing the public with permanent open access to laws and legal decisions from all Canadian jurisdictions".[132] Several provinces, including Alberta and Ontario, provide on their court system website that judicial decisions are accessible on CanLII, although they include a disclaimer that only the decisions held by the court, accessible in person and for a fee, hold official status. PPSC representatives met on-site explained that they did not see any onus on the government to ensure access to court decisions, and argued that even if there was a general desirability for publishing this material, the government had no need to undertake any work to do so, as CanLII was already taking on this role. Furthermore, decisions concerning foreign bribery cases concluded through plea deals and RAs, do not include all the elements envisaged under the 2021 Recommendation (see also below sections 3.6.2 and 3.6.3). Following the on-site visit, Canada's MOJ further explained that it "considers that publication in CanLII is preferable to a government of Canada website" as it has "sophisticated technology to provide user friendly search capability, citation, and treatment analysis".

3.6.2. Concluding foreign bribery cases at trial and through plea deals

217. Rules regarding conclusions of cases at trial and plea deals were not analysed in detail in Phase 3. Both trial proceedings and pleas are regulated by the Canadian CC. Sections 606 to 613 regulate pleas, including the conditions for the Court to accept them (section 606 (1.1)). The PPSC Deskbook, which provides guidelines to prosecutors on resolutions discussions, sets forth that they are encouraged to initiate resolution discussions, and in so doing, should agree to present a joint submission as to the exact sentence […] only when satisfied that the joint submission will not bring the administration of justice into disrepute and is not otherwise contrary to the public interest. A trial judge should reject a joint submission on sentence only if it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system."[133]

218. Since Phase 3, the rules have not changed, but the WGB adopted new standards in the 2021 Anti-Bribery Recommendation on the conclusion of foreign bribery cases, including transparency of resolutions. In addition to the hurdles to access concluded cases described above, information on cases concluded though plea deals is insufficient. Indeed, because their negotiation is confidential, limited information on cases concluded through plea deals is included in the court decisions validating them, and thus publicly accessible. As per the PPSC Deskbook, prosecutors present a joint submission as to the exact sentence, and no information is provided in the court decision as to how the sanction was determined. This lack of transparency is compounded by the fact that sentencing rules against legal persons are very limited. This contravenes Anti-Bribery Recommendation XV.iii, which includes the basis for applying sanctions in the list of key elements of concluded cases that should be made publicly accessible.

Commentary

Canada does not make public and accessible important elements of concluded cases of foreign bribery and related offences, whether resolved through trial, plea deal, or remediation agreement. While the public has a right to access them, requests must be made in person before the court where the judgment or decision validating an agreement was filed, a significant logistical barrier compounded by unharmonized rules across provinces and the absence of a one-stop shop to

[131] https://www.canlii.org/en/.

[132] https://www.canlii.org/en/info/about.html.

[133] PPSC Deskbook, chapter 3.7, section 1; https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch07.html.

obtain resolutions within each province. This situation fuels the opacity surrounding CFPOA enforcement, thereby undermining efforts to raise awareness of the foreign bribery offence in Canada. The lead examiners are all the more concerned as Canada does not consider this situation to be problematic, nor acknowledge the role the government has to play in ensuring access to this information. They recommend that Canada take immediate measures to make public and accessible important elements of resolved foreign bribery cases, for instance by proactively publishing them on a single government-supported website.

To date, a majority of foreign bribery cases were resolved through a plea deal. Due to the confidentiality of negotiations, important information is missing from court decisions validating plea deals, in particular the method for calculating the sanction. This is all the more problematic as sentencing rules against legal persons are very limited. The lead examiners therefore recommend that Canada take measures to ensure that the method to calculate fines in the context of plea deals is more transparent, in conformity with 2021 Anti-Bribery Recommendation XV. iii..

3.6.3. Non-trial resolutions: Remediation Agreements

219. In Phase 3, Canada had resolved foreign bribery cases through plea deals and trial but had yet to introduce a non-conviction-based resolution mechanism. In 2018, following an extensive public consultation, it introduced Remediation Agreements (RAs), thereby adding an instrument to its resolution mechanisms arsenal. The Phase 4 evaluation is the first opportunity for the WGB to examine the RA framework, its scope of application, and compliance with the standards on non-trial resolutions (NTRs) introduced by the 2021 Anti-Bribery Recommendation. The present section also examines the use of RAs in practice, noting that, to date, only one foreign bribery case (***Ultra Electronics (Philippines)***) has been resolved through an RA.

Overview of the RA framework and scope of applicability

220. The RA framework is set forth in Part XXII.1. of the Canadian CC. An RA is defined as "an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement". It can be used in instances including bribery, fraud, and corruption under the CC, as well as offences under the CFPOA, allowing an organisation to avoid a criminal conviction and thus suspension from public tendering. Part XXII.1. sets out definitions, governing principles, the conditions to begin negotiations, the steps to be followed in the negotiation process, the mandatory and optional content of an agreement, the court approval process, and enforcement of the agreement. It also includes provisions governing subsequent use of information from the negotiations and from the agreement as well as the manner of publication of the agreement and the court decision.

221. 2021 Anti-Bribery Recommendation XVII calls for countries to consider using a variety of resolution mechanisms to resolve foreign bribery allegations, including NTRs, against both natural and legal persons. In Canada, the RA can only be used against legal persons. The limited enforcement against natural persons raised the question of whether the scope of the mechanism should be extended to natural persons, in particular in light of the acquittal of the former founder in the ***IMEX Systems (Botswana)*** case in March 2023.

222. As further analysed below, the decision to invite a company to negotiate an RA is made solely by the PPSC. However, the RCMP is the company's sole interlocutor in the context of voluntary disclosure and cooperation with the investigation, two elements taken into account by the PPSC in its decision to offer an RA. Both the RA concluded in the domestic bribery case and the foreign bribery case make clear that cooperation was instrumental in the PPSC's decision to invite the company to negotiate an RA, and the respective rationale refer to the importance of self-reporting in the RA framework. Smooth communication between the PPSC and RCMP is therefore critical in this process. During the on-site visit, the PPSC

indicated that they would rely on the RCMP to gauge the level and extent of a company's cooperation with the investigation. Cooperation between the PPSC and RCMP is analysed in further detail under section 3.2.3. above.

Commentary

The lead examiners welcome the introduction of the RA in 2018, as well as its use for the first time in a foreign bribery case in May 2023. Recognising that NTR mechanisms are a driver of enforcement and noting the low level of enforcement against natural persons, they recommend that Canada consider extending the applicability of the RA to natural persons.

Compliance with the principles of due process, transparency, and accountability set forth in the 2021 Anti-Bribery Recommendation

223. 2021 Recommendation XVIII calls on countries to ensure that NTRs used to resolve cases related to offences under the OECD Anti-Bribery Convention follow principles of due process, transparency, and accountability. It sets forth seven standards for that purpose.

224. The RA framework complies with a number of these standards, including with Recommendation XVIII (viii) on appropriate oversight, as the AG must approve the prosecutor's decision to pursue an RA in lieu of a prosecution, and a judge must approve of the terms of the deal. Before seeking approval of the AG, the prosecutor must be of the opinion that there is a reasonable prospect of conviction with respect to the offence, and believe that negotiating an RA in the public interest and appropriate in the circumstances. Once the negotiation is completed, three conditions must be met for court approval: the organisation is charged with an offence eligible for an RA; the agreement is in the public interest; and the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

- **Criteria regarding the use of RAs are not sufficiently clear and transparent**

225. 2021 Anti-Bribery Recommendation XVIII (i) recommends that countries adopt a clear and transparent framework regarding NTRs, and Recommendation XVII (ii) that they develop clear and transparent criteria regarding the use of NTRs including, where appropriate, voluntary self-disclosure of misconduct, cooperation with law enforcement authorities, and remediation measures. Sections 715.32 (1) and (2) of the RA framework respectively provide conditions to enter an RA and factors to consider. The latter include the gravity of the offence, the involvement of senior officers, whether the company has taken disciplinary action against any person who was involved in the offence, and whether it has made reparations or taken other measures to remedy the harm caused by the section and to prevent the commission of similar offences. In compliance with Article 5 of the Convention, section 715.32 (3) provides that for corruption cases, "the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved." Nonetheless, the requirements for companies to be invited to negotiate an RA lack clarity.

226. As mentioned under section 2.6. above on self-reporting by companies, it is unclear whether voluntary disclosure would be factored in the decision to negotiate an RA, and if so to what extent. Indeed, voluntary disclosure is listed as a purpose of the RA framework (section 715.31(d)), but it is not included in the list of factors to be considered by a prosecutor to negotiate an RA. Commentators have called for Canada to urgently issue guidance in that regard. The RAs concluded to date in domestic and foreign bribery cases bring little clarity. In the former, the company did not self-report. The Court stated in its decision that voluntary disclosure was not a mandatory precondition but "it is clear that the objective of remediation agreements is to encourage self-reporting, and that self-reporting would carry considerable weight in the balance". In the latter (***Ultra Electronics (Philippines)***), the UK-based parent company, self-reported "a potential criminal violation" to the UK Serious Fraud Office in 2018, but the document does not state whether the company also self-reported to the RCMP, who investigated the Filipino bribery scheme.

227. Input from written contributions and on-site panellists concur that information on the use of RAs is lacking. In January 2020, Canada released a Guideline on RAs in the PPSC Deskbook.[134] The Guideline essentially focuses on procedural aspects to test the likelihood of a conviction and seek the AG's consent. In responses to the Phase 4 questionnaire, Canada purports that the Guideline also helps companies and their corporate counsel to interpret the provisions of the regime and it facilitates and encourages use of the regime in appropriate circumstances. This contrasts with the views expressed in written submissions and by representatives of civil society and the defence bar during the on-site visit.[135] According to TI Canada, the Guideline does not provide information to companies looking to understand when and if RAs may apply to them. "Furthermore, it does not provide guidance on what measures the companies should be taking in terms of implementing ethics and compliance programs, as does the UK Bribery Act's Guidance (2010) and the US Department of Justice Criminal Division's Evaluation of Corporation Compliance Programs (April 2019)". This point was further emphasised by defence bar representatives at the on-site, who indicated that, in the absence of guidance by Canada, they rely on the UK and US guidance to advise their clients.

- **Publication and accessibility of remediation agreements raise serious concerns**

228. As for other types of resolutions (see section 3.6.1 above), publication and accessibility of RAs raise concerns regarding 2021 Ant-Bribery Recommendation XVIII (iv), which calls on countries to "make public elements of NTRs, where appropriate, and consistent with data protection rules and privacy rights, as applicable". Neither the domestic bribery nor the foreign bribery RAs are published on a government website. The PPSC has posted a press release providing information on the terms of the RA,[136] but it does not include all the elements envisaged under the 2021 Recommendation. In particular, while the press release provides that "the court was satisfied that the agreement is in the public interest and that its terms are fair, reasonable and proportionate", the relevant considerations for resolving the case with an RA (Recommendation XVIII. iv. b.) are not included. The sanctions are listed, but the rationale for applying such sanctions is not (Recommendation XVIII. iv. c.). Few details are provided on the facts of the case (Recommendation XVIII. iv. a.), and the amount of the bribe is also unknown.

Commentary

To date, only one foreign bribery case has been resolved through a RA. While this limited use is commensurate to the low level of enforcement in Canada, the lack of guidance on the mechanism significantly undermines its use. Increased information on how the RA is applied in practice could boost its efficiency. The lead examiners therefore recommend that Canada issue guidance on what is expected from a company to be invited to negotiate an RA, including in terms of voluntary disclosure and cooperation, as well as on the process and timeline to navigate the RA negotiation. They further recommend that Canada raise public awareness of the mechanism, including by publishing key elements of the RA, with a view to building trust in this new system.

Remediation Agreements in practice

- **RAs remain underutilised to resolve foreign bribery cases**

229. Almost five years after the RA framework was adopted, it has been used only once to resolve a foreign bribery matter. In 2018, the RA resolution process against SNC-Lavalin for the bribery of Libyan public officials fell through, amidst allegations of interference from the government (***SNC-Lavalin (Libya)***

[134] PPSC Deskbook, chapter 3.21; https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html.

[135] Submissions by the private sector and civil society to the WGB.

[136] https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2023/17_05_23.html.

case) (see section 3.3.2.). The case was eventually resolved through a plea deal on fraud charges, which allowed the company to avoid automatic debarment. On 17 May 2023, the first RA was adopted against a legal person in a foreign bribery case in the ***Ultra Electronics (Philippines)*** case. As a consequence, it is too early to assess the effectiveness of RAs, and the impact they may have on detection and voluntary disclosure. While the use of RAs to resolve foreign bribery cases is commensurate to the level of enforcement in Canada, representatives of the defence bar and civil society organisations met on-site, as well as written submissions received from external stakeholders, attribute the limited use of RAs to different factors.

230. The *lack of guidance* on RAs, as mentioned above, has been consistently expressed as a concern by the private sector. In written submissions to the evaluation team, and as reiterated on-site, civil society calls on Canadian authorities to "develop guidance for organizations on how to approach authorities for an RA including describing circumstances under which a remediation agreement might be offered to a corporate offender, which conditions can be imposed, and how companies can cooperate with law enforcement authorities".[137] ACT International Consulting reports that since the regime came into force in 2018, there have been several calls for guidance as to their application.[138] TI Canada considers that "Canada needs to provide clear and transparent criteria, including guidance, on remediation agreements to facilitate their usage and promote understanding of the conditions that must exist for them to be considered by prosecutors and to truly promote and incentivize voluntary self-disclosure". During the on-site visit, the defence bar further stated that ***Ultra Electronics (Philippines)*** brings some clarity on the importance of cooperation, but guidance in terms of process, voluntary disclosure and cooperation in the context of the RA would be "immensely useful".

231. Section 715.43 (1) CC provides that the Governor in Council may make regulations for the purposes of carrying out Part XXII.1. However, Canada never adopted such regulations and representatives of the MOJ made clear during the on-site visit that they did not intend to do so, describing this provision as 'boilerplate'. The PPSC does not consider that it should issue such guidance. Finally, the RCMP is not in a position to do so, as the PPSC is the only authority in charge of inviting a company to negotiate an RA. During the on-site visit, the RCMP shared a leaflet which, similarly to its website, provides that businesses who self-report allegations of corruption *may* be able to avoid criminal convictions. However, for the sake of preserving each entity's independence, the RCMP cannot speak of the extent to which a company's disclosure and/or cooperation might give them access to an RA. This dichotomy makes the operation of the RA contingent on a smooth cooperation between the RCMP and PPSC, and may be an impediment to voluntary disclosure and cooperation in practice. Indeed, the defence bar explained that after a company starts cooperating with the RCMP, it does not know "until the last moment" if the process will result in the RA, and if so when. They called this lack of information "massively disruptive" for a company, and explained that in the absence of guidance, they would take a "leap of faith" and turn to UK and US guidelines.

232. Other factors limiting the use of RAs include Canada's *failure to communicate on the RA framework*, combined with potential public mistrust toward the instrument following the ***SNC-Lavalin (Libya)*** case. The RA framework was adopted as part of a broader legislation and, according to civil society, went unnoticed in the absence of adequate communication by the government. The framework eventually became known to the public through the ***SNC-Lavalin (Libya)*** case and alleged interference by the government, thereby resulting in a latent perception by the public that the regime was a concession to big business. One panellist explained that to this day, the instrument still lacks a "public face". To foster

[137] Written submission by TI Canada, p. 32. Submissions by the private sector and civil society to the WGB.

[138] Written submission by ACT International Consulting, p. 2. Submissions by the private sector and civil society to the WGB.

confidence in the mechanism, TI Canada advocates for Canada to "publicise clear information and educational materials to the general public about the purposes of the RA regime and how it works".[139]

233. Factors pertaining to the *legislative framework to hold companies liable for foreign bribery and the court interpretation of the CFPOA* could also explain the limited use of RAs. In order to invite a party to negotiate a remediation agreement, the PPSC must determine that there is a reasonable prospect of conviction in the case. According to the defence bar, the overall low level of enforcement and conviction for foreign bribery in Canada, as well fact that a company's liability is not triggered in case of a manager's failure to prevent, puts the bar high for a foreign bribery conviction, since in most cases, the underlying offence is neither committed nor directly ordered by a manager (see further discussion on standards to establish liability of legal persons under section 4.1. below). By the same token, commentators expect that recent decisions on the interpretation of the offence will undermine the utility of RAs. According to an expert, "with the Jordan rule significantly reducing timelines, combined with the fact that prosecutors must prove that defendant's had knowledge of the elements of the offence as per the acquittal in the ***IMEX Systems (Botswana)*** case and knowledge of the status that someone is indeed a public official as per decisions issued in the ***Cryptometrics (India)*** case, the threshold for proving an offence under the CFPOA has become overly cumbersome".[140]

234. Finally, civil society and the defence bar point to *inconsistencies between policies*. They argue that the Integrity Regime, which imposes a 10-year suspension from public tendering upon a CFPOA conviction, undermines the effectiveness of the RA framework, which aims to encourage voluntary disclosure but lacks clarity on how to access an RA. They believe that more attention should be given to how RAs, criminal enforcement, and the *Integrity Regime* for public procurement work together, calling for coordination to ensure one is not undermining the other. During the on-site visit, Canada acknowledged that the articulation of the RA framework and the Integrity Regime in its current form raises challenges. As further examined under section 4.2.2., the government is considering reforming the Integrity Regime.

- **Sanctions imposed in the RA**

235. 2021 Anti-Bribery Recommendation XVIII. v. provides that countries should ensure that foreign bribery matters resolved through an NTR are punishable by transparent, as well as effective, proportionate and dissuasive sanctions, as required by Article 3 of the OECD Anti-Bribery Convention. Part XXII.1. of the CC does not provide specific rule regarding sanctions. In its response to the Phase 4 questionnaire, Canada reports that "remediation agreements […] allow for the same financial penalties, confiscation of assets, and restitution of victims that are available following a sentencing hearing after a full trial", which it further confirmed at the on-site.

236. In the ***Ultra Electronics (Philippines)*** RA, the company undertook to "disburse a total of 10 million dollars in the form of forfeitures, penalties, a victim surcharge, and reimbursement of expenses to be incurred by the PPSC at the implementation stage of the agreement". The company was imposed a penalty of CAD 6 593 178 (EUR 4 570 655 and USD 4 975 753), a surcharge of CAD 659 318 (EUR 457 066 and USD 497 575), and forfeiture of CAD 3 296 589 (EUR 2 285 327 and USD 2 487 876) for the advantage obtained from the wrongful conduct. The sanction is lower than those imposed through a plea deal (except for the first one, concluded prior to Phase 3, in 2005).

237. According to the statement of facts, the bribes helped Ultra Electronics Forensic Technology (a subsidiary of the Ultra Electronics) win three contracts with the Philippines National Police between 2006 and 2018 worth approximately CAD 17 million (EUR 11.78 million and USD 12.8 million). To secure the

[139] Written submission by TI Canada, p. 32. Submissions by the private sector and civil society to the WGB.

[140] Written submission by ACT International Consulting Inc., p.3. Submissions by the private sector and civil society to the WGB.

contracts, the company hired agents in the Philippines who directed bribes to local agents to influence the contract award. Ultra Electronics paid these agents a 15% commission on any sales plus a further 5% as part of a "side agreement" to be distributed as bribes. Various agents were used, and ultimately paid around CAD 4.4 million (EUR 3.05 million and USD 3.32), although it is unclear how many of the fees were legitimate business costs and how many were bribes, according to the statement of facts.

238. The Agreement explains how each of these amounts were reached:

- The forfeited sum of CAD 3.3 million (EUR 2.29 million and USD 2.49 million) was set in consideration of five factors, including the total amount paid as commissions to the intermediaries (CAD 4.4 million (EUR 3.05 million and USD 3.32)), the inability to ascertain the precise amount of proceeds resulting from the commission of the offences, and the parties' fair estimate that illegal proceeds represent 75% of the disbursed.
- The CAD 6.5 million (EUR 4.5 million and USD 4.9 million) penalty was set based on nine factors, including "the general observation that, in corruption cases, Canadian courts impose penalties [fines] that are substantially higher than the bribe paid", the "sentencing factors applicable to organizations specified in section 718.21 of the Criminal Code", "the value of the procurement contracts (17 million dollars) and the sums paid as commissions to local intermediaries (4.4 million dollars)", "the inability to accurately determine the ill-gotten gains or the amount of bribes paid", "that 6.5 million dollars is an amount that meets the objectives of the RA regime and that this amount is substantially more than the commissions paid to the local intermediaries", "that 6.5 million dollars represents more than 30% of the sales to PNP, which is significantly more than the ordinary cost of doing business, and "that the conduct and the offences are serious and deserving of a severe penalty".
- The victim surcharge mechanism is only possible in relation to CC offences. Since the company was charged with two offences under the CFPOA (not the CC), and the offence of fraud under the CC ((s. 380(1)(a)), the PPSC deemed that the victim surcharge should be set at 10% of the fraud penalty, as no victim was possible in relation to the CPOS offences".

239. A single RA does not constitute a sufficient sample to assess whether sanctions imposed through this instrument are effective, proportionate, and dissuasive. Nevertheless, it can be drawn from the methods of calculation above that:

- the notion of "illegal proceeds" to determine the amount of confiscation does not account for the value of the business obtained as a result of the bribes;
- the value of the procurement contract has no concrete bearing on the amount of the sanction, which in Canada's view amount to a "severe penalty". This puts into questions the "effective proportionate and dissuasive" nature of the sanction; and
- the RA framework allows for a victim surcharge, but only when the offence is included in the CC, which means that a surcharged cannot be imposed for CFPOA offences. While this was unclear to the evaluation team prior to the on-site visit, this was confirmed by Canada.

- **Consideration of victims in RAs**

240. Under the RA framework, after a company has accepted the offer to negotiate an agreement, the prosecutor must take reasonable steps to inform any victim, or any third party that is acting on the victim's behalf, that an RA may be entered into. If the prosecutor elects not to inform a victim or third party, they must provide the court, when applying for approval of the agreement, with a statement of the reasons why it was not appropriate to do so in the circumstances.[141] This is different from the "victim surcharge"

[141] CC, section 715.36.

mechanism, which cannot be applied in CFPOA cases, as examined under section 3.6.4. on Sanctions against natural persons.

241. The agreement in the ***Ultra Electronics (Philippines)*** case does not include a provision to compensate victims, as the parties claimed that there was insufficient evidence to identify any direct victim in the bribery scheme, and that the recipients and the amounts of bribes could not be readily identified. In its decision the court noted that "clearly, the indemnification of victims is a core value of the remediation agreement framework. […] The treatment of victims is a measure of the public interest component of an agreement. The public interest is not served by an agreement that disregards the bona fide interests of victims". It further examined whether the absence of victim reparation was reasonable and justified and concluded that it was the case. It emphasised that notwithstanding the parties' reasonable efforts to identify and compensate victims and their conclusion that reparations cannot be provided, the proposed agreement does not preclude an aggrieved party from seeking compensation in the Philippines, noting that the availability of reparations from other viable sources favours approving the agreement.

Commentary

A single RA finalised in one foreign bribery case is insufficient to adequately assess whether sanctions imposed through this instrument are effective, proportionate, and dissuasive. The lead examiners recommend following up on sanctions imposed through RAs as practice develops.

3.6.4. Sanctions against natural persons

242. In Phase 3, no individual had been sanctioned for foreign bribery. Criminal sanctions for foreign bribery have increased since then. At the time, the maximum imprisonment sentence was 5 years, which was equivalent to the one for domestic bribery. After the passage of Bill S-14 FFCA in June 2013, maximum imprisonment for foreign bribery was raised to 14 years. It is thus nearly three times as high as the one for domestic bribery, which remains unchanged (section (1) CC).

243. Since Phase 3, two individuals were definitively sanctioned under the CFPOA in two separate cases (**Cryptometrics (India)**, and **SNC-Lavalin (Libya)**), including one after the reform). In its responses to the Phase 4 questionnaire, Canada did not provide information on the application of sanctions to natural persons in practice, including the nature of sanctions, grounds for determining the severity of the sanction, and consideration of mitigating factors.

Fines and imprisonment

Table 2 – Outcomes of proceedings against natural persons

Case	Natural persons (NP) involved and sanction imposed, where applicable
Canadian General Aircraft (Thailand)	• NP1 – **charges stayed** in 2017.
Cryptometrics (India)	• NP1 – sentenced at trial to **three years imprisonment** in May 2014 • NP2 – **charges stayed** in November 2019 • NP3 – convicted in January 2019, **sentenced to two and a half years imprisonment. Conviction set aside** in August 2021 by Ontario Court of Appeal. New trial ordered, but PPSC declined to pursue. NP4 – convicted in January 2019, **sentenced to two and a half years imprisonment. Conviction set aside** in August 2021 by Ontario Court of Appeal. New trial ordered, but PPSC declined to pursue.
IMEX Systems (Botswana)	• NP1 – **acquitted** in March 2023. Appeal is pending.

SNC-Lavalin (Bangladesh)	• Five natural persons charges under the CFPOA. **Charges stayed** against 2 natural persons in 2014 and 2015 respectively. Three natural persons were **acquitted** on 2017 following a challenge of the wiretap evidence.
SNC-Lavalin (Libya).	• NP1 – sentenced at trial to **8 years and 6 months imprisonment** + a **fine in lieu of forfeiture of CAD 24 690 401 (EUR 17 116 374 and USD 18 633 401)**, payable within 6 months, with an additional term imprisonment of 10 years in case of non-payment, to be served consecutively. Appeal was rejected by the Court of Appeal of Quebec in February 2023. • NP2 – **charges stayed** in February 2019.

244. As the facts in the ***Cryptometrics (India)*** case predate the adoption of Bill S-14 FFCA, the court applied the initial version of the CFPOA, but noted that "although that penalty cannot be retroactively applied to this case, it does illustrate Parliament's recognition of the seriousness of this offence and of Canada's obligation to implement appropriate sanctions."[142] The decision against a former company executive in the ***SNC-Lavalin (Libya)*** case is the only concluded case against a natural person under the amended CFPOA in practice. Although the sanctions imposed on the former executive appear to satisfy the requirement of the Convention, a single case constitutes too small a sample to assess the "effective, proportionate and dissuasive" nature of sanctions against natural persons under the amended CFPOA, as per Article 3 of the Anti-Bribery Convention. In its reasons for sentence, the court used strong language to denounce the individual's conduct and the scourge of foreign corruption in general. It underscored the gravity of the underlying conduct, its serious impact on the proper functioning of markets and its significant scope (duration and monetary amounts involved).[143]

245. In both ***Cryptometrics (India)*** and ***SNC-Lavalin (Libya)***, other individuals were charged under the CFPOA but proceedings were stayed or the persons acquitted due to undue delays and, in one case, because "the [PPSC] concluded that there was a reasonable prospect of conviction but that a new trial would not serve the public interest", as explained by Canada in its response to the Phase 4 questionnaire.

Victim surcharge

246. Any person convicted under the CC shall pay a victim surcharge of 30% of any fine that is imposed for each offence of which said person is convicted (section 737 (1) – (2) CC). Section 737 (5) provides that "a victim surcharge shall be applied for the purposes of providing such assistance to victims of offences as the lieutenant governor in council of the province in which the surcharge is imposed may direct from time to time", meaning that the allocation of monies collected through the surcharge is managed by the government at provincial level.

247. In the ***Ultra Electronics (Philippines)*** resolution, the court emphasised that the CFPOA offences could not give rise to a victim surcharge, since the CFPOA is a standalone piece of legislation that is not included in the CC. The evaluation team aimed to clarify this point during the on-site visit, considering that in previous plea deals where only CFPOA charges had been laid, a victim surcharge had been imposed. Canada confirmed that the imposition of the surcharge in these plea deals was a procedural error and confirmed that it cannot be imposed in a CFPOA resolution. However, victims' indemnification remains an important feature of the RA framework, as examined above.

[142] R. v. Karigar, 2014 ONSC 3093, para. 6.

[143] R v. Bebawi, 2020 QCCS 22; and R v. Bebawi, 2020 QCCS 2670.

3.6.5. Confiscation

248. Rules regarding confiscation of the bribe and proceeds of bribery have not changed since Phase 3. Pursuant to section 426.37 CC, where an offender is convicted of a "designated offence" (which includes an offence under the CFPOA)[144] and the court is imposing the sentence, the court has the authority to order forfeiture of the proceeds of crime upon application by the AG.[145] In Phase 3, the Canadian authorities explained that, in the context of a bribe in an international business transaction, the "proceeds" of crime will be calculated on the basis of the "benefit received" from the unlawful activity, rather than the "net profit" from the transaction. The forfeiture of the "instrument" of an offence (such as a bribe, for present purposes), is provided for under section 490.1 CC ("forfeiture of offence-related property").[146]

249. In its responses to the Phase 4 questionnaire, Canada did not provide responses to the question on confiscation applied in practice to natural persons. In its 2022 decision against the former company executive in the ***SNC-Lavalin (Libya)*** case, the Superior Court of Quebec demonstrated its ability to successfully seize the proceeds of crime in a foreign bribery case. The Court aimed to seize criminal proceeds perceived by the former executive, which they appraised at CAD 28 903 503 (EUR 20 037 064 and USD 21 812 953), in their entirety. It was established that the value of the assets frozen and that could be confiscated, including real estate, luxury fixtures etc., amounted to CAD 4 231 101 (EUR 2 933 168 and USD 3 193 136). As a result, the court imposed a fine in lieu of forfeiture in the amount of CAD 24 690 401 (EUR 17 116 374 and USD 18 633 401). The court's decision illustrates Canada's effort to ensure that "the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable", as set forth in Article 3 of the Convention. The additional prison term in case of non-payment is also a positive signal of Canada's determination to collect the amount of the sanction imposed in lieu of forfeiture. Nonetheless, this decision holds the same limitations that the prison sentence imposed in the case, in that it represents a limited sample, from one regional court.

Commentary

The lead examiners welcome the increase of the maximum imprisonment sentence from 5 to 14 years under the CFPOA after the passage of the Fighting Foreign Corruption Act in June 2013. Only one individual has been sentenced at trial since the amendment. While the sanction was effective, proportionate, and dissuasive in that resolution, and confiscation was imposed, a single sanction does not constitute a representative sample. The lead examiners therefore recommend following up on sanctions and confiscation imposed against natural persons under the CFPOA, as practice develops.

[144] The definition of a "designated offence" under section 462.3 (1) CC includes "an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation".

[145] Under section 462.37 (1) CC the court shall order forfeiture where satisfied on a balance of probabilities that any property is the proceeds of crime and that the designated offence was committed in relation to that property. And under subsection (2), the court may make an order of forfeiture where satisfied beyond a reasonable doubt that the property is proceeds of crime, where the evidence does not establish to the satisfaction of the court that the designated offence of which the offender is convicted, was committed in relation to the property in question.

[146] Canada Phase 3 Report, para. 68.

4. Legal persons

4.1. Scope of liability of legal persons

250. The legal framework for liability of legal persons for foreign bribery has not changed since Phase 3. At the time, the WGB decided to follow up on the legal framework's "effectiveness in practice", considering that it was being assessed against the then relatively recent 2009 Anti-Bribery Recommendation. The present section examines in further detail the standard of liability of legal persons for foreign bribery and related offences against the Anti-Bribery Convention and Recommendation.

4.1.1. Standard of liability: can a legal person be held liable for a manager's failure to supervise?

251. Section 22.2 CC sets forth the conditions for holding a legal person liable for offences, including foreign bribery, that require "the prosecution to prove fault, other than negligence". Legal persons can also be held liable for money laundering (section 462.31 CC), as well as the offence of false accounting, provided in section 4 of the CFPOA. Section 22.2 CC reads as follow:

> "In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers:
>
> a) acting within the scope of their authority, is a party to the offence;
>
> b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
>
> c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence."

252. Under Annex I.B.3. of the Anti-Bribery Recommendation, member countries' systems can follow two different approaches to trigger the liability of legal persons for foreign bribery. Either "the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons" (I.B.3. a), or the liability of the legal person is only triggered by acts of persons with the highest level of managerial authority (I.B.3. b.), in which case the legal person should be held liable in the following situations:

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

253. Canada's system follows the second approach, as liability of the legal person is triggered following an act by "one of its senior officers". Section 22.2 CC covers the first two situations set forth in B.3.b. However, it does not cover the "failure to prevent" offence as provided in the third situation. Indeed, paragraph 22.2. (c) refers to the case where a senior officer fails to prevent an offence by a representative of the organisation, knowing that such person is or is about to be a party to such offence. Such knowledge is not a requirement in the "failure to prevent" offence by a person with the highest level of managerial authority, as provided by Annex I.B.3. b.. In that aspect, the standard to trigger the liability of a legal person under the Canadian regime appears higher than the one under the Anti-Bribery Recommendation.

254. Cases successfully concluded against legal persons to date do not disprove this reading as no legal person has been held liable for foreign bribery based on a person with the highest level managerial authority's failure to prevent an offence by a lower-level employee. In ***Hydro-Kleen Group Inc. (United States)***, the president of the company was involved in the wrongdoings. In ***Niko Resources Ltd. (Bangladesh)***, "the presence of the Niko Canada CEO on the Niko Bangladesh Board ensured Niko Canada's knowledge of its subsidiary's actions".[147] In ***Griffiths Energy International Inc. (Chad)***, the individual alleged to have conspired to pay bribes was the former director of the company. In ***SNC-Lavalin (Libya)*** case, in which the company was convicted for fraud rather than foreign bribery under the CFPOA, executives of the company allegedly committed the offence. Finally, in the ***Ultra Electronics (Philippines)*** RA, the corruption was allegedly directed by the company's vice president of sales and marketing, as well as the regional director of sales. During the on-site visit, the PPSC confirmed that only cases where there had been a direct implication of a manager had been pursued to date, and that for the company's liability to be triggered when the offence is committed by a lower-level employee, the manager would have to be "in the same state of mind" as the employee.

255. According to the defence bar, the fact that a legal person's liability is not triggered by a manager's failure to prevent the offence creates a disincentive for companies to self-report with a view to seeking an RA. Indeed, to invite a company to negotiate an RA, a prosecutor must have a reasonable prospect of conviction. Since it is unclear how the offence committed by a third party would trigger the liability of the legal person, companies are disinclined to come forward in such situations. Along the same lines, civil society organisations contend that, due to this gap in the legal persons' liability regime, the bar to convict is very high, which undermines the efficiency of the RA framework.

4.1.2. Which legal persons can be held liable for foreign bribery and related offences?

256. For purposes of the CFPOA, and as set forth in section 2 CC, a "person" includes "Her Majesty and an organization", while "organization" is further defined as "a public body, body corporate, society, company, firm, partnership, trade union or municipality", or "an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons". As the notion of "person" includes "public bodies", it satisfies the requirement of Annex I.B.1. of the Anti-Bribery Recommendation, which calls on Member Countries to ensure that state-owned enterprises can be held liable for foreign bribery. In Phase 3, the WGB expressed concern that the requirement in the CFPOA that the foreign bribery offence be for the purpose of obtaining business "for profit" limited the scope of legal persons to which the CFPOA applies (follow-up issue 10.b.ii.). However, following the Phase 3 Follow-up, Canada amended its law to remove the words "for profit" from its definition of "business", thereby addressing the WGB's concerns.

257. Since the adoption of the 2021 Anti-Bribery Recommendation, member countries are recommended to recognise the principle of "successor liability" when it comes to foreign bribery. However, this principle is not recognised under Canadian law. "Successor liability" refers to doctrines that, under

[147] HMQ v. Niko Resources Ltd. (Agreed Statement of Facts), para. 15.

certain circumstances, can ensure that, when an entity (i) acquires or merges with another entity, (ii) divides into separate entities, (iii) dissolves, or (iv) undergoes another form of reorganisation, the successor entity or entities will assume liabilities of the predecessor entity or entities.[148] Annex I.B.5. of the Anti-Bribery Recommendation provides that "Member countries should have appropriate rules or other measures to ensure that legal persons cannot avoid liability or sanctions for foreign bribery and related offences by restructuring, merging, being acquired, or otherwise altering their corporate identity".

258. In its responses to the Phase 4 questionnaire, Canada reported that under the CBCA, "an outstanding penal proceeding against one of the amalgamating corporations may be continued against the amalgamated corporation". However, this rule applies to cases where proceedings against the initial company were already engaged at the time of the amalgamation. During the on-site visit, the PPSC referred to the Black & Decker decision,[149] in which the Supreme Court rejected the Court of Appeal for Ontario's notion that an "amalgamation" results in the extinction of the "old" companies for the purpose of the CBCA. The Supreme Court set aside the judgment of the Court of Appeal and returned the case to the Ontario Provincial Court. Since then, provincial courts have rendered conflicting decisions on the topic, and legal experts consider that successor liability remains a grey area. None of the foreign bribery cases successfully concluded against a legal person to date relied on the application of successor liability.

4.1.3. Defences for legal persons

259. The Canadian CC does not provide specific defences to a legal person's liability. Section 3 of the CFPOA provides defences to CFPOA charges, namely the permission or requirement under the laws of the foreign state or public international organisation for which the foreign public official performs duties or functions (section 3(a)), and the reasonable expense defence (section 3(b)). These defences, which apply to legal persons in the same manner as they do to natural persons, are examined under section 3.1.2. above. During the on-site visit, the PPSC reported that none of these defences had been used by a legal person to date.

260. There is no compliance defence under the Canadian system. Compliance defences usually operate when a legal person claims an exemption from liability for failure to prevent. As examined above, the criminal liability of a legal person is not triggered in Canadian law by a manager's failure to prevent an offence by a lower-level employee, as prescribed under Annex I of the Anti-Bribery Recommendation. In its responses to the Phase 4 questionnaire, Canada did not provide responses as to whether the existence of internal control, ethics and compliance programmes may be taken into account in assessing the degree of liability of and/or determining the appropriate sanction for a legal person.

4.1.4. Enforcement against legal persons in practice

261. Canada's enforcement of the foreign bribery offence against legal persons remains very limited, thereby raising questions about the effectiveness of the legal framework and/or its application in practice. To date, only four cases have been successfully concluded against a legal person under the CFPOA (for memory, in the ***SNC-Lavalin (Libya)*** case, the company was convicted of fraud). The PPSC is not aware of CFPOA books and records convictions or CC-related convictions for false accounting, related omissions and falsifications of books, records and accounts of companies in connection with foreign bribery.

262. In at least three cases since Phase 3, charges were laid against natural persons but not the company to which they were affiliated. In other cases, allegations against legal persons were not pursued:

[148] OECD (2016), The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report, footnote p.9.

[149] R. v. Black & Decker Manufacturing Co., [1975] 1 S.C.R. 411.

- In the ***Cryptometrics (India)*** case, a company representative was convicted by the Ontario Superior Court of Justice for agreeing with others to offer bribes to foreign public officials to facilitate the execution of a multi-million dollar contract for the supply of a security system by Cryptometrics, a Canadian high-tech firm. On May 23, 2014, the company representative was sentenced to three years imprisonment. Cryptometrics was not charged.
- In the ***SNC-Lavalin (Bangladesh)*** case, the RCMP laid charges under the CFPOA against five natural persons, at least four of which were employees, executives or representatives of SNC-Lavalin. They were alleged to have paid bribes in relation to the awarding of a contract for supervision and consultancy services for the construction of the Padma Multipurpose Bridge Project in Bangladesh, and thereby committing an indictable offence contrary to paragraph 3(1)(b) of the CFPOA. Ultimately, all the charges were stayed or the defendants were acquitted. SNC-Lavalin was not charged.
- In the ***IMEX Systems (Botswana)*** case, the company self-reported to the RCMP allegations that a former executive and founder of the company, provided financial benefits to a Botswanan public official and his family to secure an e-procurement project. In November 2020, charges were laid against the former executive and founder of the company pursuant to subsection 3(1) of the CFPOA, but the company was not charged. The RCMP Press Release reports that "[the Company's] self-report to the RCMP demonstrated their leadership and professionalism towards foreign bribery", thereby suggesting that the company's self-report might have shielded it from prosecution.[150] The reference to self-reporting by "new management" could suggest that a change of management between the time when the offence was committed and the time it was reported could explain why the company was not prosecuted. Imex Systems was not charged.

263. While Canada reported that in one of these cases, the company was bankrupt and therefore not prosecuted, on-site discussions and the impossibility to discuss any information not in the public domain did not allow identification of specific hurdles in the investigation and prosecution of legal persons. The PPSC explained that they would examine each case individually, and that pursuing legal persons under the CFPOA did not raise particular challenges.

Commentary

The standard to trigger criminal liability of a legal person under Canadian law is higher than under the Anti-Bribery Recommendation. In Canada, the criminal liability of a legal person is triggered when a manager is a party to the offence, orders a company's representative to be a party to the offence or, knowing that a representative of the company is or is about to be a party to the offence, fails to prevent it. However, knowledge is not a requirement in the "failure to prevent" offence by a person with the highest level of managerial authority under Annex I.B.3. b. of the Anti-Bribery Recommendation. This gap hinders voluntary disclosure and undermines enforcement of the foreign bribery offence. The lead examiners therefore recommend that Canada take measures to ensure that the regime for liability of legal persons for foreign bribery aligns with the standard under the Anti-Bribery Recommendation. The lead examiners further recommend that the Working Group follow up on the applicability of the successor liability principle as practice develops, to ensure that legal persons cannot avoid liability or sanctions for foreign bribery and related offences by restructuring, merging, being acquired, or otherwise altering their corporate identity.

Furthermore, in light of the limited CFPOA enforcement against legal persons in practice, the lead examiners recommend that, as mentioned in the commentary under section 3.2., Canadian law enforcement authorities undertake an analysis of their foreign bribery enforcement actions to date against legal persons, with a view to developing an action plan to enhance such enforcement.

[150] https://www.rcmp-grc.gc.ca/en/news/2020/rcmp-lays-charges-the-corruption-foreign-public-officials-act.

4.2. Sanctions against legal persons

264. The present section examines financial sanctions and confiscation against legal persons, under the law and in practice. While financial sanctions have generally increased, their method of calculation lacks transparency. The section also examines the expertise of Canadian enforcers in term of anti-corruption compliance, as it can be factored in the calculation of a fine when it predates the offence or constitute a sanction under a court-imposed "probation order".

4.2.1. Criminal sanctions against legal persons

265. At the time of Phase 3, only one case had been concluded against a legal person (***Hydro-Kleen Group Inc. (United States)***). The low amount of the fine, absence of confiscation and court's failure to impose a "probation order" on the company raised the WGB concerns and prompted a follow up on sanctions in practice (follow-up issue 10.c.). To date, five legal persons have been sanctioned for acts of foreign bribery, although in ***SNC-Lavalin (Libya)*****,** the company was charged with fraud, rather than violation of the CFPOA. While the number of resolutions against legal persons have increased, the sample of cases remains relatively limited to assess the "effective, proportionate and dissuasive" nature of sanctions, as required under Article 3 of the Anti-Bribery Convention.

Table 3 – Criminal sanctions and confiscation imposed in foreign bribery cases

Case	*Date of resolution*	*Resolution mechanism*	*Amount of the financial fine*	*Amount of the bribe paid*	*Amount of confiscation*	*Probation order (Yes/No – duration)*
Hydro-Kleen Group Inc. (United States).	2005	Plea deal	**CAD 25 000** (EUR 17 331; USD 18 867)	**CAD 30 000** (EUR 20 797; USD 22 640)	N/A	No
Niko Resources Ltd. (Bangladesh)	2011	Plea deal	**CAD 8.26 million** (+ 15% of victim surcharge) (EUR 5.72 million; USD 6.23 million)	**CAD 196 000** (Use of a vehicle valued at CAD 190 984.00 and approximately CAD 5000.00 related to travel and expenses) (EUR 135 875; USD 147 918)	N/A	Yes – three years.
Griffiths Energy International Inc. (Chad)	2013	Plea deal	**CAD 9 million** (+ 15% of victim surcharge) (EUR 6.23 million; USD 6.79 million)	**CAD 43.6 million** (2 million under a consultation agreement + a grant of 1,600,000 founders' shares in Griffiths International + 40 million of signature bonus) (EUR 30.22 million; USD 32.9 million)	N/A	No
SNC-Lavalin (Libya)	2019	Plea deal	**CAD 280 million** (EUR 194.1 million; USD 211.3 million)	**CAD 37 689 868.00** (EUR 26 128 124; USD 28 443865)	N/A	Yes – three years.
Ultra Electronics (Philippines)	2023	Remediation Agreement	**CAD 6 593 178** (+15% of victim surcharge) (EUR 4 570 655; USD 4 975 753)	Unknown	**CAD 3 296 589** (EUR 2 285 327; USD 2 487 876)	Yes – four years

Financial sanctions have increased but the method of calculation lack transparency

266. The CFPOA does not explicitly provide for criminal sanctions against legal persons. The CC provides that "an organization that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law, that is in the discretion of the court, where the offence is an indictable offence". Since Phase 3, imprisonment sanctions for natural persons under the CFPOA have increased from 5 to 14 years and in practice, sanctions imposed on legal persons appear to have followed suit, as shown in the table above. However, this is not true for the case resolved through an RA, as discussed under section 3.6.3 above.

267. 2021 Anti-Bribery Recommendation XV calls on member countries to "take appropriate steps, such as through providing guidance and/or training to law enforcement authorities and the judiciary without prejudice to the discretionary powers of judicial or other relevant authorities, to help ensure that sanctions against natural and legal persons for foreign bribery are transparent, effective, proportionate, and dissuasive in practice, including by taking into account the amounts of the bribe paid and the value of the profits or other benefits derived and other mitigating or aggravating factors". In Canada, information on how sanctions against legal persons are calculated is limited. Canada does not have sentencing rules but, rather, relies on an individualised sentencing process. Section 718.2 CC provides general sentencing principles, complemented by additional factors that shall be considered when imposing a sentence on a legal person, under section 718.21, as follows:

a) "any advantage realized by the organization as a result of the offence;
b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
e) the cost to public authorities of the investigation and prosecution of the offence;
f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence."

268. In practice, four of the five foreign bribery cases against legal persons were resolved through a plea deal, with the consequence that information on how the fine was calculated is not made public. The court decisions validating the pleas acknowledge that the factors set forth in section 718.21 CC were considered in the sentence agreed between the prosecution and the accused. However, it is unknown how the overall amount of the fine was calculated, including the extent to which the amount of the bribe was accounted for, and how mitigating factors weighed on the determination of the fine. The court decisions validating the plea deals also show that factors that are not provided in section 718.21 were also accounted for in determining the sanction. For instance, the fine in ***Niko Resources Ltd. (Bangladesh)*** takes into account the fact that the company cooperated with the investigation. In ***Griffiths Energy International Inc. (Chad)***, the sanction takes into consideration the fact that the company brought the matter to the attention of authorities and disclosed the detailed findings of its internal investigation; additionally, the steps taken by GEI to reduce the likelihood of it committing a subsequent related offence include "the adoption of a robust anti-corruption compliance program and the strengthening of existing internal controls, many of which steps were already initiated by GEI's new management and well underway at the time these

transactions were discovered by GEI". In the ***Ultra Electronics (Philippines)*** RA, the calculation of the sanction is provided (see above section 3.6.3).

269. The defence bar and civil society representatives met onsite expressed the need for more transparency on sanctioning in the form of guidance. A civil society representative emphasised that without removing the core principle that sanctions for legal persons are based on those for natural persons, specific guidance on financial sanctions for legal persons could be "carved out". Canada considers that this is not necessary, but representatives of the PPSC indicated that they rely on the UK and US sentencing guidelines, thereby suggesting that they too may need guidance.

Commentary

In the absence of sentencing guidelines in Canada, and because a majority of CFPOA cases against legal persons were concluded through a plea deal with limited information published, it is unclear how fines are calculated in foreign bribery cases. Guidance on the calculation of fines against legal persons would increase predictability for the private sector and contribute to enhancing transparency of foreign bribery enforcement. While Canada argues that it is unnecessary, this is because enforcers rely on guidance from other countries. This method, while not in itself reprehensible, creates an asymmetry of information between stakeholders. Along with the lack of guidance on the remediation agreement and voluntary disclosure, this fuels the notion that Canada lacks proactivity and ownership over its criminal enforcement system. The lead examiners therefore recommend that Canada issue guidance on the calculation of fines against legal persons sanctioned under the CFPOA and make public and accessible information on the sanctions and basis for applying these.

The lack of guidance, combined with prosecutors' unwillingness to provide information not already in the public domain on the calculation of fines and confiscation, and the fact that the evaluation team was not able to meet with judges, impedes an accurate assessment of the effective, proportionate and dissuasive nature of sanctions against legal persons in foreign bribery cases in practice. The lead examiners therefore recommend that the Working Group follow up to ensure that sanctions imposed on legal persons are effective, proportionate, and dissuasive.

Sanctions against legal persons require anti-bribery compliance expertise from enforcers

270. As examined above, the existence of corporate anti-corruption compliance mechanisms prior to the commission of the offence can be factored in the calculation of the fine. The court can also impose a "probation order" (PO) as a sanction, thereby directing that the offender comply with the conditions prescribed in the PO. Probation was imposed against the companies in the ***Niko Resources Ltd. (Bangladesh)***, ***SNC-Lavalin (Libya)***, and ***Ultra Electronics (Philippines)*** resolutions.

271. The rules, conditions and parameters of probation are regulated by section 731.1 to 733.1 CC. Section 732.1 (3.1) provides additional conditions that the court may prescribe in a PO made in respect to a legal person, including to "establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence" and to "comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence". The Court supervises the company's implementation of the probation orders.

272. This implies that prosecutors and judges have the appropriate level of expertise to assess anti-corruption compliance programmes for the purpose of preventing and detecting foreign bribery, and have adequate guidance made available to them. Indeed, 2021 Anti-Bribery Recommendation XXIII.D.iv provides that, when countries incentivise companies to develop effective internal controls, ethics, and compliance programmes or measures, including in the form of mitigating factors, they should consider

providing training and guidance on assessing the adequacy and effectiveness of such programmes or measures for the purpose of preventing and detecting foreign bribery, as well as on how they are taken into consideration in the context of foreign bribery enforcement. Member countries should also ensure that such information or guidance is publicised and easily accessible for companies, where appropriate.

273. During the on-site visit, the PPSC explained that they would be in charge of assessing a compliance programme at the time of sanctioning, and of monitoring the implementation of a probation order imposed as a sanction. When questioned on their expertise in assessing the efficiency of anti-corruption compliance programmes, they clarified that they do not have in-house anti-bribery compliance expertise, but retain forensic accounting experts within the government. According to the PPSC, the expertise will develop as more RAs are concluded and, to date, it is "too early in the process to justify hiring an expert".

Commentary

Under Canada's legislation, an anti-corruption compliance programme predating an offence can be factored in the calculation of a fine. Enforcers can also order that a company develop and implement such a system under a probation order. The lead examiners therefore recommend that Canada take measures to develop the expertise of the PPSC on corporate compliance systems to prevent and detect foreign bribery, including by providing adequate guidance and training, and ensuring such guidance is publicised and easily accessible for companies.

Canada struggles to impose confiscation against legal persons

274. In stark contrast with the successful confiscation of the proceeds of bribery in the resolution against the former company representative in the ***Cryptometrics (India)*** case, confiscation was imposed in none of the cases concluded against a legal person through a plea deal. During the on-site visit, the evaluation team tried to identify legal or procedural obstacles to the confiscation of bribe proceeds from legal persons, but discussions with the Canadian authorities did not allow identification of specific issues, notably because only limited information on cases concluded though plea deals is included in the court decisions validating them, and thus publicly accessible. Canada explained that in ***Griffiths Energy International Inc. (Chad)***, there were no proceeds to be confiscated. However, the bribe allowed the company to secure lucrative oil contracts in Chad, and forfeiture of criminal proceeds was ordered by US authorities on the co-founder of Griffiths Energy in the amount of USD 27 million (CAD 35.77 million and EUR 24.78 million). In another case (***Niko Resources Ltd. (Bangladesh)***), panellists did not have the information because it was resolved by a provincial court. In ***SNC-Lavalin (Libya)***, no proceeds were identified. In ***Ultra Electronics (Philippines)***, which was concluded in May 2023 through an RA, confiscation of CAD 3 296 589 (EUR 2 285 327 and USD 2 487 876) was imposed for the advantage obtained from the wrongful conduct. The amount of the bribes served as a reference rather than the proceeds, thereby pointing to challenges in terms of proceed quantification.

Commentary

Canada has not yet demonstrated a capacity to efficiently impose confiscation of proceeds against legal persons in foreign bribery cases. Although the lack of publicly available information does not allow for a fully effective assessment of the reasons for this, the lead examiners query whether this may point to a lack of expertise in the quantification and seizure of bribery proceeds. They therefore recommend that Canada develop, as part of its action plan to enhance foreign bribery enforcement (see above commentaries under sections 3.2. and 4.1.4.), a proactive approach to the identification, freezing, seizure, and confiscation of bribes and the proceeds of bribery of foreign public officials, or property the value of which corresponds to that of such proceeds, including in the context of proceedings involving legal persons. They also recommend that Canada consider developing, publishing, and disseminating guidance and training to law enforcement authorities for identifying, quantifying, and confiscating bribes and proceeds.

4.2.2. Administrative sanctions against legal persons: Canada's Integrity Regime

275. Companies and individuals convicted of foreign bribery are automatically suspended from contracting with the government. The framework for automatic debarment is set forth in the 2015 Canada's Integrity Regime (the Regime), which is administered by PSPC on behalf of the government, and aims to "ensure the government does business only with ethical suppliers in Canada and abroad".[151] The Regime has gone through several iterations since its adoption in 2012. It is governed by memoranda of understanding (MOUs) between PSPC and federal departments and institutions. All entities that have signed an MOU must include the Integrity Provisions in applicable contracts and verify a supplier's eligibility status with respect to the Regime prior to contract award. Integrity verifications on suppliers are requested by procurement officers using Canada's online Integrity Verification Portal. PSPC also maintains a public listing of all organisations that are suspended or debarred under the Regime. For privacy reasons, individuals are not listed publicly.

276. The "Ineligibility and Suspension Policy" of the Regime sets out the circumstances in which the Minister of Public Works and Government Services Canada (PWGSC) may declare ineligible or suspend a supplier from award of a contract with Canada, the ineligibility and suspension periods, and the process for entering into an administrative agreement to reduce a period of ineligibility. A Registrar of Ineligibility and Suspension within PSPC has been delegated to these authorities in order to preserve independence and mitigate potential or perceived conflicts of interest between procurement decisions and suspension or debarment. The Registrar informs the Minister and Deputy Ministers once a final decision has been rendered in relation to debarment, suspension or the signing of an administrative agreement. Under the Ineligibility and Suspension Policy, a supplier who has been convicted of a foreign bribery offence under the CFPOA will be automatically ineligible for a period of ten years, which can be reduced to five years pursuant to an administrative agreement between the supplier and PSPC when conditions are met. This policy is aligned with administrative sanctions imposed in domestic bribery cases, as recommended by the WGB in Phase 3 (recommendation 2).

277. As mentioned under section 2.6. on self-reporting by companies, commentators have expressed concerns regarding the Integrity Regime. The defence bar and civil society have called for an overhaul of the Regime, emphasising that the rigid application of the suspension rules, the ten-year debarment period and limited due process for implicated contractors have had a chilling effect on voluntary disclosure and enforcement.[152] Some argue that the Regime in its current form played out in favour of SNC-Lavalin in the Libya case:[153] while the charges against the company initially included one count of corruption under section 3(1)(b) of the CFPOA, and one count of fraud under section 380(1)(a) CC, following the failure of the RA process, the CFPOA charges were stayed. In December 2019, SNC-Lavalin pleaded guilty to one count of fraud, and, as the fraud was not against Her Majesty, debarment under the Integrity Regime was not triggered.

278. In the second quarter of 2018, PSPC announced that it intended to make enhancements to the Integrity Regime, including greater flexibility and discretion in debarment decisions.[154] This announcement came in response to consultations held by the Government of Canada and extensive feedback from

[151] https://www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html.

[152] Written submission by ACT International Consulting, pp. 2-3 and by Transparency International, p.30 [Submissions by the private sector and civil society to the WGB]. See also Tillipman and Block, Canada's Integrity Regime: the Corporate Grim Reaper, 53 Geo. Wash. Int'l L. Rev. 475 (2022), available here: https://ssrn.com/abstract=4081297.

[153] Tillipman and Block, Canada's Integrity Regime: the Corporate Grim Reaper, 53 Geo. Wash. Int'l L. Rev. 475 (2022), available here: https://ssrn.com/abstract=4081297.

[154] https://www.tpsgc-pwgsc.gc.ca/ci-if/ariac-aceir-eng.html.

industry associations, businesses, justice sector stakeholders, non-government organisations and academics. The government originally announced that a revised Regime would be adopted in the third quarter of 2018 and come into effect on 1 January 2019, but stated in a 2018-2019 "Annual Report" on the Integrity Regime that it would take additional time to "assess aspects of the Policy and possible next steps regarding the Integrity Regime".[155] During the onsite visit, the government of Canada explained that the reform announced in 2019 had been delayed, but that it was actively working to advance enhancements to the Integrity Regime, taking into account the feedback received in response to the public consultation and experiences learned through recent global events. The government aspires to instil stronger integrity tools and more flexibility in the system, in particular by adopting a preventive and remedial rather than punitive posture.

Commentary

The lead examiners welcome Canada's efforts to revisit the Ineligibility and Suspension Policy of the Integrity Regime, which currently includes an automatic ten-year suspension from public contracting upon a CFPOA conviction. While acknowledging the importance for Canada to do business with ethical suppliers, they believe that a more flexible system could achieve this objective without undermining Canada's efforts to incentivise voluntary disclosure of foreign bribery and cooperation with law enforcement. They therefore encourage Canada to pursue its reflection on amending the Integrity Regime, with a view to envisaging ways of making it more flexible and compatible with incentives for good corporate behaviour.

4.3. Engaging the private sector

4.3.1. Efforts to raise awareness on foreign bribery among the private sector

279. Various Canadian government entities, and the RCMP SII unit in particular, have engaged in extensive awareness raising activities with private sector and Canadian companies operating abroad. These awareness raising initiatives have targeted private sector actors working in high-risk sectors and jurisdictions. While these initiatives are a welcome development by Canada, the evaluation team notes the lack of engagement at the on-site visit by companies, with only three remote participants, and only one representative of a business association present.

280. In its responses to the Phase 4 questionnaire, Canada outlines the following initiatives aimed at the private sector to raise awareness of foreign bribery:

- *GAC* has coordinated presentations on foreign bribery aimed at Canadian companies delivered by Trade Commissioners deployed in the Americas, Africa, Europe, Asia and Middle-East.
- *RCMP SII* has engaged in significant outreach to raise awareness with the private sector entities through (i) coordination with the TCS, (ii) presenting at workshops to banking institutions on the CFPOA legislation and foreign corruption indicators, (iii) presenting on foreign bribery topics at the annual mining conference for Canadian companies in coordination with the TCS, and (iv) producing risk-assessment pamphlet for Canadian companies on most common red flags of bribery. In particular, the outreach between Trade Commissioners and RCMP SII to private sector actors has been significant. This includes (i) presentations with Trade Commissioners in Indonesia (ii) series of awareness raising webinars during the COVID-19 pandemic organised by Trade Commissioners that included foreign bribery topics, aimed at Canadian companies operating in Peru, Colombia, Malaysia, and Indonesia, as well as companies in high-risk sectors like mining; (iii) presentation on

[155] Following an update of the website https://www.tpsgc-pwgsc.gc.ca/ci-if/rpri-irr-eng.html#a4) that took place in August 2023, the 2018-2019 Annual Report is no longer available online.

foreign bribery and Canada's RA regime in Morocco to Canadian companies operating in the region, local companies, and civil society.

- The *Canadian Commercial Corporation* (CCC), a federal Crown corporation, released a Code for Exporters, which provides standards and guidance on responsible business conduct for companies and includes anti-bribery and corruption standards. The Code references the CFPOA and foreign bribery.
- *NRCan* has raised awareness of the reporting requirements for extractive industry companies under ESTMA (see section 2.1.2), as well as the CFPOA and foreign bribery. The RCMP and NRCan have provided joint workshops on foreign bribery and disclosure requirements under ESTMA to the private sector at industry conferences and online webinars.

281. A gap in Canada's engagement with the private sector concerns SMEs and business associations. Regrettably, no Canadian SMEs or business associations representing them participated in the on-site visit. As described in the foreign bribery risk section, Canadian SMEs are internationally active and play an important role in Canada, making up 42.7% of the Canada's total value of exported goods.[156] Yet, there are limited initiatives aimed specifically at SMEs on their foreign bribery risks. While the CCC and EDC may provide some tailored guidance to its clients (see section 4.3.2), more could be done to address the specific need of SMEs. At the on-site, the TCS noted that it intends to focus on SMEs as part of its anti-corruption outreach strategy.

282. Further, limited to no outreach has been provided to SMEs or business associations on Canada's introduction of the RA regime for corporations. At the on-site visit, representatives from the media, legal profession, auditing profession and civil society were in general agreement that Canadian SMEs are not prepared for the foreign bribery risks that they face abroad. These on-site participants noted that SMEs would not have the resources to retain law firms to navigate foreign bribery risks and law enforcement in the same manner as large corporations.

4.3.2. Promoting corporate anti-corruption compliance

283. Canada primarily has engaged in anti-corruption compliance training and awareness raising through its public sector agencies, particularly those in charge of export credits, ODA and public procurement. EDC developed a resource site that contains materials on internal controls, ethics and compliance programmes. Resources outline risks faced by Canadian companies operating and exporting abroad, and how to manage that risk through internal controls. The EDC further publishes materials aimed at EDC business partners on how to establish a "robust risks management framework". The CCC also promotes responsible business conduct for exporters and promotes anti-corruption compliance through various policies that cover CCC business relationships. The CCC's Code for Exporters outlines the anti-bribery due diligence, including topics related to risks assessments, integrity due diligence, gifts and hospitality, conflicts of interest and makes references to the CFPOA. The CCC also publishes various guidance materials on internal controls, ethics and compliance for Canadian exporters, including user-friendly questionnaires and instructions. An Integrity Compliance Committee (ICC) reviews CCC transactions and recommends ways to implement or improve compliance programmes in line with best practices. Since 2021, 33 companies, of which 24 are SMEs, have implemented or improved their compliance programmes based on these recommendations. CCC also offers compliance training and resources to SMEs through its membership with a non-profit business association dedicated to anti-bribery and corruption.

284. Business organisations and professional associations may play an essential role in assisting companies, in particular SMEs, in the development of effective internal control, ethics, and compliance

[156] Innovation, Science and Economic Development Canada (2022), *Key Small Business Statistics 2022*.

programmes or measures for the purpose of preventing and detecting foreign bribery. Canada reports no other guidance issued by business associations or professional organisations to assist companies to ensure effective internal controls, ethics, and compliance programmes to prevent and detect foreign bribery. As SMEs exposure to corruption risks is typically comparable to that of larger companies, this makes them particularly vulnerable to bribery and corruption, and it is essential that government stakeholders and business organisations play their part in assisting SMEs in their efforts to prevent and detect foreign bribery, as provided under Annex II.B of the Anti-Bribery Recommendation.[157]

4.3.3. Collective action initiatives

285. As part of the Phase 4 evaluation, external parties submitted responses on Canada's efforts to implement the Convention. Representatives of non-governmental organisations and an academic emphasised the importance of collective action programmes, including working with the Basel Institute on Governance Collective Action Mentoring Programme. At the on-site, representatives of civil society underscored the importance of government support in collective action initiatives specific to corruption and foreign bribery, as also highlighted in the Anti-Bribery Recommendation.

Commentary

The lead examiners acknowledge Canada's efforts, and in particular those of GAC and the RCMP SII, to raise awareness of foreign bribery among the private sector both in Canada and abroad. Moreover, the lead examiners note that government entities such as EDC and CCC have promoted the development of compliance programmes for Canadian companies operating abroad.

However, the lead examiners regret the notable lack of engagement of business organisations during the on-site visit, and the very limited engagement of companies. They are further concerned that participants from the media, private sector, civil society, lawyers and accounting profession were in general agreement that SMEs are not as well prepared for foreign bribery risks. This is of particular concern due to the high percentage of Canadian SMEs that are active internationally. Thus, the lead examiners recommend that Canada engage with Canadian business organisations and professional associations to encourage them to play their role in assisting companies, in particular SMEs, in the development of effective internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. Furthermore, Canada should take steps to raise awareness of SMEs on foreign bribery, including the RA regime.

[157] See also OECD (2022), *Toolkit for raising awareness and preventing corruption in SMEs*, OECD Business and Finance Policy Papers, OECD Publishing, Paris, https://doi.org/10.1787/19e99855-en. The toolkit identifies actionable ways in which governments and other stakeholders can engage SMEs in the fight against corruption.

5. Conclusions

286. The Working Group welcomes the steps taken by Canada to strengthen its legislative framework to combat foreign bribery, particularly introducing significant reforms to its CFPOA legislation and the introduction of the RA regime in 2018. Nevertheless, the Working Group considers the low enforcement of the foreign bribery offence in Canada is a serious concern, especially in view of the size of the Canadian economy and the industrial sectors in which Canadian companies operate, which represent high corruption risks. This is compounded by a general lack of detailed statistics on foreign bribery detection sources, MLA, and enforcement, which does not allow the Working Group, or Canada, to assess the effectiveness of efforts to combat foreign bribery. Canadian law enforcement authorities should therefore promptly take necessary steps to more proactively enforce foreign bribery legislation against both natural and legal persons, including by developing an action plan to address challenges that may have impeded foreign bribery enforcement. Furthermore, Canada should maintain comprehensive statistics, including on investigation, prosecution, termination of cases involving foreign bribery and related offences, and take steps to increase public accessibility of concluded foreign bribery cases. Finally, Canada is urged to take measures to ensure that the regime for liability of legal persons and whistleblower protection for foreign bribery aligns with the standards under the Anti-Bribery Recommendation.

287. Regarding implementation of the Phase 3 recommendations, the Working Group considers that Canada has fully implemented recommendations 4(a) (Article 5 considerations), 4(e)(iii) (auditor independence) and 8(b) (ability for tax authorities to share information with law enforcement); while recommendations 4(e)(ii) (requirements of companies to submit to external audit), 4e(iv) (reporting by external auditors), and 8(a) (training to tax officials) remain partially implemented.

288. In conclusion, based on the findings in this report, the Working Group acknowledges the good practices and positive achievements set out in Part 1 below and makes the recommendations set out in Part 2. The Working Group will also follow up the issues identified in Part 3. Canada will report to the Working Group in writing in October 2025 on its implementation of all recommendations, on its foreign bribery enforcement actions, and on developments related to the follow-up issues.

Part 1. Good practices and positive achievements

289. The report has identified several good practices and positive achievements by Canada for combating foreign bribery.[158]

290. Canada introduced several legislative reforms to strengthen the CFPOA and its legislative framework to combat foreign bribery, including increasing the sanctions available under the CFPOA, repealing the CFPOA facilitation payment exemption, introducing nationality jurisdiction in the CFPOA, broadening the foreign bribery offence to remove the “for profit” qualification, adoption of the ESTMA and amending the ITA to allow tax-sharing in CFPOA investigations. The Working Group also welcomes Canada’s efforts to provide trainings on the facilitation payment exemption repeal to private sector

[158] See Phase 4 Monitoring Guide, which states that Phase 4 evaluations should also reflect good practices and positive achievements which have proved effective in combating foreign bribery and enhancing enforcement.

stakeholders, including Canadian companies that operate abroad. Further, the adoption of RAs in 2018 as a form of an NTR is a welcome development and has the potential to enhance foreign bribery enforcement, noting that Canada's first foreign bribery RA was concluded in 2023.

291. In terms of enforcement and international cooperation, Canadian law enforcement authorities have responded positively to their foreign counterparts, both in investigating reports received from foreign authorities and international organisations, as well as proactively engaging in international police-to-police cooperation with WGB police jurisdictions. The Working Group also welcomes the efforts made by Canada to clarify that Article 5 considerations must not be taken into account in prosecuting foreign bribery cases, or when inviting legal persons to enter an RA through updates to the PPSC Deskbook and DPP Guidelines. The Working Group also favourably notes the PPSC's professionalism and independence in the face of political pressures following the PPSC's decision to decline to enter into an RA in a high-profile foreign bribery matter.

292. Canada's positive achievements also relate to certain aspects of detecting foreign bribery. Canadian authorities, such as GAC, TCS and EDC officials, have provided extensive training to their representatives and in turn have been able to detect and report foreign bribery allegations to law enforcement. Canadian authorities in charge of ODA have also developed specialised anti-corruption training through a dedicated resource centre, targeted in-country workshops, and a helpdesk that promotes prevention and detection of foreign bribery and corruption. Finally, the vitality and high level of engagement of Canadian civil society on these issues – as demonstrated by their involvement in the present evaluation – presents a significant asset which Canada can rely on in its efforts to fight foreign bribery.

Part 2. Recommendations of the Working Group on Bribery to Canada

Recommendations to enhance detection of the foreign bribery offence

1. Regarding detection of foreign bribery in general, the Working Group recommends that the relevant Canadian agencies and Ministries systematically collect, maintain, and consider publishing, data on foreign bribery reports, with a view to allowing for an assessment of the effectiveness of the various reporting channels [Anti-Bribery Recommendation XX., XXI., XXII. and XXIII].

2. Regarding detection by Canadian public officials, the Working Group recommends that Canada continue to take steps to raise awareness of the foreign bribery offence and of their related reporting obligations among public officials that interact with Canadian companies operating abroad, including Natural Resources Canada [Anti-Bribery Recommendation IV.i. and XXI.vi.].

3. Regarding detection through tax authorities and cooperation between tax authorities and the RCMP, the Working Group recommends that Canada:

    a) develop guidance and train CRA auditors to identify foreign bribery red flags and report suspicions to law enforcement authorities;

    b) take appropriate measures, including by raising awareness as necessary of the RCMP, to ensure that access to tax information held by the CRA can be effectively relied on in foreign bribery investigations as needed; and

    c) raise awareness of CRA officials, with a view to improving collaboration between the CRA and RCMP in the context of foreign bribery investigations [Anti-Bribery Recommendation IV.i., XX.i. and XXI.ii.-iii.; 2009 Tax Recommendation II].

4. Regarding export credits, the Working Group recommends that EDC consider using the denial of payment, indemnification or refund of sums in EDC-supported transactions to ensure conformity with Export Credits Recommendation VIII.2. [Export Credits Recommendation VIII.2.].

5. Regarding detection through self-reporting by companies, the Working Group recommends that Canada issue guidance on voluntary disclosure, with a view to increasing clarity and transparency on the process of self-reporting and the enforcement outcome [Anti-Bribery Recommendation IV.ii.].

6. Regarding whistleblower protection and detection through whistleblowing, the Working Group recommends that Canada enact strong and effective legal and institutional frameworks to protect and to provide remedy against retaliatory action to persons working in the private or public sector who report on reasonable grounds suspected acts of foreign bribery and related offences in a work-related context, in line with the standards under the Anti-Bribery Recommendation [Anti-Bribery Recommendation XXII].

7. Regarding detection through media reports, the Working Group recommends that Canada take measures to ensure that the RCMP deploys additional means for more systematically monitoring Canadian and international media for foreign bribery allegations involving Canadian companies or individuals [Anti-Bribery Recommendation VIII.].

8. Regarding detection through the anti-money laundering system, the Working Group recommends that Canada:

   a) ensure that reporting entities receive training and guidance to enhance detection of money laundering predicated on foreign bribery;

   b) ensure that FINTRAC develops its expertise to enhance referrals and intelligence sharing with the RCMP of suspicions of money laundering predicated on foreign bribery; and

   c) in line with the findings of the 2016 FATF report, ensure that the legal profession is subject to a reporting obligation under Canada's AML regime, including for money-laundering predicated on foreign bribery [Convention Article 7; Anti-Bribery Recommendation IV.i. and XXI.ii.].

9. Regarding detection through accounting and auditing, the Working Group recommends that Canada:

   a) consider whether the requirements to submit to independent external audit are adequate, in view of the rule that permits large private companies to exempt themselves from the requirement [Anti-Bribery Recommendation XXIII.B.i.; Phase 3 Recommendation 4(e)(ii)];

   b) consider amending the law to require external auditors to report indications of foreign bribery to the competent authorities [Anti-Bribery Recommendation XXIII.B.v.; Phase 3 Recommendation 4(e)(v)]; and

   c) raise awareness of, and provide training on, foreign bribery red flags among accountants and auditors [Anti-Bribery Recommendation XXIII.B.].

Recommendations to enhance enforcement of the foreign bribery offence

10. Regarding the foreign bribery offence and defences, the Working Group recommends that Canada:

    a) provide training and/or guidance to judges on (i) the foreign bribery offence, including Article 1 of the Convention, and (ii) the evidentiary threshold for the foreign bribery offence, including the type of circumstantial evidence and/or direct evidence required to prove a briber's mental

knowledge with respect to elements of the foreign bribery offence [Convention Article 1; Anti-Bribery Recommendation XV.i];

b) consider taking appropriate measures, including if necessary amending the Evidence Act, to ensure that the evidentiary requirements for introducing foreign legislation to show the law of another country in proceedings is not unduly onerous in foreign bribery cases [Convention Article 1; Anti-Bribery Recommendation Annex I.D.2].

11. Regarding investigation and prosecution of foreign bribery, the Working Group recommends that Canada:

a) maintain comprehensive statistics, including on the detection, investigation, prosecution, and termination of cases involving foreign bribery and related offences;

b) in particular the RCMP, enhance its capacity to detect foreign bribery, and more proactively gather information from diverse sources to enhance detection and investigations of foreign bribery [Convention Article 5, Anti-Bribery Recommendation VIII.];

c) in particular the RCMP and PPSC, (1) conduct an analysis of their foreign bribery enforcement actions to date to identify the challenges that may have impeded effective enforcement of the foreign bribery and related offences in Canada, including relating to investigative techniques and enforcement against legal persons, and (2) develop an action plan to address these challenges [Convention Article 5 and Commentary 27; Anti-Bribery Recommendation VI.i.-iii.];

d) (i) promptly take appropriate measures to ensure that PPSC prosecutors dealing with foreign bribery cases have the necessary resources and training to deal with these matters effectively and in a timely manner, and (ii) ensure that foreign bribery cases are assigned to PPSC prosecutors with sufficient specialisation and expertise [Convention Article 5 and Commentary 27; Anti-Bribery Recommendation VII.];

e) raise awareness among relevant parts of the government that foreign bribery investigations and prosecutions shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved [Convention Article 5 and Commentary 27; Phase 3 Recommendation 4(a)]; and

f) take measures to ensure that any use of Shawcross exercises in foreign bribery cases is publicised and transparent, as the circumstances permit [Convention Article 5 and Commentary 27].

12. Regarding international co-operation, the Working Group recommends that Canada:

a) maintain comprehensive and detailed statistics on incoming and outgoing foreign bribery related MLA [Convention Article 9; Anti-Bribery Recommendation XIX.];

b) (i) maintain detailed and comprehensive statistics on extradition requests in relation to foreign-bribery cases, with a view to allowing for a proper assessment of the efficiency of processes in practice, and (ii) take steps to ensure Canadian authorities proactively pursue extradition requests in foreign bribery cases [Convention Article 10; Anti-Bribery Recommendation XIX.].

13. Regarding offences related to foreign bribery, the Working Group recommends that Canada:

a) take measures to enforce the money laundering offence more effectively in connection with foreign bribery cases and ensure that in practice alleged offenders are simultaneously prosecuted and convicted of money laundering and foreign bribery, where appropriate [Convention Article 7];

b) take measures to ensure that the CRA is systematically made aware of CFPOA resolutions, so as to be able to reaudit the tax returns of legal and natural persons who were sanctioned with a view to ensuring enforcement of the non-tax deductibility of bribes [Anti-Bribery Recommendation XX.i.; 2009 Tax Recommendation II.].

14. Regarding the conclusion and sanctioning of foreign bribery cases, the Working Group recommends that Canada:

a) take immediate measures to make public and accessible important elements of resolved foreign bribery cases, irrespective of their method of resolution, including the main facts, the natural or legal persons sanctioned, the approved sanctions, and the basis for applying such sanctions, for instance by proactively publishing them on a single government-supported website [Anti-Bribery Recommendation XV.iii.].

b) take measures, such as providing guidance to law enforcement and the judiciary, to ensure that the method for determining sanctions against natural and legal persons is more transparent, including information on how the amounts of the bribe paid and the value of the profits or other benefits derived and other mitigating or aggravating factors can be accounted for [Anti-Bribery Recommendation XV.i.];

c) consider extending the applicability of the RA to natural persons [Anti-Bribery Recommendation XVII.];

d) issue guidance on the criteria regarding the use of RAs, including in terms of voluntary disclosure, cooperation, remediation measures and possible advantages for the alleged offender of entering into an RA, as well as on the process and timeline to navigate the RA negotiation [Anti-Bribery Recommendation XVIII.i.-iii.];

e) raise public awareness of the RA, including by publishing key elements of the mechanism, with a view to building trust in it [Anti-Bribery Recommendation XVIII.iv.];

f) i. develop, as part of its action plan to enhance foreign bribery enforcement, a proactive approach to the identification, freezing, seizure, and confiscation of bribes and the proceeds of bribery of foreign public officials, or property the value of which corresponds to that of such proceeds, including in the context of proceedings involving legal persons, and ii. consider developing, publishing, and disseminating guidance and training to law enforcement authorities for identifying, quantifying, and confiscating bribes and proceeds [Anti-Bribery Recommendation XVI.ii. and iv.]; and

g) maintain detailed and comprehensive statistics on the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials, so as to allow for an assessment of the effectiveness of these measures in practice [Convention Article 5; Anti-Bribery Recommendation VI. and XVI.].

Recommendations to enhance liability of, and engagement with, legal persons

15. Regarding the liability of legal persons and enforcement of the foreign bribery offence against legal persons, the Working Group recommends that Canada:

a) take measures to ensure that the regime for imposing liability of a legal person for foreign bribery does not require knowledge by a person with the highest level of managerial authority [Anti-Bribery Recommendation Annex I.B.3.b.];

b) undertake an analysis of its foreign bribery enforcement actions to date against legal persons, with a view to developing an action plan to enhance such enforcement [Convention Articles 2 and 5; Anti-Bribery Recommendation III. and VI.iii.];

c) take measures to develop the expertise of the PPSC on corporate compliance systems to prevent and detect foreign bribery, including by providing adequate guidance and training, and ensuring such guidance is publicised and easily accessible for companies [Anti-Bribery Recommendation XXIII.D.iv.];

d) pursue its reflection on amending the Integrity Regime with regard to automatic debarment, with a view to envisaging ways of making it more flexible and compatible with incentives for good corporate behaviour [Anti-Bribery Recommendation IV.ix. and XXIV.].

16. Regarding engagement with legal persons, the Working Group recommends that Canada take steps to:

a) engage with Canadian business organisations and professional associations to incite them to play their role in assisting companies, in particular SMEs, in the development of effective internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. [Anti-Bribery Recommendation Annex II.B]; and

b) raise awareness of SMEs on foreign bribery, including the Remediation Agreement framework [Anti-Bribery Recommendation IV.ii., XXIII.C.ii.; Annex II.A. and II.B.].

Part 3. Follow-up issues

17. The Working Group will follow up as case law and practice develop with regard to the following issues:

a) the detection and reporting of corruption, including foreign bribery, in Canada's Official Development Assistance programme, in particular by GAC's Grants and Contribution Fraud Management Unit;

b) (i) the investigation, prosecution, and sanctioning of foreign bribery cases involving officials of SOEs; (ii) jurisprudence of section 3(1)(a) of the CFPOA; and (iii) treatment of circumstantial evidence in foreign bribery cases;

c) application of the defence of "reasonable expenses incurred in good faith";

d) application of the nationality jurisdiction under section 5(1) of the CFPOA;

e) application of territorial jurisdiction and the use of the "real and substantial" test in CFPOA cases against foreign nationals;

f) the PPSC subject-matter experts available to the RCMP SII for ongoing investigations to ensure foreign bribery investigations receive sufficient support and advice;

g) the use of investigative techniques in foreign bribery investigations;

h) the application of section 15 of the DPP Act as necessary;

i) to ensure that the steps taken by Canadian law enforcement authorities are sufficient to mitigate the effects of the Jordan jurisprudence and ensure sufficient time is available for the effective investigation and prosecution of cases of foreign bribery and related offences;

j) application of the false accounting offence in investigating, prosecuting and sanctioning foreign bribery cases;

k) sanctions and confiscation imposed against natural persons under the CFPOA;

l) sanctions imposed on legal persons, including through RAs, with a view to ensuring that they are effective, proportionate, and dissuasive; and

m) the applicability of the successor liability principle, to ensure that to ensure that legal persons cannot avoid liability or sanctions for foreign bribery and related offences by restructuring, merging, being acquired, or otherwise altering their corporate identity.

Annex A. Canada's foreign bribery enforcement actions

Note: In this table, "LP" refers to "legal persons", while "NP" refers to "natural persons"; in the "Date" column, "F" refers to the date of the facts and "D" refers to the date of the decision(s).

Note: Canada did not provide information regarding ongoing or closed investigations not already concluded through the court system and in the public domain.

Concluded Foreign Bribery Cases (information in the public domain)					
Case	**Date**	**Detection**	**Parties charged**	**Facts**	**Resolution**
Hydro-Kleen Group Inc. (United States)	F: unknown D: 10 January 2005	Unknown	1 LP 2 NPs	Company and two individuals (president and employee) charged with CFPOA for allegedly paying bribes of approximately CAD 30 000 (EUR 20 797 and USD 22 640) to US Immigration officials. In January 2005, the company pleaded guilty to one count under the CFPOA and the charges against the director and the officer of the company were stayed. The U.S. immigration officer pleaded guilty in July 2002 to accepting secret commissions. He received a six-month sentence and was subsequently deported to the United States.	1 LP: fine of CAD 25 000 (EUR 17 331; USD 18 867) 2 NPs: charges stayed
Niko Resources Ltd. (Bangladesh)	F: 2005 D: 24 June 2011	Department of Foreign Affairs and International Trade (now GAC)	1 LP	On 24 June 2011, the oil and gas company pleaded guilty to a foreign bribery charge under section 3(1)(a) of the CFPOA in relation to its business dealings in Bangladesh. In addition, the company was placed under a probation order, which put the company under the Court's supervision for three years to ensure that audits were completed to examine the company's compliance with the CFPOA.	1 LP: fine of CAD 8.26 million (EUR 5.72 million; USD 6.23 million), plus a 15% victim fine surcharge
Griffiths Energy International Inc. (Chad)	F: 2009 – 2011 D: 22 January 2013	Various: Media reports and company self-report	1 LP	An oil and gas company based in Calgary, pleaded guilty on 22 January 2013 to one count of bribery under section 3(1)(b) of the CFPOA in relation to its dealings in Chad. The company acknowledged committing to provide CAD 2 million (EUR 1.38 million and USD 1.5 million) in cash and shares in exchange for exclusive resources in two regions. After providing the Government of Chad with a CAD 40 million (EUR 27.7 million and USD 30.2 million) signing bonus, GEI was awarded the resource rights. After a voluntary disclosure by the company, full cooperation with the RCMP, and a guilty plea, GEI was sentenced in 2013. In September 2023, a US federal judge sentenced a former founding shareholder of Griffiths Energy to three years of prison under the US Foreign Corrupt Practices Act for his role in this case.	1 LP: fine of CAD 9 million (EUR 6.23 million; USD 6.79 million), plus 15% victim surcharge
Cryptometrics (India)	F: 2005 -2008 D: 2014–2021	Various: Agent disclosed information to Trade Commissioner and to US authorities.	4 NPs	Several individuals employed by or associated with the Canadian biometric technology company (*Cryptometrics Canada)* were charged with foreign bribery offences under the CFPOA. The misconduct involved payments to Indian government officials, including a cabinet minister and SOE officials, to facilitate the execution of a multi-million-dollar contract for the supply of a security system by the company. The following individuals were charged: the CEO of *Cryptometrics*, the COO of Cryptometrics and two agents of the company.	1 NP: three years imprisonment 2 NPs: acquitted 1 NP: charges stayed

Concluded Foreign Bribery Cases (information in the public domain)					
Case	**Date**	**Detection**	**Parties charged**	**Facts**	**Resolution**
				NP1: In 2013, one individual, a representative of the company, was found guilty of agreeing with others to offer bribes to officials of a SOE and cabinet minister under section 3(1)(b) of the CFPOA to secure a major contract from the SOE for the provision of facial recognition software and related equipment. The court found that the individual conceived of and orchestrated the bribery scheme, including the bribing of several senior employees of the SOE to have the *Cryptometrics'* bid selected and proposing substantial bribes to a foreign minister. The individual was sentenced to three years imprisonment in 2014. This decision was upheld on appeal in 2017. **NP 2 and 3**. Two other individuals (the CEO of *Cryptometrics* and an agent of the company) were jointly tried in 2019 and found guilty of one count of foreign bribery under section 3(1)(b) of the CFPOA for agreeing to pay bribes to Indian officials. In 2021, the two individuals, however, had their convictions set aside on appeal on a procedural ground (delayed disclosure of evidence by the prosecution during the trial). As a result, a new trial was ordered. Prosecutors declined to pursue a new trial against these two individuals. **NP 4**. In 2019, the fourth individual, the COO of *Cryptometrics*, had their CFPOA charge stayed by the prosecution.	
Canadian General Aircraft (Thailand)	F: unknown D: November 2017	U.S FBI **]**	1 NP	The president of an aviation company was charged under section 3(1) of the CFPOA for allegedly agreeing to offer a bribe to Thai officials in order to secure the sale of a commercial jet from Thailand's national airline. Charges against the individual were stayed by prosecutors in 2017 due to the "re-assessment of the available evidence" following a preliminary inquiry.	1 NP: charges stayed
SNC-Lavalin (Bangladesh)	F: 2009-2011 D: 2014–2017	IFI referral (World Bank INT)	4 NPs 1 FPO charged	The World Bank's Integrity Vice Presidency (INT) investigated allegations that the company's representatives and agents were planning to pay bribes to officials in Bangladesh in relation to the construction of the Padma Multipurpose Bridge Project. In 2011, INT referred this matter to the RCMP. The RCMP subsequently opened an investigation. **NPs and FPO**. On 11 April 2012, two former employees of SNC-Lavalin were charged under section 3(1)(b) of the CFPOA for allegedly paying bribes in relation to the awarding of the project to the company. On 16 September 2013, two former SNC representatives and a Bangladeshi public official allegedly involved in the scheme were also charged with foreign bribery offences under section 3(1)(b) of the CFPOA in the same case. In April 2014, a Canadian court concluded that Canada did not have jurisdiction over the foreign public official and the proceeding against the official was stayed. In November 2015, the prosecution stayed charges against one of the former employees of SNC-Lavalin.	3 NPs: acquitted (exclusion of wiretap evidence) 1 NP: stayed in 2015. 1 NP (FPO): stayed by court (lack of jurisdiction)

Concluded Foreign Bribery Cases (information in the public domain)					
Case	**Date**	**Detection**	**Parties charged**	**Facts**	**Resolution**
				The case proceeded against the three other SNC representatives and executives. In 2016, the Supreme Court of Canada upheld the World Bank's privileges and immunities in response to motions challenging the privileges and immunities of the World Bank Group over its archives and personnel, and information referred by INT to the RCMP. In January 2017, a court ruled that the wiretap evidence obtained as part of the investigation of foreign bribery against the three individuals was not admissible. As a result, the prosecution did not call evidence and the three NPs charged with CFPOA offences were acquitted.	
SNC-Lavalin (Libya)	F: 2001 – 2011 D: 2019–2023	Unknown	1 LP 2 NPs	SNC-Lavalin and its subsidiaries allegedly offered, promised or gave a total of CAD 47.7 million (EUR 33.1 million and USD 36 million) to several Libyan public officials to obtain and retain major contracts in Libya. The RCMP opened an investigation in 2011 into this matter. **NP 1**. In January 2014, charges were laid against former SNC-Lavalin executive with respect to payment of bribes to foreign public officials in Libya. In September 2014, the executive and his lawyer, were also charged with obstructing justice and extortion, but the obstruction charges against both were stayed due to unreasonable delay. Following a jury trial in 2019, the former company executive was convicted on counts of fraud, bribing a foreign public official under section 3(1)(b) of the CFPOA, laundering proceeds of crime, and possession of stolen goods. In January 2020, the court sentenced the individual to a sentence of 8 years and 6 months along with a fine in lieu of forfeiture of CAD 24 690 401 (EUR 17 116 374 and USD 18 633 401), payable within 6 months, with an additional term imprisonment of 10 years in case of non-payment, to be served consecutively. The individual appealed his conviction. In February 2023, his appeal was rejected by the Court of Appeal of Quebec. **NP 2**. In January 2014, a former SNC-Lavalin employee was charged with fraud under the CC and foreign bribery under section 3(1)(b) of the CFPOA. In February 2019, the charges against the individual were stayed due to a finding of delay. **LP** (*SNC-Lavalin*). On 19 February 2015, Groupe SNC-Lavalin Inc. and two of its subsidiaries were charged with a foreign bribery offence (section 3(1)(b) of the CFPOA) and fraud under section 380(1)(a) of the CC. The charges related to the alleged payment of bribes to secure an advantage for the company in relation to major construction projects in Libya. In addition, the company and its subsidiaries were charged with defrauding Libya and various Libyan entities in the amount of CAD 129 832 830 (EUR 89 962 282). In December 2019, SNC-Lavalin Construction Inc. (SLCI) pleaded guilty to the fraud charge under the	1 NP: 8.5 years imprisonment and CAD 24 690 401 fine (EUR 17 116 374 and USD 18 633 401) 1 NP: CFPOA charge stayed 1 LP: no foreign bribery offence conviction under CFPOA; fined CAD 280 million (EUR 194.1 million; USD 211.3 million) for fraud under CC (*SNC-Lavalin*)

Concluded Foreign Bribery Cases (information in the public domain)					
Case	**Date**	**Detection**	**Parties charged**	**Facts**	**Resolution**
				CC, and the CFPOA foreign bribery offences were stayed. In the Agreed Statement filed with the Court, the company admitted that between 2001 and 2011, payments of CAD 47 689 868 (EUR 33 060 524; USD 35 990 685) were directed to Saadi Gadhafi. In exchange for the payments, Saadi Gadhafi used his influence as the son of the Libyan Dictator Muammar Ghadafi to secure construction contracts for the benefit of the company. The company was fined CAD 280 million (EUR 194.1 million; USD 211.3 million) and subject to a three-year probation order, with conditions that SLCI cause the SNC-Lavalin Group to maintain, and as required, further strengthen its compliance program, record keeping, and internal control standards and procedures.	

Ongoing Foreign Bribery Cases (information in the public domain)					
Case	**Date**	**Detection**	**Parties charged with CFPOA offences**	**Facts**	**Stage**
IMEX Systems (Botswana)	F: 2015-2016	Company self-reported to RCMP	1 NP	On 12 November 2020, charges were laid against the founder of a software development company with respect to allegations of bribes to a public official. The former executive allegedly provided a financial benefit to a Botswanan public official and his family, in contravention of the CFPOA. The investigation referred to as "Project Alkaloid" was initiated in October 2018, after the new management of the company self-reported allegations of the former's executive alleged misconduct to the RCMP. On 7 March 2023, the trial court acquitted the individual of foreign bribery charges under section 3(1)(a) of the CFPOA. Prosecutors appealed the decision. The appeal case is pending at the time of this report.	Ongoing (decision appealed)
Ultra Electronics Forensic Technology Inc. (Philippines)*	F: 2006-2018	Parent company reported to the UK SFO	1 LP 4 NPs	On 20 September 2022, a technology company and four former executives were each charged with foreign bribery under the CFPOA (section 3(1)(a) and (b)) and fraud under the CC. Between 2010 and 2018, the company sold equipment to the Philippines National Police for a total contract price of CAD 17 million (EUR 11.78 million; USD 12.8 million). The corporation and the individuals allegedly directed local agents in the Philippines to bribe foreign public officials to influence and expedite the multi-million-dollar contract. On 28 February 2023, the company entered into a RA in relation to the foreign bribery charges under the CFPOA and fraud under the CC. On 16 May 2023, the Canadian court published the details of the RA. Trial is pending against the former executives at the time of this report.	1 LP: -fine CAD 6 593 178 (EUR 4 570 655; USD 4 975 753); -confiscation CAD 3 296 589 (EUR 2 284 234) 4 NPs: trial pending

Annex B. Phase 3 Recommendations to Canada and issues for follow up (2011) and Assessment of Implementation by the Working Group on Bribery (2013)

Phase 3 Recommendation	*Status at Written Follow-up (May 2013)*[159]*
Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery	
1. The Working Group recommends that Canada amend the offence of bribing a foreign public official in the CFPOA so that it is clear that it applies to bribery in the conduct of all international business, not just business "for profit". (Convention, Article 1)	Fully implemented*
2. The Working Group recommends that Canada take appropriate measures to automatically apply, on conviction for a CFPOA violation, the removal of the capacity to contract with the Government or receive any benefit under such a contract, consistent with the domestic bribery offence in the Criminal Code. [Convention, Article 3; Commentary 26; 2009 Recommendation XI (i)]	Fully implemented
3. The Working Group recommends that Canada urgently take such measures as may be necessary to prosecute its nationals for the bribery of foreign public officials committed abroad. (Convention, Article 4.2; Commentary 26; Recommendation V)	Fully implemented*
4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:	
(a) Clarify that in investigating and prosecuting offences under the CFPOA, considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, are never proper; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)	Partially implemented
(b) Ensure that resources for investigating CFPOA cases by the RCMP International Anti-Corruption Teams remain at least at their intended functional levels of six full-time regular RCMP members and a civilian member or public servant for each Team; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)	Fully implemented
(c) Urgently dedicate resources for the soon expected CFPOA prosecution case-load of potentially more than 20 cases; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)	Fully implemented
(d) Take appropriate measures to encourage provincial securities commissions to sanction books and records and other securities violations associated with CFPOA misconduct, and share with the RCMP and other relevant investigative authorities expertise and information about potential CFPOA violations; [Convention, Article 8.2; 2009 Recommendation X. A. (i) and (ii)]	Fully implemented
(e) In consultation with the provinces in an effort to ensure consistency of standards throughout Canada:	
i. prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation for purposes that would include "bribing foreign public officials or of hiding such bribery";	Fully implemented*
ii. consider whether the requirements to submit to independent external audit are adequate, in view of the rule that permits large private companies to exempt themselves from the requirement;	Partially implemented

[159] *The Working Group determined that Canada had fully implemented recommendations 1, 3 and 4(e)(i) in its Phase 3 additional follow up report (March 2014), pp. 10-11.

Phase 3 Recommendation	*Status at Written Follow-up (May 2013)*[159]*
iii. consider broadening the prohibitions for participating in audits in order to improve auditor independence; and	Partially implemented
iv. consider amending the law to require external auditors to report	Partially implemented
(f) To the extent appropriate and possible in the Canadian legal system, consider options for encouraging voluntary disclosure of CFPOA violations and for cooperating with investigations, which may thereby increase the reporting of violations of the CFPOA. [2009 Recommendation III (iv)]	Fully implemented
Recommendations for ensuring effective prevention and detection of foreign bribery	
5. The Working Group recommends that Canada find an appropriate and effective means for making companies aware of the CFPOA, including the defence for "reasonable expenses incurred in good faith" and the defence for "facilitation payments", and increase efforts to raise awareness of the CFPOA specifically amongst: i) Industries at high risk for bribing foreign public officials, and individuals and companies operating in countries where there is a high risk of bribe solicitation; and ii) municipal and provincial law enforcement authorities, to enable them to spot suspicions of foreign bribery and thus facilitate reporting to the RCMP International Anti-Corruption Unit. [2009 Recommendation III (i), IV, VI (ii), and Annex I, paragraph A]	Fully implemented
6. Further regarding the defence in the CFPOA for "facilitation payments", the Working Group recommends that Canada as soon as possible implement Recommendation VI of the 2009 Recommendation by: i) periodically reviewing Canada's policies and approach on small facilitation payments; and ii) encouraging companies, including SMEs, to prohibit or discourage the use of such payments in internal controls, ethics and compliance programmes or measures. [2009 Recommendation VI; and X. C. (i)].	Fully implemented
7. The Working Group recommends that Canada promote compliance programmes or measures specifically targeting the prevention and detection of CFPOA violations in the private sector, including in particular the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance. [2009 Recommendation X. C. (i) and (ii)]	Fully implemented
Recommendations Concerning Prevention and Detection of Foreign Bribery	
8. Regarding the tax treatment of bribes to foreign public officials, the Working Group recommends that Canada:	
(a) Provide specific training for tax examiners on whether a payment comes under the defence for reasonable expenses incurred in good faith or facilitation payments, and the detection of foreign bribery by non-profit organisations; [2009 Recommendation VIII (i); 2009 Tax Recommendation II] and	Partially implemented
(b) Complete as soon as possible the review of the prohibition against reporting non-tax criminal offences detected in the course of a tax audit, to law enforcement authorities, and identify methods to enable the tax authorities to share information about CFPOA violations, including by considering inclusion of the optional language in paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties. [2009 Recommendation VIII (i); 2009 Tax Recommendation I (ii) and (iii)]	Not implemented
9. Regarding public procurement contracting in Canada, the Working Group reiterates the Phase 2 recommendation that Canada revisit the policies of Public Works and Government Services Canada on dealing with applicants convicted of CFPOA violations. In addition, the Working Group recommends that Canada consider further strengthening CIDA procedures by undertaking due diligence concerning applicants" declarations about corruption-related convictions. [Convention, Article 3.4; Commentary 24; 2009 Recommendation XI (i)]	Fully implemented

Follow up by the Working Group:

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

    (a) Application of the defence of “reasonable expenses incurred in good faith"; (Convention, Article 1)

    (b) Due to the newness of the provision, application of the Criminal Code provision on the liability of legal persons, including in the following cases: i) the natural perpetrator(s) is (are) not prosecuted and/or convicted under the CFPOA; and ii) the relevant legal person was not created with an expectation of profit, including non-profit and government controlled entities; (Convention, Article 2; 2009 Recommendation IV, and Annex 1, paragraph B)

    (c) Sanctions imposed on natural and legal persons in CFPOA cases, including confiscation of bribes and the proceeds of bribing foreign public officials; (Convention, Articles 3.1 and 3.2)

    (d) Coordination in practice of investigations and prosecutions of CFPOA cases involving features of the federal criminal enforcement framework, including the following: i) the RCMP inspector in Ottawa who manages the RCMP anti-corruption programme and provides support to the two RCMP Anti-Corruption teams; ii) the PPSC subject-matter position who works with and advises the RCMP Anti-Corruption teams on ongoing investigations; iii) the DOJ’s International Assistance Group and the RCMP’s Legal Services Unit, with designated individuals to liaise with the International Anti-Corruption teams; and iv) the Integrated Market Enforcement Teams, which include RCMP investigators, PPSC legal advisors, securities regulators, and law enforcement agencies of local jurisdictions; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)

    (e) Statistics compiled on convictions under the CFPOA, and related omissions and falsifications of book, records and accounts of companies; (Convention, Article 3)

    (f) Application of the money laundering offence where violations of the CFPOA form the predicate offence; (Convention, Article 7)

    (g) The efficiency of mechanisms for incoming and outgoing mutual legal assistance regarding cases of bribing foreign public officials; (Convention, Article 9.1; 2009 Recommendation XIII) and

    (h) The operation of the relatively new Criminal Code offence of retaliation against employees. [2009 Recommendation IX (iii)]

Annex C. On-site visit participants

Public Sector

- Royal Canadian Mounted Police
- Public Prosecution Service of Canada, including Regional Offices (Calgary, Quebec)
- Ministry of Justice (Department of Justice Canada), including Criminal Law Policy Section and International Assistance Group
- Ministry of Foreign Affairs (Global Affairs Canada), including Compliance & Fraud Division; Trade Strategy & Responsible Business Conduct Division; and Criminal, Security and Diplomatic Law Division
- Ministry of Finance (Department of Finance Canada), including Financial Crimes Policy
- Canada Revenue Agency
- The Financial Transactions and Reports Analysis Centre of Canada
- Export Development Canada
- Public Services and Procurement Canada
- Treasury Board of Canada Secretariat, Office of the Chief Human Resources Officer
- Office of the Public Sector Integrity Commissioner of Canada
- Innovation, Science and Economic Development Canada

Private Sector and Civil Society

Private enterprises, financial institutions, and business organisations

- SNC-Lavalin
- Enbridge
- Desjardins Group
- Canadian Chamber of Commerce

Private sector lawyers

- Baker & McKenzie LLP
- Bennett Jones LLP
- Blake, Cassels & Graydon LLP
- Dentons LLP
- Fasken LLP
- Gowling WLG LLP
- Sole practitioner criminal defence lawyers

Legal academics

- University of Alberta, Faculty of Law
- University of Ottawa, Faculty of Law
- University of Toronto, Faculty of Law

Accounting and auditing profession

- KPMG
- PWC
- Deloitte
- Investigative and Forensic Accountant consultants

Civil society and media

- Transparency International Canada
- Canadian Centre of Excellence for Anti-Corruption
- ACT International Consulting
- The Globe and Mail

Annex D. List of abbreviations, terms and acronyms

AASB	Auditing and Assurance Standards Board
AG	Attorney General of Canada
AML	anti-money laundering
CAD	Canadian dollar
CAS	Canadian Auditing Standards
CBCA	Canada Business Corporations Act
CC	Criminal Code of Canada
CCC	Canadian Commercial Corporation
CFPOA	Corruption of Foreign Public Officials Act
CPA	Chartered Professional Accountants
CRA	Canada Revenue Agency
DPP	Director of Public Prosecutions
DPP Act	Act Respecting the Office of the Director of Public Prosecutions
EDC	Export Development Canada
ESTMA	Extractive Sector Transparency Measures Act
EUR	Euro
FATF	Financial Action Task Force
FDI	Foreign direct investment
FFCA	Bill S-14, Fighting Foreign Corruption Act
FINTRAC	Financial Transactions and Reports Analysis Centre
FIRAC	Foreign Information Risk Advisory Committee
FIU	Financial Intelligence Unit
GAC	Global Affairs Canada (Ministry of Foreign Affairs)
IAASB	International Auditing and Assurance Standards Board
IAG	International Assistance Group of the Ministry of Justice
IFBT	International Foreign Bribery Taskforce
IFI	International Financial Institution
IMET	Integrated Market Enforcement Teams
INT	World Bank Group, Integrity Vice Presidency
ISA	International Standards on Auditing
ITA	Income Tax Act
MLA	Mutual legal assistance
MOJ	Ministry of Justice (Department of Justice Canada)
NIRA	National Inherent Risk Assessment
NRCan	Natural Resources Canada
NTR	Non-trial resolution
ODA	Official development assistance
OSC	Ontario Securities Commission
PCMLTFA	Proceeds of Crime Money Laundering and Terrorist Financing Act
PPSC	Public Prosecution Service of Canada
PSDPA	Public Servants Disclosure Protection Act
PSIC	Public Service Integrity Commission
PSPC	Public Services and Procurement Canada
PWGSC	Minister of Public Works and Government Services Canada
RA	Remediation Agreement
RCMP	Royal Canadian Mounted Police
SII	Royal Canadian Mounted Police Sensitive & International Investigations
SME	Small and medium-sized enterprise
SOE	State Owned Enterprises
TCS	Trade Commissioner Service
TI	Transparency International
TSX	Toronto Stock Exchange
USD	United States Dollar