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Corruption in Canada: Definitions and Enforcement

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Corruption in Canada: Definitions and Enforcement

by

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Prepared for

PUBLIC SAFETY CANADA

*The views expressed herein are those of the authors and do not
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Acronyms

AFP	Australian Federal Police (Australia)
AMF	Autorité des marchés financiers
CBSA	Canada Border Services Agency
CCC	<i>Criminal Code</i> of Canada
CDPP	Criminal Director of Public Prosecutions
CFPOA	<i>Corruption of Foreign Public Officials Act</i>
DFATD	Department of Foreign Affairs, Trade and Development
EDC	Export Development Canada
DOJ	Department of Justice (United States)
FBI	Federal Bureau of Investigation (United States)
FCPA	<i>Foreign Corrupt Practices Act</i> (United States)
IACAC	<i>Inter-American Convention Against Corruption</i>
MESICIC	Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption
NCA	National Crime Agency (United Kingdom)
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
RCMP	Royal Canadian Mounted Police
SEC	Securities and Exchange Commission (United States)
SFO	Serious Fraud Office (United Kingdom)
TI	Transparency International
UNCAC	<i>United Nations Convention against Corruption</i>
UNCATOC	<i>United Nations Convention against Transnational Organized Crime</i>
UNODC	United Nations Office on Drugs and Crime
UPAC	Unité permanente anti-corruption
WB	World Bank

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Executive Summary

The objective of this study is to outline how the concept of corruption is defined in Canada and to give an overview of enforcement responses, the results of which may serve to assist policy development regarding corruption and corruption-related crime. With this in mind, various types of corruption, definitions and related offences have been reviewed, including domestic, foreign and multilateral legislation, as well as civil society and international financial institution definitions.

Corruption can be defined and categorized in different ways. The most common types or categories of corruption are supply versus demand corruption, grand versus petty corruption, conventional versus unconventional corruption and public versus private corruption. There are other categories or ways of describing corruption, such as “systemic” versus “individual” or “isolated,” corruption by “commission” versus by “omission,” by the degree of coercion used to perform the illegal act, and the type of benefit provided. In Canada, as is the case in the United States, the United Kingdom, Australia, and other OECD member states, both domestic and foreign corruption are criminalized. In Canada, the *Corruption of Foreign Public Officials Act* (CFPOA) creates an offense for foreign corruption and also contains books and records provisions. The CFPOA’s bribery offense only criminalizes the supply-side of the corrupt behaviors. Domestic corruption offenses, provided for in the *Criminal Code*, are broader in nature: both the supply and demand sides of bribery transactions are criminalized as well as acts of “unconventional” corruption, such as breach of trust by a public officer and misconduct of officers executing process.

The *Criminal Code* also contains a private corruption offense. This type of corruption (between private sector organizations) has received weaker responses and focus from the media in Canada in recent years. The media and enforcement authorities have instead placed much focus on public corruption. Furthermore, although foreign bribery has been the source of much discussion with the recent amendments to the CFPOA in 2013, there has been much more activity surrounding domestic corruption by criminal enforcement bodies and in the media in the last few years, often in relation with organized crime charges and investigations.

The media has been active in reporting grand or political corruption involving elected or high ranking government officials, as well as systemic corruption, involving the infiltration of organized crime into the public sector. Canadian enforcement bodies however seem to equally investigate instances of grand and petty corruption.

Most cases in Canada have included acts of conventional corruption, as opposed to unconventional corruption. The few prosecuted cases of unconventional corruption were brought alongside other charges which included conventional corruption, as opposed to stand alone charges. This might be due to evidentiary issues, such as the lack of third parties or physical evidence in cases of unconventional corruption.

Further research might be necessary to address additional weaknesses and best practices, such as areas surrounding information sharing between enforcement authorities and admissibility before

Canadian criminal courts, the domestic and international asset recovery and mutual legal assistance framework under the Canadian *Criminal Code* (under sections 354 and Part XII.2 relating to proceeds of crime), federal laws (such as the *Freezing Assets of Corrupt Foreign Officials Act*), the World Bank/UNODC joint Stolen Asset Recovery Initiative and other revenue transparency initiatives, as well as the impact on prosecutions following the use of proactive investigation tools in other jurisdictions.

1. Introduction

The fight against corruption has become more urgent in recent years as the global focus on detecting and preventing corruption has significantly increased. Not only does corruption defy the rule of law and undermine democracy, it also channels criminal activity, crippling economic growth and healthy competition in the private sector.¹ Corruption often results in an extensive distrust of political authorities, in both developing and developed Nations alike.² The consequences are grave and systemic.³ It is also increasingly connected to organized crime, terrorism, drug trafficking, and human trafficking.⁴ Whatever the cause, there is no doubt that corruption is a global phenomenon that is not exclusive to any State.

Corrupt practices have often been touted as a cost of doing business abroad, implying it to be a foreign problem, however it is clear that corruption is a growing concern in Canada. Scandals have recently erupted in both the private sector and the public sector, resulting in widespread media coverage, economic and reputational damage and government commissions of inquiry. Furthermore, the international community has in recent years called upon Canada to develop stricter anti-corruption legislation and to ensure stronger enforcement of corruption-related offences. Although legislative amendments and increased enforcement have taken place to curb these critiques, much work remains to elevate Canada's position internationally.

Deloitte has been retained by Public Safety Canada to explore the various definitions and enforcement of corruption in Canada. The objective of this study is to outline how the concept of corruption is defined at home and abroad, and to give an overview of enforcement responses in Canada, the results of which will serve to assist policy development regarding corruption and corruption-related crime. The first section of this report gives an overview of definitions of corruption in Canada and in select foreign jurisdictions. In the following section, enforcement of corruption related offences in Canada as well as in the United States, the United Kingdom and Australia will be reviewed. Lastly, identified weaknesses and suggested best practices will be discussed.

2. Defining Corruption

This section offers an overview of the various categories or classifications of corruption used by scholars and civil society organizations, before delving into the legal definitions of corruption and corruption-related offences adopted by Canada, the international community and foreign jurisdictions.

2.1 Categories of Corruption

The word 'corruption' originates from the Latin word *corruptus*, which means 'to break.'⁵ Although corruption is a complex concept to define, its most broad definition is the "exercise of official powers without regard for the public interest."⁶ It is also widely assimilated to "the abuse of public office for private gain."⁷ Although these two definitions imply the involvement of the public, as will be discussed, corruption also exists in a purely private setting. In such instances,

there is almost always a breach of institutional interests by individuals for personal gain at the expense of the communal interest to which the offender has been entrusted with supporting. The usefulness of attributing a specific definition to detrimental actions is paramount for research purposes, but also for the purpose of attempting to identify solutions.⁸

Not only are there differing definitions of corruption, there are also various ways of classifying it. Legal scholars and political scientists have classified corruption into different categories, such as supply versus demand, conventional versus unconventional, grand versus petty, and public versus private. In the media, a variety of actions are described as being corrupt acts. Terms such as “bribery,” “kick-backs,” “misappropriation” and “embezzlement” are some examples. These distinctions are relevant to the study of corruption due to the lack of a global consensus on one universal definition. International and multilateral treaties to date have not specifically defined the concept of corruption. Instead, they emphasize acts that constitute corruption, thus allowing for domestic implementation. Moreover, national laws differ in their definition and criminalization of corruption. These various definitions and differences among jurisdictions will be illustrated in the following paragraphs.

i) Supply versus Demand

“Supply-side corruption” is used to describe the act of offering an illicit payment or undue advantage, whereas “demand-side corruption” relates to the acceptance or solicitation of such a payment or advantage.⁹ “Active” and “passive” corruption are terms that have been used synonymously with supply and demand corruption in the past but are less used today, due to their evaluative or judgmental connotations; classifying an offence as “passive” wrongly suggests a lesser involvement or criminal intent. This study will therefore refer to “supply” and “demand” corruption.

Within the field of international law, treaties and multilateral agreements focusing on anti-corruption measures have taken varying positions, some only criminalizing the supply aspect (such as the Organisation for Economic Co-operation and Development (OECD)¹⁰ *Convention against Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention)*),¹¹ others creating offences for both supply and demand corruption (such as the *United Nations Convention against Corruption (UNCAC)*¹² and the *Inter-American Convention against Corruption (IACAC)*).¹³ The same can be said of national laws: in Canada and the United States, the corruption of foreign officials legislation only deals with supply bribery, whereas corruption involving a domestic public official receives a different treatment. Under the *Criminal Code*,¹⁴ both supply and demand corruption-related behaviors are considered illegal. The reasoning behind these policy decisions can be explained by the significant legal and jurisdictional consequences that stem from criminalizing demand bribery, such as the unlikelihood of enforcing criminal action against foreign officials. In this respect, criminalizing the actions of another country’s public officials would impede sovereignty. Such considerations will be underlined throughout the following chapters.

ii) Grand versus Petty

The United Nations, while offering a multi-layered definition of corruption, states that the most commonly seen forms or categories of corruption include grand corruption and petty corruption as well as supply and demand corruption.¹⁵

Petty corruption is sometimes coined with the term “bureaucratic corruption,” which implies involvement of public administration officials and non-elected officials.¹⁶ Some examples of the use of petty corruption include bribes paid to enforcement officials, customs personnel, health service providers, and other government officials. Grand corruption on the other hand involves higher ranking government officials and elected officials who exploit opportunities that are presented through government work. It is more often the result of bribes offered or paid in connection with larger scale government projects, such as infrastructure and construction projects.¹⁷ Some examples of grand corruption include the issuance of government contracts by public officials to private businesses for excessive prices and arranging kickbacks in advance to the benefit of both the public officials and private business. Such grand corruption involving higher ranking officials can be carried out at the contractor or subcontractor levels.¹⁸

“The most critical difference between grand corruption and petty corruption is that the former involves the distortion or corruption of the central functions of Government, while the latter develops and exists within the context of established governance and social frameworks.”¹⁹

Facilitation payments, also known as “grease” payments, fall under the category of petty corruption. These payments or bribes are commonly described as regular or routine administrative payments made to hasten a result or an outcome to which the payer is already entitled.²⁰ Such payments to foreign governments are legal in a few OECD Member States, such as New Zealand, Australia, the United States, South Korea, and Canada, although they would be considered bribes under these countries’ domestic legislation.²¹ They are also legal in some developing countries, such as Iraq and Iran.

Political corruption is considered a type of grand corruption due to its seriousness and the high-ranking level of public officials involved. It exists where politicians and government agents who are entrusted with enforcing laws are themselves corrupt: it occurs at the top levels of government.²² Another type of grand corruption is “State capture,” which is defined as a “company or organization that shapes and influences legislation or government policies in an entire sector” (e.g., the extractive and mining industry or taxation) through payments.²³ An example of State capture is a corporation influencing policy by offering undue advantages in order to favor its own interests or those of its stakeholders.²⁴ The opposite effect can also occur, whereby public officials attempt to manipulate actors in the private sector for their own personal gain, also known as “reversed State capture.” State capture has a not-so-distant equivalent known as “influence,” for which the actors and goals are identical. The difference is in the absence of any payment, advantage or transaction ever taking place. In this case, influence is exerted based on the organization’s ability to impact policy as a result of its size, its ownership, or potential ties to, and interactions with, State officials.²⁵

Grand and petty corruption are both forms or sub-categories of conventional corruption, defined in the next section.

iii) Conventional versus Unconventional

Conventional corruption occurs when government officials, whether higher or lower ranking, illegitimately receive or accumulate an undue advantage for their own personal use, disregarding public interest. It exists in the forms of grand and petty corruption. There is also an element of reciprocity or *quid pro quo* within conventional corruption: both the solicitation and the acceptance of bribes (supply and demand bribery) are therefore considered forms of conventional corruption.

Unconventional corruption on the other hand is not by definition illegal: it exists where a public or government official acts without consideration for the public's interest, the goal being to attain a specific and personal gain. It can be argued that there is no element of reciprocity or *quid pro quo* in unconventional corruption, as there is no clear-cut transaction between two parties. In its broader interpretation, this type of corruption includes acts considered illegal in most countries, such as misappropriation, theft, embezzlement, and breach of trust. However, it is often more narrowly associated with a public official's decision to act while disregarding public interest in order to induce individuals and entities to contribute or to expend towards re-election. The main characteristic of this type of corruption lies in the officials' decision-making process, whereas the incentive to act should be to serve the public's interest, in this case, the incentive lies in the official's personal gain.²⁶

Lobbying efforts are often associated with unconventional corruption, although these two concepts differ in several ways. The first difference is the focus of the act itself: unconventional corruption focuses on the acts carried out by public or government officials, whereas lobbying focuses on the actions carried out by individuals and businesses. The second main difference is that lobbying is more than a private counterpart to unconventional corruption in that it is a broader concept that can involve not only campaign contributions and expenditures, but also offering expertise to public officials. With this broader notion in mind, the development and enforcement of lobbying legislation can have a significant impact on private organizations. The following passage speaks to the relationship between the two concepts:

“There is a coherent and sensible argument to be made that money from lobbyists does not literally buy an election; it merely buys speech that helps persuade voters to side with one candidate over another. However, the focus of unconventional corruption is not on what the money does; rather, it is about what has to be done in order to obtain the money. The effect of the money does not necessarily contradict democratic principles. However, what must be done to secure the money corrupts a democracy to its core.”²⁷

In 2010, the OECD adopted recommendations to fight corruption in the public sector specifically relating to lobbying. These recommendations are aimed at providing decision makers with guidance to foster transparency and integrity in lobbying. The guiding principles of these recommendations relate to building a fair and effective framework for openness, enhancing transparency, fostering a culture of integrity, and developing mechanisms for effective implementation.²⁸

iv) Public versus Private

Corruption can also be distinguished by its “public” or “private” nature. One may often hear the term “public corruption” or “private corruption” (sometimes also referred to as “private-to-private corruption”). The difference lies in the sectors in which operate the participants of the illicit act. Public corruption involves a public official (whether domestic or foreign) as one party to the corrupt act, whereas private corruption involves only individuals in the private sector. When a particular private company demonstrates corrupt behavior, its clients and suppliers have the possibility to go to competitors if the corruption is noticed. But in the case of government, taxpayers and citizens cannot rely on other organizations to provide the same government services, such as healthcare or public safety. This may explain why corruption in the public sector is perceived to be a much greater threat to society than purely private sector corruption. The level of monopoly of the good or service provided therefore affects the perceived threat.

Definitions of public corruption often emphasize the notion of State versus society relationships.²⁹ Corruption however exists within and between private businesses and individuals in various forms, without any involvement from government officials or agencies. Some examples of corrupt acts in the private sector include bribing, swindling, and mafia-methods.³⁰ Historically, international legislation has focused primarily on public corruption. Some examples include the *OECD Anti-Bribery Convention* and the *United Nations Convention against Transnational Organized Crime* (UNCATOC).³¹ In fact, none of the international instruments create a mandatory framework combating private corruption. To this effect, the OECD demonstrated concern stating that “permissiveness toward private sector bribery could result in a business climate conducive toward foreign bribery, especially where privatization has occurred in high risk areas, energy, telecommunications and transport.”³² Although the UNCAC innovates in criminalizing private corruption, it does so in a non-binding context, calling on States to only “consider” criminalizing private sector corruption.³³ None the less, private sector corruption has received more attention from civil society actors in recent years.³⁴ Its importance is clear when considering that the public and private sectors are more and more intertwined as a result of outsourcing, privatization, rapid growth in the private sector in some countries, and the growing influence of multinational corporations and State-owned enterprises, blurring the lines between public and private funds.³⁵

Amidst public corruption, legislation can be distinguished by the type of public official it targets, whether the official is a domestic public official or a foreign public official. This is the case in Canada where there are separate laws that criminalize each type of offence: the *Corruption of Foreign Public Officials Act* (CFPOA)³⁶ criminalizes the corruption of foreign public officials, whereas the *Criminal Code* criminalizes the corruption of domestic public officials. Other jurisdictions have taken a similar stance in this respect, discussed further below.

v) Other Categories

There are other categories or ways of describing corruption, such as “systemic” versus “individual” or “isolated,” corruption by “commission” versus by “omission,” by the degree of coercion used to perform the illegal act, and the type of benefit provided.

Systemic corruption exists where corruption is pervasive or entrenched in a society. In other words, it exists where it is routine in dealings between the government and private individuals or businesses. In such cases, tension exists between formal and informal rules, as there are strong incentives for public officials, businesses, and individuals to comply with this illegitimate system. In contrast, isolated or individual corruption exists when corruption is rare or consists of a few individual acts.³⁷

Acts of corruption can be carried out by “commission,” but also by “omission”: a public official can either refrain to act or act in the performance of his or her duties, in exchange for a benefit from an individual or business. A concrete example of refraining to act might include a government official ignoring regulatory mishaps or non-compliance that might ordinarily affect a business’ eligibility or continued approval for a permit. These factors as well as the degree of coercion applied by the public official and the type of benefit allotted (monetary, physical good, or creation of a social obligation) are of importance as they may affect decision-making and rationalization by corrupt actors. For instance, for some individuals, “looking the other way” may be more acceptable than being actively corrupt or actively seeking to conclude corrupt transactions. Moreover, benefiting from corrupt practices may be easier to rationalize if an individual is engaged with threatening criminal actors or is under coercion. The same can be said in cases where the benefit received is not immediate but instead the result of the creation of a social obligation: individuals might be less inclined to engage in corrupt behaviour in cases where the counterpart or offering is a financial benefit, compared to less obvious benefits such as future favors or services.

2.2 Corruption as Defined by International Organizations

This section will give an overview of three existing corruption-related international and multilateral treaties, all of which Canada is a signatory: the UNCAC,³⁸ the *OECD Anti-Bribery Convention*, and the IACAC.³⁹ Following this, corruption as defined by international civil society organizations will be discussed.

i) Legal Definitions⁴⁰

It is widely maintained that public corruption refers almost solely to bribery, which is viewed as the “most identified form of corruption.”⁴¹ Indeed, international anti-corruption tools rely for the most part on bribery as a standard offence of public corruption.⁴² Transparency International (TI)⁴³ defines bribery as the “offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust. Inducements can take the form of gifts, loans, fees, rewards or other advantages.”⁴⁴ In this way, it seems that bribery has become almost synonymous with corruption. Some argue that this outcome tends to restrict the scope and applicability of anti-corruption tools by ignoring other illicit acts that also enable personal gains through the misuse of public authority.⁴⁵

One international instrument that differs in this respect is the 2003 UNCAC. This anti-corruption treaty has 140 signatories. It creates offences for corruption in its wider sense, including bribery but also various corruption-related offences such as the abuse of functions,⁴⁶ embezzlement,⁴⁷

illicit enrichment,⁴⁸ trading in influence,⁴⁹ obstruction of justice,⁵⁰ and money laundering.⁵¹ Furthermore, the bribery of national and foreign government officials is criminalized, as well as corruption in the private sector, among other offences.⁵² The specific acts that are criminalized are the offering, giving, promising, acceptance, and solicitation of any “undue advantage.”⁵³ It therefore tackles both the supply and demand sides of corrupt acts. Although there is unfortunately no specific definition of “undue advantage” within the Treaty, there is consensus among scholars that it applies to any type of advantage, whether material or immaterial, monetary or non-pecuniary.⁵⁴

The notion of “undue advantage” is a central one and widely used in corruption-related legislation. The *OECD Anti-Bribery Convention*, the UNCAC, and the *African Union Convention on Preventing and Combating Corruption*⁵⁵ all rely on the notion as part of their main corruption or bribery offences.⁵⁶ Similar terms are used in the IACAC, which refers to the offering or accepting of a “benefit” or an “advantage.”

Aside from the UNCAC, most international or multilateral anti-corruption instruments tend to focus only on the supply aspect of bribery.⁵⁷ The sparse criminalization of foreign demand bribery can be explained by legal issues such as jurisdiction, enforcement, and implementation: it can be argued that controlling supply corruption (or for instance, the offering of a bribe) through extra-territorial legislation applicable to businesses, citizens and domestic government officials operating abroad is much more feasible than controlling the actions of a foreign government official.⁵⁸

The 1997 *OECD Anti-Bribery Convention* is a clear example of a corruption definition that encompasses the supply side of bribery only. In fact, it was developed out of a pledge by OECD Member States to proscribe the bribery of foreign public officials in the same way that OECD countries prohibit the bribery of their domestic officials, therefore aiming at a reduction of corrupt payments.⁵⁹ All 34 OECD member countries and six non-member countries (Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa) have adopted the bribery convention. Its main requirement is that Member States adopt and implement national legislation against the bribery of foreign public officials in the course of international business transactions.⁶⁰ More specifically, the main offence surrounding acts of bribery states that signatories “shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”⁶¹ Although the Convention does not specifically define the term “bribery,” it clearly states that the offering or promising of any undue advantage to any foreign public official, whether pecuniary or not, constitutes a bribery offence.⁶²

The IACAC, adopted in 1996, has 34 signatories.⁶³ Its reach is wider than that of the *OECD Anti-Bribery Convention* in that it criminalizes bribery in the public and private sectors, and also takes into account both the supply and demand sides of bribery. It should however be noted that not all provisions under the IACAC are binding on Member States, similarly to the UNCAC: certain articles are subject to progressive implementation whereas others are conditional to the State’s

constitution and fundamental legal principles.⁶⁴ The IACAC states that it applies to the following acts of corruption: the solicitation, acceptance, offering or granting by or to a public official of “any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions.”⁶⁵

Facilitation payments are a significant subset of the notion of corruption and bribery and have been a hot topic of late, widely discussed by policy makers and by the media. Within the international arena, both the UNCAC and *OECD Anti-Bribery Convention* implementation review mechanisms have acknowledged the need for the criminalization of such payments as part of a comprehensive anti-corruption legal framework.⁶⁶ Although the *OECD Anti-Bribery Convention* specifically provides an exception for small facilitation payments, it has since issued (in November of 2009) recommendations changing its stance.⁶⁷ It has criticized Canada, the United States and Australia, among other States, for their policies on these payments in various country evaluation reports.⁶⁸

The IACAC, similarly to the UNCAC, does not specifically mention the legality or illegality of facilitation payments in the text of its legislation. The IACAC’s review mechanism report of Canada’s implementation (dating 2011) does not specifically request that domestic legislation be modified in order to criminalize such payments. It does however call on Canada to “consider continuing to make efforts to ensure that facilitation payments do not receive favorable tax treatment” and to “consider adopting the measures deemed appropriate to make it easier for the appropriate authorities to detect sums paid for acts of corruption in the event that they are being used as grounds for obtaining such treatment.”⁶⁹

ii) International Financial Institution and Civil Society Definitions

The World Bank and the International Monetary Fund both define corruption in its broadest sense, through various publications and reports. One thorough example is given in “Helping Countries Combat Corruption: The Role of the World Bank”⁷⁰ where the authors qualify corruption as covering a vast range of behaviors. It settles on the following definition: “the abuse of public office for private gain.” Because one of the main roles of the World Bank is to finance governments and support government policies and programs, its main concern is with bribery in the public sector (although it still recognizes the important problem of bribery in the private sector).⁷¹ With this in mind, the abuse of public office for personal benefit through nepotism, State asset theft or the diversion of State assets, regardless of there being a bribe paid, is considered sufficiently broad to encompass the corruption-related acts that the World Bank encounters.⁷² The Bank also lays out specific behavior that falls under the breadth of corruption, such as bribery, theft and isolated or systemic corruption (which may exist in either the public sector or purely private settings) as well as political and bureaucratic corruption (which by their very nature are types of public corruption).

The same can be said of TI, defining corruption as “the abuse of entrusted power for private gain. Corruption can be classified as grand, petty and political, depending on the amount of money lost and the sector where it occurs.”⁷³ This definition can apply to both public and private corruption. In the latter case, the “entrusted power” could consist of the proper management of capital in a private entity. TI also defines some commonly used terms that relate to corruption in the 2009

Anti-Corruption Plain Language Guide,⁷⁴ such as bribery, clientelism, collusion,⁷⁵ conflict of interest,⁷⁶ embezzlement,⁷⁷ extortion,⁷⁸ fraud,⁷⁹ nepotism,⁸⁰ and several others. Within this guide, bribery is defined as “the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust.”⁸¹ Clientelism on the other hand is defined as a reciprocal relationship between a wealthy or more powerful patron and a less wealthy or weaker client. This type of system is labelled as unequal or exploitative, the goal being to exploit resources or favors from the weaker party.⁸²

Civil society organizations and international financial institutions define corruption using the broadest terms. Where corruption seems to receive a more restricted view is in its legal applications, whether in multilateral treaties or domestic legislation. This can be explained by differing priorities among States, including criminal law policy and sovereignty considerations. Furthermore, corrupt acts are criminalized in different ways. Some of the methods of criminalization do not take into account institutional points of view which are usually included in the concept of corruption, whereas other methods choose not to criminalize the behavior, instead identifying it as a question of values and ethics instead. The next sections delve into corruption as defined by national legislation in Canada and in select foreign jurisdictions.

2.3 Definitions in Canada

i) Legal Definitions

Different legal concepts surrounding corruption can be visible not only between countries, but also within one same jurisdiction. For instance, corruption-related offences are often more narrowly defined in legislation than they are in orders in council which set out the mandate of specialized bodies, whose primary goal is to prevent, investigate, and combat corruption.⁸³ This is the case in Québec where the more general terms “corruption” and “collusion” were used to establish the Commission of Inquiry on the awarding and management of public contracts in the construction industry.⁸⁴ However, when taking a closer look at the relevant federal legislation in Canada, such as the CFPOA and in Part IV of the *Criminal Code*, the term “corruption” is not actually defined. This section will examine how these pieces of legislation consider corrupt acts.

- ***Criminal Code***

Under common law, bribery (in both its supply and demand forms) has historically been defined as “the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.”⁸⁵ Domestic bribery has been a criminal offence in Canada since 1892. Other than bribery, the *Criminal Code* contains several offences that can be assimilated to corruption when taken in its broader sense.⁸⁶ They apply to Canadian public officials, as opposed to the CFPOA which deals with officials of foreign States. For example, sections 119 to 149 contain offences that are all related to the administration of justice, such as the bribery of officers and judicial officers, fraud against the government, breach of trust by a public officer, municipal corruption, selling or purchasing office, and many more.

Sections 379 to 427 include fraud-related offences as well as a private corruption offence known as secret commissions. Although this section will not analyze every offence that might fall under the widest definition of corruption, a closer look into a select number of offences that can be assimilated to corrupt acts will be given.

Because the *Criminal Code* does not specifically define the term “corruption,” one way to assess what conduct falls under its reach is to determine what specific conduct is deemed illegal. The offence of breach of trust by a public official, at section 122, states that it is an offence for a public official to commit a fraud or breach of trust in connection with his or her duties. Considering our previous analysis of various categories of corruption, it can be argued that certain behavior falling under this offence’s purview could constitute unconventional corrupt acts (as opposed to conventional corrupt acts, which require reciprocity or an exchange of services). The maximum punishable term of imprisonment under this offence is five years. While the law does not specify or detail what constitutes a fraud or a breach of trust, relevant case law and interpretations given by the courts can assist.

In 2006, the Supreme Court of Canada set out the offence’s underlying elements that must be proven beyond a reasonable doubt, in *R v. Boulanger*.⁸⁷ The court lists the following elements: it must be shown that the accused was an official at the time of the offence and was acting in connection with duties of the office, and that there was a breach in the standard of responsibility and conduct demanded by the nature of the office. Furthermore, the conduct of the accused would have to markedly deviate from the standards expected from an individual in such a position of public trust. Finally, prosecuting authorities must prove that the individual intended to use his or her public profile for a purpose other than the public good.⁸⁸

Other offences dealing with the corruption of public officials in Canada include the bribery of officers and judicial officers, at sections 120 and 119, respectively, of the *Criminal Code*, both punishable by a maximum of fourteen years imprisonment.⁸⁹ The law defines what constitutes an “officer” under section 120. It includes “a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law.”⁹⁰ Section 121 in relation to frauds on the government, punishable by a maximum of five years imprisonment, applies to persons offering or accepting any kind of benefit as consideration, cooperation or assistance with any matter of business relating to the government. Each offence covers both the supply and demand sides of corrupt acts, therefore including, for instance, both the offering and accepting of a bribe or a benefit. They both have a transactional or *quid pro quo* quality, suggesting that they might apply to forms of conventional corruption. The “undue advantage” under these sections includes “any money, valuable consideration, office, place or employment.”⁹¹ For an act to be successfully prosecuted, authorities must be able to prove beyond a reasonable doubt either intent to interfere with the administration of justice, to facilitate the commission of an offence, or to circumvent its detection.⁹² The *Criminal Code* also defines the term “official” for the purpose of this group of offences (from sections 118 to 427), as “a person who holds an office, or is appointed or elected to discharge a public duty.”⁹³

Private corruption in Canada is criminalized in the context of domestic bribery, under section 426 of the *Criminal Code*. This section titled “Secret Commissions,” punishable by a maximum of five years of imprisonment, is a type of private corruption offence that deals with both supply and

demand corruption. It creates an infraction that prohibits an agent (defined as including an employee) from receiving an award, advantage or benefit of any kind as consideration for committing any act related to the affairs or business of the agent's principal (defined as including an employer). It also prohibits any person from corruptly offering or giving an agent such an advantage.⁹⁴ This offence applies to all employment and agency relationships, and includes private sector businesses. Secrecy is one of the main characteristics of this offence: case law has confirmed that one of the underlying elements that must be proven in order to secure a conviction is the omission in disclosing the amount, source and nature of the benefit in an adequate and timely manner. Therefore, if there is adequate and timely disclosure of the source, amount and nature of the benefit, there cannot be a conviction.⁹⁵

The *Criminal Code* provides for automatic debarment following the conviction of certain offences. Section 750(3) titled "disability to contract," applies to persons convicted namely of fraud against the government (section 121) and selling and purchasing office (section 124), but not to the offence of bribery under section 120 or municipal corruption under section 123.

The following paragraphs summarize the categories of offences in the *Criminal Code* deemed most closely related to corrupt acts, using the types and definitions of corruption previously identified in section 2.1, titled "Categories of Corruption":

a) Supply versus demand

These offences criminalize both supply and demand bribery, as they apply to both the offering and acceptance of bribes:

- Bribery of officers and judicial officers (sections 119 and 120 CCC)
- Fraud against the government (section 121 CCC)
- Municipal corruption (section 123 CCC)
- Selling or purchasing office (section 124 CCC)
- Influencing or negotiating appointments or dealing in offices (section 125 CCC)
- Secret commissions (section 426)

b) Public versus private

Aside section 426 in regards to secret commissions, all of the above-mentioned offences under the *Criminal Code* are forms of public corruption, as they necessitate a public official or government counterpart.

c) Conventional versus unconventional

The above sections in the *Criminal Code* can also be categorized as conventional corrupt acts, as they all necessitate a counterpart in exchange for the illegal act. For instance, section 426 requires "any reward, advantage or benefit of any kind as consideration" for the omission or commission of a reciprocal act. Similarly, sections 119, 120, 121, 123, 124, and 125 all require a type of consideration, ranging from the broader notion of a "benefit" to outright payment.

It can be argued that the offences of breach of trust by a public officer and misconduct of officers executing process (sections 122 and 128 CCC respectively) constitute forms of unconventional corruption, as neither requires a transactional counterpart or *quid pro quo* in return for the unlawful act.

d) Grand versus petty

Most of the offences listed above may fall under grand or petty categories depending on the breadth of the corrupt act, as well as the seniority of officials involved. For instance, bribery offences under section 120 may involve high ranking or senior officials. In such cases, these acts would fall under the category of grand corruption, whereas similar acts of bribery involving lower level or administrative officers and smaller bribes would be considered acts of petty corruption.

e) Other

Under the *Criminal Code*, corruption by commission and omission are both criminalized within the above offences, as long as all of the criteria in regard to intention (*mens rea*) and the elements of the infractions (*actus reus*) are met. This equally applies to the *Criminal Code*'s private corruption offence (section 426).

The type of benefit or consideration in exchange for the corrupt act is however defined differently between the same offences in the *Criminal Code*. Sections 119 and 120 CCC (bribery of judicial officers and bribery of officers) use the terms “any money, valuable consideration, office, place or employment,” whereas sections 121 and 123 CCC (frauds on the government and municipal corruption) state more broadly “a loan, reward, advantage or benefit of any kind.” Section 125 CCC (influencing or negotiating appointments or dealing in offices) also uses these terms, with the exception of “loan.”

Although the degree of coercion is neither an essential element nor explicitly provided for within these offences, the courts may consider it upon sentencing. Furthermore, the offence of extortion could be applicable in certain circumstances and is provided for in section 346 of the *Criminal Code*, which applies in cases where an individual uses threats or violence to induce someone to act or to abstain from acting. Extortion is punishable by a maximum penalty of life imprisonment.

- ***Corruption of Foreign Public Officials Act***

The 1998 CFPOA applies to the bribery of foreign public officials, as opposed to Canadian public officials. Like other OECD foreign bribery laws, it does not contain any private bribery provisions (such as *the Criminal Code*'s secret commissions offence).⁹⁶ It defines a foreign official as either an individual holding a legislative, administrative or judicial position in a foreign State, an individual who performs public duties or functions for a foreign State or an official of a public international organization.⁹⁷ Its main corruption offence is the bribery of foreign public officials, which criminalizes the supply side of bribery only, stating that “every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official[...].”⁹⁸ Significant amendments brought to the CFPOA in 2013 include increased

sentencing, the prohibition of facilitation payments, the inclusion of not-for-profit organizations, books and records provisions as well as extended jurisdiction.

The amendments increased the maximum term of imprisonment from five years to fourteen years for bribery offences, bringing the maximum sentence in line with the various corruption and fraud offences that exist under the *Criminal Code* for similar cases of domestic corruption.⁹⁹ The books and records amendment prohibits companies from carrying out transactions or maintaining accounts that do not appear in their books and records, and recording non-existent transactions. Also prohibited are the incorrect recording of liabilities, knowingly using false documents, and the intentional destruction of accounting records earlier than permitted by law.¹⁰⁰ For these provisions to be applicable, the prosecution must demonstrate that they were committed for the purpose of bribing a foreign official, or for hiding such bribery. The books and records provision is therefore not a stand-alone offence. The CFPOA does not define what constitutes ‘adequate’ books and records, underlining the importance of the courts’ interpretation and legislative guidance. Because the provision is still recent, it might take some time before accusations can be brought: for criminal charges to be possible, the law has to have been in force at the time the infraction was committed.¹⁰¹ Considering that corruption offences tend to involve lengthy investigations years after the fact, it is arguable that such cases will not be brought before the court in the immediate future. Legislative guidance and subsequent jurisprudence would remedy this gap.

The new law also changed Canada’s stance in regard to facilitation payments, by providing for the eventual removal of the law’s facilitation payments exception: the CFPOA previously provided a specific exception that allowed “payments made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions.”¹⁰² Out of all of the amendments, it is the only one to provide for delayed enforcement. Canada is one of five jurisdictions in the OECD that currently have a facilitation payments exception in force within its legislative framework, alongside the United States, New Zealand, South Korea, and Australia.

While the law currently defines the term “business,” a central element of the bribery offence, as “any business, profession, trade, calling, manufacture or undertaking of any kind carried out in Canada or elsewhere,”¹⁰³ it previously contained a requirement that the business in question act on a “for profit” basis, thus excluding from its reach not-for-profit organizations. As Canada was the only OECD Member State to have made this distinction, the OECD strongly recommended that it be modified, one of the reasons being that its application was unclear and therefore an obstacle to the law’s proper enforcement.¹⁰⁴

Another significant change occurred in regard to jurisdiction. The amendments now allow the bribery offences committed outside Canada to be prosecuted by Canadian enforcement agencies and government authorities if the offender is a Canadian citizen, a permanent resident, or an entity incorporated or formed under the laws of Canada or one of the provinces. Before this modification, the proof of a “real and substantial link”¹⁰⁵ was required, meaning that a substantial portion of the activities constituting the offence had to take place on Canadian territory.

The *Act* contains a local law exception, whereby an individual or an entity cannot be found guilty of foreign bribery if “the loan, reward, advantage or benefit is permitted or required under the

laws of the foreign state or public international organization for which the foreign public official performs duties or functions.”¹⁰⁶

The courts also have an important role in defining terms used in legislation. It is within their role to interpret legislation and apply their interpretation to the case at hand. In August 2013, a Canadian court ruled on charges brought under the CFPOA which has, for the first time in Canada, defined several aspects of the law. Mr. Nazir Karigar was charged under subsection 3(2) of the *Act* with offering or agreeing to give or offer bribes to India’s Minister of Civil Aviation as well as Air India officials. A total of US\$200,000 in 2006 and US\$250,000 in 2007 were allegedly transferred to Mr. Karigar for the purpose of bribing foreign officials.¹⁰⁷

During the court proceedings, defense argued that the underlying elements of the offence under the CFPOA had not been successfully proven by the prosecution, stating that the term to “agree” to give or offer a benefit implies the existence of an agreement between two individuals.¹⁰⁸ In other words, he suggested that the prosecution must prove beyond a reasonable doubt not only that a bribe or illicit payment had been offered (supply bribery), but that it was subsequently accepted (demand bribery). If this were the requirement under the law, authorities would be tasked with a higher burden of proof: proving both the supply and demand sides of the bribery, for an offence that ultimately only criminalizes supply bribery.

Although there was no evidence put forward as to what ensued after the payments were transferred to Mr. Karigar, the court was satisfied with the prosecution’s arguments and stated that the term “agree” does not require proof that the bribe was carried out or accepted, and that conspiracy to commit the offence of bribery is encompassed within the law.¹⁰⁹ The court also pointed out that to restrict the term “agree” to the act of two parties to a transaction would be to restrict the law itself as well as its objectives. It also stated that to do so would ultimately require evidence stemming from a foreign jurisdiction, thus creating enforcement difficulties.¹¹⁰ Although the court has not yet ruled on sentencing, the prosecution has pled for a four year incarceration period.¹¹¹ This case involves grand corruption as a high ranking foreign official was on the receiving end of the bribe. Due to its transactional nature, it can also be characterized as conventional corruption.

Several other corruption related charges have been brought under the CFPOA and the *Criminal Code* that are either pending before the courts or have resulted in settlements. An overview of these cases will be given in the enforcement chapter.

ii) Scholarly Definitions

Scholarly journals around the world have attempted to define and study the concept of corruption. In Canadian journals, similar attempts have been made. In an article discussing Canada’s efforts to combat corruption, the author adopts the view of the World Bank, defining corruption as “the exploitation of a position of trust, typically in the public sector, in order to receive a private gain, which may or may not be financial.”¹¹² Bribery is adopted as the most common type of corruption, examples of which include cash transactions, improper political contributions, kick-backs, gifts or illicit payments made in order to secure public contracts or regulatory action or regulatory inaction.¹¹³

Corruption has been identified as a main crime sector in Canada, along with organized crime and violent crimes. It has also been labelled a type of white collar crime, along with various types of fraud and embezzlement.¹¹⁴ A study conducted on corruption cases (published in the *Canadian Journal of Criminology*)¹¹⁵ involving law enforcement in Québec spanning over 30 years concluded that the perception of corruption was often erroneously limited to bribes. In fact, this definition was considered partial, not taking into consideration the myriad of other underlying conducts, such as extortion, the protection of illegal activities, sharing confidential information, and kick-backs. This same study defines corruption as either “systemic” or “individual,” based on the goal of the illegal conduct. In cases of systemic corruption, the goal is in furtherance of a group of individuals or criminal organization, whereas the goal of individual corruption is centered on the perpetrator.¹¹⁶

Another study assessing the incidence of white collar crime in Canada defined corruption in its conventional form (*quid pro quo* corruption or necessitating a transaction), as a public official “accepting bribes in return for favours” and “bribing a public official to obtain favours.”¹¹⁷ Although this definition restricts corruption to bribery, it considers both its supply and demand aspects. It also similarly qualifies corruption as a type of white collar crime.¹¹⁸

Another opinion stresses the important task of “modeling corruption and its correlates” and argues that a working definition of corruption should encompass the notion of misuse of public office for private gain. This broad concept begs the question as to what constitutes “misuse” and “gain,” and what expectations lie in the notion of “public office.”¹¹⁹ The answers may differ based on the audience: politicians and political advisors might stress that corruption is about “breaking increasingly elaborate contracts between office-holders and the state.”¹²⁰ On the other hand, corporations and economists might stress the prevalence of “rent-seeking officials who hold processes and players for ransom.”¹²¹ For citizens, corruption might equate to a breakdown of trust between government and its people.

Scholars classify corruption as either grand or petty. Grand corruption, often linked to political corruption, tends to focus on the illicit diversion of public funds for personal use, setting aside the broader notion of political ethics. Securing political power, which could be construed as a type of non-financial personal enrichment, is also a motive for corrupt behavior which is considered grand corruption.¹²²

Criminologists and political scientists, whether in Canada or abroad, tend to ascribe corruption its wider meaning which encompasses a host of various behaviors, whereas legal definitions established by the courts or by legislation are much more precise and restrictive. This is due to several factors that pertain to domestic policy, international relations, Canadian criminal procedure and jurisdiction.

iii) Media Use of the Term Corruption

Within Canada, the media seems to refer to corruption almost exclusively in relation to ongoing investigations and arrests, cases brought before the judiciary, or legislative developments. A media review was conducted spanning the last three years. The goal of the review was to give an overview on how Canadian media has reported on corruption in recent years. This section offers a brief overview of the search results obtained.¹²³

Due to the high volume of results, the term “corruption” was searched in conjunction with other terms. When paired with the term “scandal,” the vast majority of news articles centered on Québec’s Commission of Inquiry or *Charbonneau Commission*,¹²⁴ arrests carried out by Québec’s anti-corruption squad,¹²⁵ municipal corruption in Québec,¹²⁶ and ongoing corruption cases.¹²⁷ Only a few news articles using this set of keywords focused on foreign bribery. Of these, most were in relation to Québec construction or engineering firms. Using “corruption” in conjunction with either of the terms “case,” “investigation” or “trial,” results were more diverse in geography. News articles discussed foreign and domestic corruption cases from Ontario,¹²⁸ British Columbia,¹²⁹ Québec,¹³⁰ and Alberta.¹³¹

The same exercise was conducted, replacing “corruption” with “bribery.” This resulted in more discussion surrounding foreign bribery cases under Canada, United States,¹³² or United Kingdom¹³³ legislation. Nonetheless, half of the results still related to corruption in Québec, discussing the *Charbonneau Commission* and ongoing cases, including municipal corruption. The terms “illegal payments” or “illicit payments” produced similar results, but also included fiscal fraud cases and private corruption charges.¹³⁴

Other terms falling under the broader scope of corruption were reviewed, such as “misappropriation,” “kick-back,” “embezzlement,” and “extortion.” The latter term yielded news articles discussing court cases involving various types of charges, including organized crime charges¹³⁵ and extortion charges.¹³⁶ “Embezzlement” and “misappropriation” on the other hand yielded results relating to investigations and cases of fraud and theft.¹³⁷ The majority of the results containing the term “kick-back” focused on Québec corruption cases relating to the construction industry and the public sector.

Several news articles resulted in combining the search for “corruption” and “organized crime.” The vast majority of the results surrounded the *Charbonneau Commission* and arrests pursuant to corruption-related charges in Québec, including initial calls for action on the political scene as well as the Commission’s ensuing activities. The link between organized crime and the construction industry is highlighted and widely discussed in these news articles. Other than Québec cases, organized crime cases are covered across Canada, mostly in Ontario and Vancouver.

It can be argued that a significant portion of news articles in Canada in the last three years have centered on corruption and organized crime in Québec. Public corruption and municipal corruption, relating to political corruption and the infiltration or organized crime in the construction industry, seem to have taken center stage in the media across the country.

2.4 Foreign Definitions

This section gives a brief overview of foreign and domestic corruption legislation in the United States, the United Kingdom, and Australia. Specific corruption-related offences as well as their main exceptions such as local law exceptions and facilitation payments shall be discussed. Like Canada, all three countries are members of the OECD and have ratified the *OECD Anti-Bribery Convention* as well as the UNCAC.

i) United States

The *Foreign Corrupt Practices Act* (FCPA),¹³⁸ the United States' main transnational corruption law, criminalizes the corruption of foreign public officials. Dating from 1977, it is part of the *Securities Exchange Act of 1934*¹³⁹ as amended and is the oldest foreign corrupt legislation subject to our study. Preceding the 1997 *OECD Anti-Bribery Convention*, it is said that the latter was modeled after the FCPA.¹⁴⁰ Both the United States Department of Justice (DOJ)¹⁴¹ and the Securities and Exchange Commission (SEC)¹⁴² have jurisdiction to prosecute individuals and companies under the *Act*.

The FCPA covers two types of provisions: anti-bribery provisions and accounting (books and records) provisions.¹⁴³ Its fundamental position warrants that U.S. individuals and businesses are prohibited from bribing foreign officials or political parties.¹⁴⁴ The *Act's* anti-bribery provisions (applicable only to supply-side bribery) therefore prohibit “offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any improper advantage in order to obtain or retain business,” which is known as the business purpose test and is broadly interpreted.¹⁴⁵

A few important aspects of this law require mentioning. First is the local law defense: in determining the legality of a potential illicit transaction or offer, whether or not the payment, gift, or hospitality is “lawful under the written laws” of the foreign State are elements taken into consideration. To this end, the gift or payment must be an item of nominal value (such as cab fare, reasonable meals or entertainment expenses, and company promotional items) and must be unlikely to improperly influence a public official.¹⁴⁶ In this regard each transaction must be considered on a case-by-case basis, with no “one size fits all” solution in determining whether a payment is equivalent to an illegal bribe or a permissible gift. This allows for some flexibility in business transactions in taking into account foreign customs relating to gifts and hospitality.¹⁴⁷ A second important aspect is the facilitation payments exception. These payments are considered legal when they involve non-discretionary acts and are defined as “any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”¹⁴⁸

The FCPA defines a “foreign public official” as including an officer or employee of a foreign government or public international organization, or any department or agency, including any person acting in an official capacity for or on behalf of any such government or organization.¹⁴⁹ Although there is no such specific definition in regard to the notion of “improper advantage in the conduct of international business” in the law, the DOJ has released a guidance document offering some insight on what constitutes an improper “benefit.” The guide states that an improper benefit can take many forms but most often involve cash payments, sometimes veiled as commissions and consulting fees, as well as travel expenses and expensive gifts.¹⁵⁰

The FCPA's accounting provisions apply to domestic and foreign companies whose securities trade on a national securities exchange in the United States, including foreign issuers with exchange traded American Depository Receipts. They also apply to companies whose stock trades

in the over-the-counter market in the United States and who file periodic reports with the Commission, such as annual and quarterly reports. The provisions require that companies that have securities registered with the SEC, or that are required to file reports with the SEC, adhere to recordkeeping and internal controls provisions.¹⁵¹ The recordkeeping provision requires that entities “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”¹⁵² The internal controls provision requires that a system of internal accounting controls providing “reasonable assurances” that transactions are “executed in accordance with management’s authorization be in place.”¹⁵³ Both the SEC and the DOJ can prosecute under these provisions, however only the latter can prosecute criminally. Criminal liability can be asserted in instances where a person “knowingly” circumvents or fails to implement a system of internal accounting controls, or “knowingly” falsifies the books and records.¹⁵⁴

The law’s application is quite wide when considering the breadth of companies and individuals that fall under its jurisdiction. It applies to three categories of individuals and entities: issuers, domestic concerns, and a residual category of persons and organizations that act in furtherance of an FCPA violation while in the United States, regardless of their nationality.¹⁵⁵ An Issuer under the *Act* is either a company listed on a national securities exchange in the United State or a company whose stock trades in the over-the-counter market and is required to file SEC reports.¹⁵⁶ A domestic concern includes either “(a) U.S. citizens, nationals, and residents and (b) U.S. businesses and their officers, directors, employees, agents, or stockholders acting on the domestic concern’s behalf.”¹⁵⁷ Penalties under the FCPA bribery provisions range from fines to incarceration, the maximum incarceration being five years and the maximum fine in the order of US\$2 million per count.¹⁵⁸

The United States domestic bribery statute, titled *Bribery of Public Officials*,¹⁵⁹ similarly prohibits giving, offering or promising “anything of value,” but also prohibits demand side bribery (“corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value”¹⁶⁰). It also proscribes the acceptance of certain gratuities by public officials. The U.S. Supreme Court in a 1999 ruling explained the subtle differences between these two illegal behaviors: intent is the deciding factor separating bribery from the acceptance of a gratuity.¹⁶¹ While the act of bribery necessitates a reciprocal character or *quid pro quo*, the latter does not.¹⁶² There needs to be “specific intent to give or receive something of value in exchange for an official act”¹⁶³ for an individual to be convicted of bribery under this legislation. The maximum punishment under these provisions is fifteen years imprisonment as well as possible fines.¹⁶⁴

While there is no federal statute that deals with private or commercial bribery, the majority of U.S. States has enacted criminal commercial bribery legislation.¹⁶⁵ Federal liability in regard to private bribery still exists, although not as one single federal standard. Rather it is encompassed within the *Foreign Travel or Transportation in Aid of Racketeering Enterprises Act*,¹⁶⁶ also commonly known as the *Travel Act*. It applies to individuals who travel in “interstate or foreign commerce” (within the United States but across State borders) or who use the mail or “any facility in interstate or foreign commerce” with the intent to commit certain criminal acts.¹⁶⁷ Prohibited acts under the law include the distribution of proceeds relating to any “unlawful activity” as well as the promotion, management, or establishment of any such activity. The term “unlawful activity” is considered as including bribery.¹⁶⁸ Violations under the *Travel Act* are punishable by a

maximum incarceration of five years, and may include a fine. U.S. courts have recognized that State laws criminalizing bribery and corruption can serve as a basis for bringing charges under the federal Travel Act provisions.¹⁶⁹

There is however federal legislation concerning corrupt acts other than bribery. These are addressed by the *US Criminal Code* (Title 18 of the US Code), and the *Racketeer Influenced and Corrupt Organizations Act* (1970) (RICO). The latter was enacted following the conclusion that organized crime had succeeded in infiltrating and exercising corrupt influence on businesses and labor unions throughout the country. New remedies were therefore deemed necessary to combat this threat.¹⁷⁰ RICO claims are difficult to successfully prosecute: they require proof of a crime within a crime. To this effect, RICO claims can be predicated on various federal criminal violations as well as State criminal laws. Predicate offences may include murder, kidnapping, gambling, arson, robbery, bribery and extortion, to name a few. In order to successfully prove a RICO claim, the prosecution must first successfully prove the underlying offence.¹⁷¹

ii) United Kingdom

In the United Kingdom, the main anti-corruption law is the *UK Bribery Act*,¹⁷² which came into force in July 2011. Unlike the United States and Canada, it harmonizes both foreign and domestic bribery legislation into one law. Other criminal offences are covered by other legislation, such as the England and Wales 1977 *Criminal Law Act*.¹⁷³

The United Kingdom has taken a different approach than Canada and the United States by criminalizing both public and private corruption in one piece of legislation the *UK Bribery Act*. It is one of few jurisdictions to treat private corruption equally to public corruption offences and also one of few jurisdictions to criminalize demand bribery.

The *Act* contains: a general offence of offering, promising or giving a bribe (section 1), a general offence of requesting, agreeing to receive or accepting a bribe (section 2), a distinct offence of bribing a foreign public official to obtain or retain business (section 6), as well as a new strict liability offence for commercial organisations that fail to prevent bribery by those acting on their behalf (their associated persons), where the bribery was intended to obtain or retain a business advantage for the commercial organisation (section 7).¹⁷⁴ Although the *Act* does not contain any accounting provisions, the offence to prevent bribery may be successfully prosecuted unless the entity establishes that it had effective internal controls at the time the offence was committed.¹⁷⁵ Furthermore, the *Act* also contains a defence for conduct that would constitute a bribery offence where the conduct was necessary for the proper exercise of any function of the intelligence services or the armed forces engaged in active service (section 13).

Its jurisdiction is also far reaching as it applies to individuals or companies that are nationals, regardless of where the illicit act was committed. Jurisdiction can also be established where the person committing the offence has a close connection with the United Kingdom by virtue of being a British national or resident, an entity incorporated in the United Kingdom, or a Scottish partnership.¹⁷⁶

Due to the *Act's* significant extraterritorial reach, its prevention offence and the absence of defenses previously provided by the FCPA (the *UK Bribery Act* does not contain a facilitation

payments exception), the new *Act* caused some alarm throughout the international business community. In order to offer clarity, a guide was issued in 2011.¹⁷⁷

Section 7 of the *Act* creates an offence where a commercial organization fails to “prevent persons associated with them from committing bribery on their behalf.” Guidance on this matter establishes that proving the company had adequate procedures in place to prevent acts of bribery is considered a full defense.¹⁷⁸ Under section 7, only a “relevant commercial organization” can commit an offence, which is defined “as a body or partnership incorporated or formed in the United Kingdom irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation.”¹⁷⁹ As long as the organization is incorporated or is a partnership, it falls under this definition, regardless of whether it pursues charitable, educational or public functions.¹⁸⁰ The *Act* has clearly gone down a different road in terms of how a company should prevent or mitigate corruption charges with the “adequate measures” defense.

Although sections 1 and 2 of the *Act* deal with public and private, supply and demand *domestic* bribery, section 6 deals with the bribery of *foreign* public officials. It creates an offence where the illegal act is committed in order to obtain or retain business or an advantage in the conduct of business. The offences include offering or accepting a financial or other advantage to bring about the “improper performance” by a person of a relevant function or activity, or to reward such a performance. The notion of “improper performance” is defined in the *Act* as amounting to “a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust.”¹⁸¹ The test for deciding whether a function or activity has been performed improperly relies on what a reasonable person would expect in relation to the performance of that function or activity.¹⁸²

A “foreign public official” is defined as including officials who hold a legislative, administrative or judicial position of any kind of a country or territory outside of the United Kingdom. Officials or agents of a public international organization, such as the United Nations or the World Bank, are also considered foreign public officials.¹⁸³ The *UK Bribery Act*, similarly to the FCPA and CFPOA, has a local law exception. For the purposes of section 6, the prosecution must demonstrate that the undue advantage was one that the official was not permitted to receive under the foreign jurisdiction’s domestic law.

Penalties under the *Act* in relation to sections 1, 2 and 6 include a maximum incarceration period of ten years as well as a fine, whereas section 7, the failure to prevent bribery in a commercial organization, is punishable by a fine only.¹⁸⁴

iii) Australia

Australia’s *Criminal Code Act*¹⁸⁵ contains both domestic and international bribery offences. Division 70 of the Code criminalizes the bribery of foreign public officials. It came about with the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act* of 1999, Australia’s response to its obligations under the *OECD Anti-Bribery Convention*. It shares similarities with the *OECD Anti-Bribery Convention* as well as the CFPOA and FCPA in that it addresses the supply side of transnational bribery only (or supply bribery).

It differs however by adding an additional layer of proof, requiring that authorities establish that the illicit offer was made “with the intention of influencing” the foreign official to “obtain or retain business” or to “obtain or retain a business advantage that is not legitimately due.”¹⁸⁶ A business advantage is defined as “an advantage in the conduct of business.”¹⁸⁷ The Code specifically defines “benefit” as including any advantage, not limited to property. The Australian *Criminal Code* creates two defenses in relation to foreign bribery: lawful conduct in the foreign public official’s country and for facilitation payments.¹⁸⁸ The latter defense is only available if certain recordkeeping requirements are followed, such as keeping detailed records that include the value of the benefit, the identity of both the foreign official and the employee involved as well as particulars of the routine government act in question.¹⁸⁹

In 2012, Australia conducted a proactive public consultation on the question of the facilitation payment defense in view of taking a stance on whether or not to implement the OECD recommendation. Guidance has also been issued to clarify that the existing defense is restricted to smaller payments, at the recommendation of the OECD in its Phase 2 report.¹⁹⁰ Previously, reference was made to “government actions of a minor nature” rather than payments of a minor nature.¹⁹¹ Australian Government guidance now urges companies to “resist” making facilitation payments and argues that gains may be achieved by refusing to make these payments.¹⁹²

The offence of bribing a foreign public official is punishable by an imprisonment period of no more than ten years and/or an AU\$1.1 million fine for individuals.¹⁹³ For corporations, the maximum fine was increased in 2010 to the greatest of either AU\$11 million, three times the benefit borne from the illegal payment, or 10% of the company’s annual turnover during the twelve months preceding the offence.¹⁹⁴ Furthermore, offenders are automatically disqualified from managing a company for five years, which can be extended up to twenty years upon request.¹⁹⁵ Offenders can also be disqualified from acting as an officer in a financial institution.¹⁹⁶ Fraud and domestic bribery carry the same maximum penalties as foreign bribery. The domestic bribery offence is provided for by Division 140 of the same law. Both supply and demand bribery are considered an offence under this section of the *Criminal Code*, applicable to domestic public officials.

Jurisdiction for foreign bribery offences can be established in instances where the act occurs wholly or in part in Australia.¹⁹⁷ In instances where the offence occurs outside Australia, jurisdiction may be asserted if the offence was carried out by an Australian national or by an entity incorporated under Australian law. The nationality principle in this case applies to subsidiaries located abroad where incorporation occurs in Australia: an offshore subsidiary of an Australian company not incorporated under Australian law and acting without any Australian citizens or residents would be considered outside the scope of the Act.¹⁹⁸

3. Enforcing Corruption

3.1 Enforcement in Canada

i) Enforcement Authorities and Bodies

In Canada, the enforcement of the CFPOA is undertaken by the Royal Canadian Mounted Police (RCMP). The mandate is specifically referenced in their Commercial Crime Program which has over 450 employees within 27 sections located across the country.¹⁹⁹ The June 2013 amendments to the CFPOA have granted the RCMP exclusive authority to lay charges under the *Act* which states that charges can be laid by “an officer of the Royal Canadian Mounted Police or any person designated as a peace officer under the *Royal Canadian Mounted Police Act*.”²⁰⁰ The decision to prosecute is however made by the prosecution services which include the Public Prosecution Service of Canada (PPSC)²⁰¹ as well as provincial Crown Attorneys offices. In regard to domestic bribery charges under the *Criminal Code* of Canada, both provincial and municipal authorities (as well as the RCMP) may lay charges relating to anti-corruption.²⁰²

Within the RCMP’s Commercial Crime Branch, the International Anti-Corruption Unit was established in 2008. It was tasked with investigating allegations that “a Canadian person or business has bribed, offered or agreed to bribe a foreign public official, allegations that a foreign person has bribed a Canadian public official that may have international repercussions, and allegations that a foreign public official has secreted or laundered money in, or through, Canada.”²⁰³ It was also tasked with requests for international assistance.

In June 2013, the RCMP launched a new division, the National Division, which includes the Financial Integrity Unit. It has a dual mandate which includes a focus on sensitive or high risk investigations into significant threats to Canada’s political, economic and social integrity, and providing protective services and protecting designated sites in the National Capital Region.²⁰⁴ This is understood to include investigations into the corruption of Canadian and foreign officials. Since its inception in 2013, the National Division has investigated and charged Senator Patrick Brazeau and former Senator Mac Harb in relation to housing and living expenses. Charges include counts of breach of trust and fraud under sections 122 and 380 of the *Criminal Code*.²⁰⁵ The Division has also laid charges against several individuals under the CFPOA, including against a former SNC-Lavalin executive and a citizen of Bangladesh following an investigation into the awarding of a contract for supervision and consultancy services in relation to the construction of the Padma Multipurpose Bridge in Bangladesh.²⁰⁶ SNC-Lavalin is one of the ten largest engineering firms in the world. This investigation was reportedly initiated at the request of the World Bank, which loaned C\$1.2 billion to the government of Bangladesh for the construction of the bridge.²⁰⁷

Provincial authorities also have units tasked with corruption-related enforcement. One such example is the Ontario Provincial Police (OPP). Its Anti-Rackets Branch investigates enterprise crime which includes multi-jurisdictional and transnational fraudulent schemes, political corruption, secret commissions, frauds related to health services, and multi-jurisdictional fraudulent schemes that target seniors.²⁰⁸ The Branch has a specialized Corruption Unit which

investigates corruption allegations that involve business activities within provincial and municipal governments, ministries, and agencies.

In 1993, the Anti-Rackets Branch created what is now called the Canadian Anti-Fraud Centre, a police-led call center that gathers information on fraud and criminal organizations. It prepares investigative reports and provides assistance and intelligence to law enforcement and regulatory agencies in Canada, the United States and abroad. The Center is jointly managed by the OPP, the RCMP and the Competition Bureau of Canada. Reports from the public can be made online, by email, or telephone. The Center reports collecting data from more than 25,000 victims per year. Its focus is geared towards fraud-related crimes such as telemarketing fraud, letter fraud, and identity theft.²⁰⁹

In Québec, a specialized anti-corruption unit was created by the provincial government in 2011, the “Unité permanente anticorruption” (UPAC). With over 300 individuals, its role includes coordinating and supervising the enforcement of corruption-related crimes in the province. Members are pooled from various pre-existing organizations, including namely the “Commission de la construction du Québec,” the “Régie du bâtiment du Québec,” “Revenu Québec,” and Québec’s provincial police, the “Sûreté du Québec.” A specialized team of prosecutors is tasked with bringing accusations against suspects following investigations. This team of prosecutors forms the “Bureau de lutte à la corruption et à la malversation,” also created in 2011.

The UPAC has carried out 66 arrests last year, bringing the total number of arrests since its inception in 2011 to 118. The arrests relate to charges of fraud against the government, abuse of trust, organized crime and conspiracy under the *Criminal Code*, to name a few.²¹⁰ It also added to its team a municipal corruption force comprised of roughly twenty individuals, the “Escouade de protection de l’intégrité municipale,” bringing the total number of UPAC members to 320. The UPAC operates a hotline whereby wrongdoing may be reported. The *Loi concernant la lutte contre la corruption* or *Anti-Corruption Act* of 2011 is the law which establishes the office of the Anti-Corruption Commissioner, responsible for the UPAC, as well as a procedure to facilitate the disclosure of wrongdoings to the Commissioner. The *Act* defines the term wrongdoing as including contraventions to federal or Québec laws or regulations pertaining to “corruption, malfeasance, collusion, fraud or influence peddling”²¹¹ as well as a “misuse of public funds or public property or a gross mismanagement of contracts”²¹² by public sector officials. In 2013, the hotline received roughly 1,250 reports, an increase of 40% compared to the previous year.²¹³

The “Autorité des marchés financiers” (AMF),²¹⁴ Québec’s provincial securities regulator, has been designated under the *Integrity in Public Contracts Act*²¹⁵ to assess and issue authorizations to businesses that wish to enter into public contracts and subcontracts with Québec government departments, agencies and municipalities. This authorization procedure was put in place by the *Act* in 2012 and provides for conditions under which a company can receive or renew such an authorization. A public register of authorized companies is also made available. In order to assist businesses with their applications, the AMF issued a guide in January 2014.²¹⁶ Legal persons and individuals who have been found guilty of certain offences in preceding years, either in Canada or by a foreign jurisdiction, may see their authorizations revoked or refused.²¹⁷ There is a long list of offences leading to such a refusal. These include infractions under the *Criminal Code* such as bribery, fraud, drug trafficking, and organized crime as well as offences under various other laws

(the *Competition Act*,²¹⁸ the CFPOA, the *Income Tax Act*,²¹⁹ etc.²²⁰). Furthermore, enterprises that have ongoing business relationships or connections with natural or legal persons who are linked to organized crime or engage in drug trafficking or money laundering schemes may be refused or revoked under the law.²²¹ The verification process includes cooperation from various provincial bodies. The information is first communicated to the UPAC who performs the audits it considers necessary, in conjunction with various provincial authorities. UPAC then sends the AMF an opinion indicating reasons for refusal or acceptance. With this information, the AMF then issues a decision as to the authorization application.²²²

The *Charbonneau Commission* was created in 2011 to investigate occurrences of corruption and collusion strategies in the granting and management of public contracts in the construction industry as well as to investigate the level of possible infiltration of criminal organization groups. As of January 14, 2014, the Commission stated that it had heard the testimony of 111 witnesses over the period of 151 days of hearings.²²³ These 111 individuals were selected out of over 1,000 people that were met in person. Over 6,000 communications from the public were reviewed during the same period.²²⁴ Although the Commission has the power to compel witness testimony and documents, testimony cannot be held against persons appearing in front of the Commission.²²⁵ Following the facts and testimony gathered during the Commission's investigation, it will issue a report that will include recommendations that might include legislative, regulatory, or organizational changes aimed at combating and preventing corruption in the construction industry, as well as the infiltration of organized crime.²²⁶

Canada's financial intelligence unit, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), was created in 2000. It is an independent agency that reports to the Minister of Finance, who is in turn accountable to Parliament for its activities. The Centre was established under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA)²²⁷ and its Regulations. Its mandate includes facilitating the detection, prevention and deterrence of money laundering and the financing of terrorist activities, while ensuring the protection of personal information. The Centre has issued several guidelines that may assist entities in putting together compliance programs and internal controls processes and touch upon specific types of transactions that are regulated, such as suspicious transactions and large cash transactions, as well as client identification and record-keeping requirements.²²⁸

A new transparency initiative was announced whereby Canadian companies in the extractive industries, including mining, oil and gas, will be required to disclose payments made to domestic and foreign governments. The Canadian government will enact legislation by April 2015 requiring such companies to publicly report payments made to governments for resource projects. The Canadian government indicated that it intends to consult with the provinces, industry, and civil organizations as it formulates and implements the new reporting regime. Specific enforcement details as well as the use of any penalties for non-compliance have not yet been released. NGOs and industry organizations have however formulated possible rules for a disclosure regime. This is the case of the Canadian Extractive Resource Revenue Transparency Working Group that has issued recommendations in January 2014. It recommends that the act of reporting inaccurate information or the failure to report altogether be sanctioned in a manner that is "consistent with the current enforcement regime of provincial securities disclosure requirements, and that such penalties are proportionate to the violation and its impact."²²⁹ Furthermore, it recommends that

the disclosure requirements be implemented through securities regulators due to the fact that they have the expertise to ensure that public companies and foreign companies seeking to raise capital in Canadian markets comply with the disclosure obligations.²³⁰

Other Canadian organizations have acknowledged the importance of fighting the harmful effects of corruption and have recently increased resources focusing on its prevention. For instance, the Canadian Association of Chiefs of Police's Organized Crime Committee has planned to support a study on corruption and collusion in 2013-2014. The scope of the study will include looking into the involvement of organized crime in legitimate industries. The Committee will also explore avenues for the implementation of its recommendations.²³¹

ii) Cases

Although *R v. Karigar* is the first case that went to trial to date under the CFPOA, there have been a few other prosecutions under the *Act* that have resulted in settlements.²³² A brief overview of these cases will be given in this section as well as a select few notable organized crime and domestic corruption cases.

• Hydrokleen Systems

*R v. Watts*²³³ was the first prosecution under the CFPOA and is a good example of a prosecution involving both supply and demand bribery. The accusations surround the bribery of a United States immigration officer, Hector Ramirez, who worked at the Calgary International Airport. Mr. Watts was President and majority shareholder of Hydrokleen Systems, an oil refinement services company with operations in Canada and the United States. In order to secure entry of its employees into the United States, the company hired a United States immigration officer as a consultant and, through Genesis Solutions 2000, a company owned by the latter based in Alberta, made payments over the course of a year in exchange for the favorable processing of employee visas. The immigration officer also made it more difficult for Hydrokleen's competitors to enter the country, unbeknownst to the accused. Approximately 33 illegal payments amounting to approximately C\$28,000 were made. In 2005, Hydrokleen entered a plea of guilt on one count of bribery under the *Act* before the Alberta Court of Queen's Bench. The company was sentenced to a C\$25,000 fine.²³⁴ Hydrokleen, its President (Mr. Watts), and Operations Coordinator (Mr. Bakke) were all charged under the CFPOA as well as under section 426(1)(a)(i) of the *Criminal Code* (the secret commissions private bribery offence). As part of the settlement, the charges against the individuals were dropped. The immigration official (Mr. Ramirez) was also charged and pleaded guilty in 2002 to two counts of corruptly accepting secret commissions under section 426(1)(a)(ii) of the *Criminal Code*.²³⁵ While the prosecution requested that Mr. Ramirez serve nine months of prison time and pay a fine in the amount of approximately C\$30,000, defense counsel requested a conditional sentence. The court ordered that Mr. Ramirez serve a six-month incarceration period without a fine. In this case, provincial prosecution took the lead, as opposed to the federal prosecution service, whose mandate is to prosecute offences under federal statutes.²³⁶ This may be explained by the fact that initially, the investigation was initiated under section 426 of the *Criminal Code*.²³⁷

In this case, the lack of a demand bribery provision within the CFPOA was complemented by the secret commission offence in the *Criminal Code*: because the foreign official committed the

offence while in Canada, authorities had jurisdiction to lay charges under section 426. The act of bribery in this case can be qualified as an act of petty corruption, as it involved lower ranking official as well as more administrative services. It is also “conventional” in nature due to the services provides in exchange for a benefit, in this case cash payments.

- **Niko Resources Ltd.**

The RCMP’s International Anti-Corruption Unit conducted a six-year investigation resulting in the laying of foreign bribery charges against Niko in 2011, tackling the supply-side of the bribe.²³⁸ Although this case was settled with a significantly higher monetary fine than in the case of Hydrokleen, no individuals were charged, only the legal entity. Niko, a Calgary-based oil and gas exploration and production company with operations in several countries, was charged with the bribery of a foreign public official under section 3(1)(b) of the CFPOA.²³⁹ The company provided the Minister for Energy and Mineral Resources of Bangladesh with a C\$190,000 vehicle for personal use as well as trips to Canada and the United States. During this time, the Minister was evaluating how much compensation was owed to villagers due to damages caused by an explosion at one of Niko’s natural gas fields. Following an agreed statement of facts produced to the court by both parties, the company was sentenced in 2011 to a C\$9.5 million fine and victim surcharge, including a three-year probation order that required the implementation of a detailed compliance program subject to review by an independent auditor.²⁴⁰ The bribes in this case are types of public sector corruption and fall under the categories of grand and conventional corruption, similarly to the following case.

- **Griffiths Energy International Inc.**

Another case involving an oil exploration and development company based in Calgary was settled in 2013 with fines in the amount of C\$10.35 million. Although this case is similar to that of Niko’s in regard to sentencing, industry and accusations, it is significantly different in that the company, Griffiths Energy International Inc., voluntarily self-disclosed its internal investigation to the RCMP’s International Anti-Corruption Unit and the federal and provincial prosecution in November 2011. Griffiths pleaded guilty to section 3(1)(b) of the CFPOA for using fabricated consulting agreements to funnel or attempt to funnel US\$2 million to entities owned and controlled by Chad’s ambassador to Canada as well as his spouse.²⁴¹ The prosecution has also stated that it intends to seek the recovery of sums pursuant to the proceeds of crime provisions under the *Criminal Code*. These provisions include section 354 regarding the possession of property obtained by crime, and Part XII.2 of the *Criminal Code* titled “Proceeds of Crime.”²⁴² Part XII.2 defines “proceeds of crime” as including “any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result”²⁴³ of an offence committed in Canada.

With the amendments brought to the CFPOA in June of 2013, it will be technically possible for authorities to bring charges relating to books and records (in the context of foreign bribery), in conjunction with those of bribery, in future cases such as Niko, Griffiths, Hydrokleen and *R v. Karigar*, where the evidence demonstrates that the company’s books and records were manipulated in order to hide or facilitate a bribe.

- ***R v. Kandola***

In 2012, two individuals, Baljinder Singh Kandola and Shminder Singh Johal, were accused of importing and trafficking cocaine pursuant to the *Controlled Drugs and Substances Act*,²⁴⁴ importing firearms, bribery and breach of trust under the *Criminal Code*.²⁴⁵ Mr. Kandola was employed at the Canadian Border Services Agency (CBSA) as a Border Services Officer. He facilitated the smuggling of over 200 kg of cocaine into Canada from the United States and in exchange received a total of C\$10,000.²⁴⁶ He was charged under sections 120a) and 122 of the *Criminal Code*, along with other drug, conspiracy and firearm offences. Through his employment as a public officer, he was charged and found guilty of corruptly accepting bribes under section 120a) (demand bribery). He was also charged and convicted of breach of trust by a public officer under section 122. His co-accused, Mr. Johal, was also accused and convicted of conspiracy, drug and firearm offences, as well as corruptly offering or giving bribes to a public official (Mr. Kandola) under section 120b) (supply bribery). Mr. Kandola received a fifteen-year incarceration sentence, whereas his co-accused, Mr. Johal, received an eighteen-year sentence.²⁴⁷ In this public sector corruption case, both the supply and demand sides of domestic conventional bribery were successfully prosecuted, along with other unconventional corruption-related offences (breach of trust). Due to the nature of the corrupt acts carried out as well as the government officials' lower ranking, the corruption could be qualified as a "petty," similarly to the following case.

- ***R v. Serré***

In 2012, Diane Serré stood trial on several corruption-related offences, including six counts of fraud against the government pursuant to section 121(1)(a)(ii), nine counts of fraud against the government pursuant to section 121(1)(d), twelve counts of breach of trust under section 122, and one count of bribery under section 120(a) of the *Criminal Code*.²⁴⁸ Ms. Serré was an acting Operations Supervisor with Citizenship and Immigration Canada. In 2003 and 2004, she assisted two other individuals, Mr. and Mrs. Dakik, who had formed a joint enterprise to help immigrants with their immigration files, by favoring and/or speeding up the immigration approval process. In return, she accepted gifts, money and services valued at approximately C\$25,000. She was convicted of all charges except for section 120(a) in relation to the acceptance of bribes: the charge was dismissed by the prosecution because the evidence did not establish that she was a public officer as defined by that specific section. In 2013, she received a four-year incarceration sentence.²⁴⁹ Section 121, similarly to section 120, applies to both the supply and demand sides of the illicit transaction. The courts have however specified on several occasions that section 121 does not require that the prosecution prove the benefit in question depended on the accused's position as a public official.²⁵⁰

Her co-conspirators were also charged with bribery and other corruption-related offences. Mr. Dakik pled guilty to seven counts of fraud on the government under section 121, one count of being party to a breach of trust by a government official, and one count of bribery under section 120 of the *Criminal Code*. Following Mr. Dakik's guilty plea, charges against Mrs. Dakik were dropped. In this public sector bribery case, offences of supply and demand corruption, as well as conventional and unconventional corruption were prosecuted, when considering the charges of frauds against the government and breach of trust.

- **Benoit Roberge**

Benoit Roberge was arrested in 2013 on two counts relating to organized crime (sections 467.11 to 467.14 CCC), one count of obstruction of justice (section 139 CCC), and one count of breach of trust (section 122 CCC). Mr. Roberge, a former sergeant-detective with the Montreal police, had previously been assigned to investigate organized crime cases. His arrest came after an investigation which led to the discovery that he sold sensitive and confidential information to a criminal organization, known as the Hells Angels. Defense admitted receiving roughly C\$125,000 in return for the information. He pled guilty in March 2014 to one organized crime count and one count of breach of trust under the *Criminal Code* and awaits confirmation of an eight-year sentence, jointly suggested by both the prosecution and defense.²⁵¹ This public sector corruption case is a rare example of purely unconventional corruption charges being brought, although they are not “stand-alone” charges: they were brought alongside other non-corruption related offences.

- **Michael Applebaum**

In 2013, Montreal’s interim mayor was arrested on fourteen counts of fraud on the government (section 121 CCC), conspiracy (section 465 CCC), breach of trust (section 122 CCC), and corruption in municipal affairs (section 123 CCC). The co-accused in the case, Saulie Zajdel and Jean-Yves Bisson, face counts of bribery (section 120 CCC), breach of trust (section 122 CCC), municipal corruption (section 123 CCC), fraud against the government (section 121 CCC) and private corruption (secret commissions, section 426 CCC).²⁵² The charges stem from political support and authorizations obtained in the context of real estate transactions concluded while Mr. Applebaum served as district mayor. The co-accused also served as public officials during the commission of the offences.²⁵³ Because judicial proceedings are still under way, little information surrounding the facts of the case is publicly available. A preliminary inquiry has been set for June 2015. In this case, the demand-side of corrupt acts was prosecuted and the charges include both conventional and unconventional corruption. Due to the high-ranking level of the accused in this public corruption case, the illegal acts can be qualified as a grand corruption.

iii) International Review Mechanism Findings

- **OECD**

As Canada is party to the *OECD Anti-Bribery Convention* and the *UNCAC*, it is also subject to their review mechanisms. In 2011, the OECD issued a critical report of Canada’s implementation of its anti-bribery convention and offered several recommendations, several of which have been remediated by the passing into legislation of Bill S-14 in June last year.²⁵⁴ In its follow-up report issued in May 2013, the OECD agreed that significant steps had been taken to improve the CFPOA and to address the many recommendations made in 2011 (a total of nine recommendations were made, the first four relating to the enforcement of bribery and the others relating to the prevention of bribery).²⁵⁵ Recommendation 1, relating to the notion of “profit” previously contained in the definition of “business” within the foreign bribery legislation, has been implemented.²⁵⁶ By removing this requirement, the law now clearly applies to all businesses and transactions, regardless of profit. Recommendation 2 relates to automatic debarment following conviction under the CFPOA and has not been implemented. The OECD recommends

that provisions such as section 750(3) be applicable to foreign bribery offences. Recommendation 3 in regard to jurisdiction has also been implemented by widening the scope of the law: jurisdiction has been extended and now allows the prosecution of foreign bribery acts committed by either Canadians or Canadian companies, regardless of where the offence was committed. Recommendation 4e(i) has been implemented with the CFPOA's new books and records provision that establishes specific criminal offences for bookkeeping violations when committed for the purpose of bribing foreign public officials. OECD Recommendation 6 in relation to facilitation payments has been implemented, although the amendment within the law is not yet in force.²⁵⁷

Several other recommendations have been satisfied by various initiatives, such as measures taken to establish coordination between the RCMP's International Anti-Corruption Unit and provincial securities regulators, ultimately allowing for more effective information sharing on potential CFPOA violations (Recommendation 4d). Another example is that of the RCMP, Foreign Affairs and International Trade (DFAIT), and Export Development Canada (EDC) encouraging the private sector to adopt compliance measures that specifically target the prevention and detection of foreign bribery violations (Recommendation 7).²⁵⁸

TI measures the *OECD Anti-Bribery Convention's* enforcement progress in various countries from year to year. In 2012, the report stated that enforcement in Canada and Australia had increased from the "little enforcement" category up to the "moderate enforcement" category. The former category includes countries that have only brought minor cases or only have ongoing investigations, whereas the latter includes countries that have finalized at least one major case and have one ongoing investigation. Countries considered as part of the "active enforcement" category on the other hand are deemed capable of providing effective deterrents to foreign bribery. The United States and the United Kingdom both fall under this category²⁵⁹. However, in its most recent 2013 report, TI created a new category called "limited enforcement," nestled between the "little" and "moderate" enforcement categories. Canada was demoted to this category, along with France, Sweden and Argentina.²⁶⁰

The 2013 TI report also mentions shortcomings in the availability of statistical information relating to investigations, explained by the desire to protect the confidentiality of ongoing investigations.²⁶¹ The 2013 OECD follow-up report does however state that the RCMP's International Anti-Corruption Unit disclosed the existence of 35 ongoing corruption investigations.

- **UNCAC**

In November of 2013, the Conference of the States Parties to the UNCAC held its fifth session. On its agenda was the review of a civil society report on Canada's implementation of the UNCAC, titled "Document submitted by TI, a non-governmental organization in consultative status with the Economic and Social Council."²⁶² The report covers the implementation and enforcement of two chapters under the Convention, "Criminalization and Law Enforcement" and "International cooperation." In regard to criminalization and enforcement, it classifies most provisions under the Convention as fully implemented with "good" or "moderate" enforcement.²⁶³

The areas lacking include the absence of an “illicit enrichment” offence and poor enforcement of whistleblower and witness protection. Under the Convention, the illicit enrichment offence is defined as “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.”²⁶⁴ The question had been previously raised in relation to a similar provision under the IACAC. In response, a Statement of Understanding upon ratifying the convention was issued in 2000 indicating that Canada would not criminalize the offence, because to do so would go against the presumption of innocence, guaranteed by Canada’s Constitution, including the Charter of Rights and Freedoms.²⁶⁵ The United States has taken the same stance in regard to the act of illicit enrichment, whereas in Australia, several jurisdictions have unexplained wealth laws which have received public criticism due to their argued infringement on the presumption of innocence.²⁶⁶

Stating poor enforcement relating to whistleblower and witness protection, TI’s report to the Conference of the States Parties to the UNCAC stated that there should be adequate statutory protection for whistleblowers in both the public and private sectors and suggests the introduction of a more robust legislative protection for whistleblowers in the private sector. It also mentions that all provinces and territories should have whistleblower protection statutes for public and private sector employees.²⁶⁷ Canada’s current federal whistleblower legislation, the *Public Servants Disclosure Protection Act*,²⁶⁸ came into force in 2007. Its main goal is to encourage public servants to come forward if they suspect wrongdoing in their workplace and provide them with protection from reprisal. The term “public servant” is defined as “every person employed in the public sector, every member of the RCMP and every chief executive,”²⁶⁹ but does not include the Canadian Forces, the Canadian Security Intelligence Service, or the Communications Security Establishment or individuals in the private sector.²⁷⁰ Whistleblower protection is ensured through a confidential reporting process set out in the Act. In cases of reprisal, whistleblowers are afforded a complaint mechanism that can lead to either a settlement or a corrective action, such as compensation or disciplinary action. Acts of reprisal include all disciplinary measures, namely demotion, termination of employment, and any other action or threat that adversely affects employment or working conditions.²⁷¹

- **Organization of American States (OAS)**²⁷²

Tasked with reviewing the implementation of the IACAC, the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption²⁷³ is an inter-governmental body established within the framework of the OAS. It supports and reviews the States Parties in the implementation of the Convention through a peer-review evaluation and formulates recommendations where gaps are identified or further progress is necessary. In 2011, it released a report on Canada’s implementation as part of its third round of review.²⁷⁴ Recommendations were issued relating to more adequate whistleblower protection, the removal of the facilitation payments exception, the creation of an illicit enrichment offence, stronger methods to detect and prevent domestic and foreign corruption, and the removal of favorable tax treatments. The final report on Canada pursuant to the fourth round of review is upcoming in 2014.

- **G20**

In 2010, the G20 adopted an anti-corruption plan (the Seoul Action Plan) with a goal to combat corruption, promote market integrity, and support a clean business environment. Building upon the review mechanisms of the UNCAC and the OECD, it created an anti-corruption working group to monitor the action plan's progress. In its first monitoring report, it issued several recommendations to all of its members in the following areas: 'The implementation of the international legislative framework', 'National measures to prevent and combat corruption', 'International cooperation' and 'public-private partnerships'.²⁷⁵ The working group also seeks to ensure the ratification of the UNCAC, the *OECD Anti-Bribery Convention*, as well as the adoption of anti-money laundering initiatives, such as the Financial Action Task Force's Recommendations and the joint World Bank and UNODC Stolen Asset Recovery Initiative. In 2013, it issued another progress report and adopted the *G20 Guiding Principles on Enforcement of the Foreign Bribery Offence*, as well as the *G20 Guiding Principles to Combat Solicitation*. These principles identify measures that are considered part of an effective enforcement, detection, and investigation strategy. The Group adopted asset recovery principles during its summit in Los Cabos, following which a country review was conducted to assess the approaches used by each member. Nine asset recovery principles were adopted and their implementation reviewed. All nine principles were considered fulfilled by Canada.²⁷⁶ Notable legislative developments in this field include the 2011 *Freezing Assets of Corrupt Foreign Officials Act*²⁷⁷ as well as a related regulation, the *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations*.²⁷⁸ The *Act* and its relation regulations allow the federal government to seize or freeze the assets of persons who "misappropriated or inappropriately acquired the property of a foreign state by virtue of either their office or a personal business relationship."²⁷⁹ These individuals are referred to under the *Act* as "politically exposed foreign persons."²⁸⁰

3.2 Foreign Enforcement

i) United States

In the United States, the SEC, the DOJ, and the Federal Bureau of Investigation (FBI)²⁸¹ have enforcement authority over FCPA-related investigations and prosecutions. The Fraud Section of the DOJ's Criminal Division is responsible for criminal prosecutions and civil proceedings against non-issuers.²⁸² A dedicated unit was created in 2006 to deal solely with FCPA prosecutions. The FBI is tasked with conducting criminal investigations into potential corruption and bribery violations under the DOJ's supervision. A specialized task force called the International Corruption Unit was created in 2008 due to an increase in overseas investigations.²⁸³ With regard to issuers, the SEC Enforcement Division is responsible for civil enforcement and a specialized unit was created in 2010.²⁸⁴ Coordination among these organizations is often required due to concurrent civil and criminal proceedings.

Despite pressure from the OECD to modify its legislation in respect to grease payments, the United States holds a very strong enforcement track record, both in regard to foreign bribery and domestic bribery enforcement.²⁸⁵ Since 1990, over a thousand individuals have been charged each year under federal domestic bribery law. Almost half of these individuals are federal officials, whereas the remainder are state officials as well as individuals that paid or offered bribes. The

conviction rate is over 90%.²⁸⁶ It is important to note that there is no minimum threshold amount for a bribe to be prosecuted under domestic bribery law, therefore there are numerous cases dealing with small amounts.²⁸⁷

Prosecutions under the FCPA have risen significantly since the early 2000s; whereas previously the SEC and DOJ would average three prosecutions per year, the estimate is more along the lines of between 60 and 100 investigations per year (there were roughly 23 cases brought against natural and legal persons in 2013 by the DOJ).²⁸⁸ One of the reasons for this might be the growing tendency for businesses to self-report and conduct internal investigations. Another reason might be related to the SEC and DOJ's initiatives, such as use of proactive investigative steps. The approach of "industry-wide sweeps" is based on a sweep letter sent to industry members requesting cooperation on a voluntary basis. One example is of the investigation into companies that paid kick-backs to the Iraqi Government in the context of the United Nations Oil-for-Food Programme, which subsequently resulted in the laying of charges against more than fifteen companies.²⁸⁹

A continued approach used by U.S. enforcement agencies is the use of anonymous whistleblower reports. There is specific legislative protection for whistleblowers in the *Sarbanes-Oxley Act* (2002) and the *Dodd-Frank Wall Street Reform and Consumer Protection Act*.²⁹⁰ The latter was signed into law in 2010 and offers incentives and protections to individuals that provide the SEC and the DOJ with information, also known as whistleblowers, under specific criteria. Qualified whistleblowers can be awarded between 10% and 30% of the pecuniary sanctions collected. Most often, former employees and competitors are the ones to send these types of reports to authorities. Both the DOJ and the SEC provide a hotline and ensure the callers' anonymity. Not only does the *Act* provide for anonymity and financial incentives, it prohibits retaliation against whistleblowers by their employers. In 2013, the SEC reported receiving over 3,200 whistleblower reports in the United States, mainly in relation to corporate disclosures and financials, fraud, and market manipulation. A total of 404 reports originating from abroad were received the same year, constituting approximately 11.7% of the total reports received in 2013.²⁹¹

On January 9, 2014, the SEC and the DOJ charged Alcoa Inc., a global aluminum producer, with bribery and books and records charges in relation to bribes paid by the company's subsidiaries to government officials in Bahrain, the goal being to maintain a key source of business. The investigation concluded that over \$110 million in payments were made to Bahraini officials to influence contract negotiations with a government-operated aluminum plant. Alcoa entered a plea agreement pleading guilty to the SEC's and the DOJ's charges, as well as a parallel criminal case, and agreed to pay a total of US\$384 million in fines.²⁹²

In November of 2013, three subsidiaries of Weatherford International Limited agreed to plead guilty to civil and criminal charges under the FCPA and other Acts. Evidence brought forward showed that between 2004 and 2008, employees of the subsidiaries had operated a joint venture abroad with two local entities that were controlled by foreign officials as well as members of their families.²⁹³ As a result of failing to put in place proper internal controls, employees were able to engage in corrupt behavior over the course of several years, including bribing foreign officials and misusing the United Nations Oil-for-Food Programme. The settlement includes fines and penalties adding up to over US\$252 million which include penalties under the FCPA, penalties for

violations of export controls under the *International Emergency Economic Powers Act* and under the *Trading with the Enemy Act*.²⁹⁴ Also in 2013, Total S.A., a French oil and gas company, agreed to settle on US\$398 million penalties to the DOJ and SEC settling charges under the FCPA in connection with illegal payments made to a government official in Iran in order to obtain oil and gas concessions.²⁹⁵

Outside prosecutions under the FCPA, several domestic bribery cases have made headlines in the United States in recent years, often involving bribery but also other bribery-related charges such as money laundering and fraud. One such example is the arrest of over forty individuals in 2009 (including public officials) in Operation Bid Rig, a joint operation involving the FBI, IRS and United States Attorney's Office, under charges of namely bribery, extortion, and money laundering. Authorities infiltrated a money laundering and corruption network that operated internationally between the United States and Israel, laundering tens of millions of dollars through charitable non-profit groups. Although not all individuals accused were found guilty, most were sentenced to terms of incarceration.²⁹⁶

More recently in 2013, a federal judge sentenced Kwame Kilpatrick, a Detroit Mayor, to a 28-year incarceration sentence for his involvement in a racketeering conspiracy, including acts of extortion, bribery, and mail and wire fraud. Evidence showed that Mr. Kilpatrick extorted vendors, rigged bids, and accepted bribes. Over US\$9 million in illegal profits were unaccounted for in one of the defendant's co-conspirators' enterprises. His bank records also revealed over US\$840,000 in unexplained expenditures.²⁹⁷ Not only did he receive an incarceration sentence, he also was ordered to pay restitution of US\$4.6 million.²⁹⁸

ii) United Kingdom

In the United Kingdom, the investigation and prosecution of serious and complex fraud, bribery and corruption offences is carried out by the Serious Fraud Office (SFO).²⁹⁹ It was established by the 1987 *Criminal Justice Act* and saw its role expanded to include domestic corruption with the introduction of the 2010 *Bribery Act*.³⁰⁰ According to TI, there are at least twelve different agencies or government departments in the United Kingdom with partial responsibility for anti-corruption activities.³⁰¹ This might be solved by the United Kingdom's recent overhaul of its enforcement bodies. The Serious Organized Crime Agency and the National Fraud Authority have both been replaced by the National Crime Agency (NCA) last year, which was established by the *Crime and Courts Act* of 2013.³⁰² The new agency tackles organized crime, fraud, border issues, and cyber-crime.

The Economic Crime Command within the NCA will be responsible for overseeing the enforcement response in relation to corruption investigations. In instances where organized crime is involved, the Agency will either take action or cooperate with other agencies. The Agency intends to work closely with the SFO, which remains the lead agency for investigating complex cases of corporate bribery and corruption and enforcing the *Bribery Act* with respect to overseas corruption. It will also coordinate with the City of London Police, responsible for investigating cases of domestic bribery and corruption.³⁰³

It is important to note that England and Wales, Northern Ireland and Scotland (forming the United Kingdom) each have their own local investigation and prosecution agencies that deal with cases of bribery and corruption. These include:

- Local police forces;
- Crown Prosecution Service (CPS) in England and Wales;
- Public Prosecution Service (PPS) in Northern Ireland; and
- Crown Office and Procurator Fiscal Service (COPFS) in Scotland.

The City of London Overseas Anti-Corruption Unit, operational since 2006, investigates allegations of corruption and bribery in developing countries. In 2012-2013, it investigated over twenty cases. A notable case involves a joint investigation with the SFO that resulted in the laying of charges against four suspects for the payment of bribes made to avoid tax revenue payments in Nigeria and Azerbaijan.³⁰⁴ The SFO's Annual Report states that in 2012-2013, the prosecution of twelve cases involving twenty defendants was carried out with a 70% conviction rate.³⁰⁵ TI's 2013 report on the *OECD Anti-Bribery Convention's* enforcement concluded that in the previous year the United Kingdom was among the most active countries in regard to enforcement.³⁰⁶ This same report mentions issuing new guidance on self-reporting and facilitation payments. Guidance suggests that although facilitation payments will remain prohibited, relatively small payments will, depending on the circumstances, not likely be prosecuted. Several factors may be considered in determining whether charges are brought. For instance, larger payments may attract a significant sentence whereas one isolated small payment may result in a nominal penalty. Circumstances surrounding the payment may also be considered, such as whether the payer was in a vulnerable position.³⁰⁷

Parliamentary debates held in 2009 offer some insight as to domestic corruption cases in parts of the United Kingdom. Between 1998 and 2007, a yearly average of 13 individuals were found guilty of bribery related offences in England and Wales.³⁰⁸

In 2011, the SFO launched a whistleblowing service known as the "SFO Confidential for anonymous reporting of suspected fraud and corporate corruption." Through this system, a whistleblower may choose to remain anonymous when submitting a report. Although this service shares similarities with the SEC whistleblowing program, it differs in that it does not currently offer any financial incentive to whistleblowers.³⁰⁹ Enforcement authorities are discussing creating a new single reporting or whistleblowing mechanism to target serious and organized crime and corruption. Moreover, the Ministry of Justice is considering incentivizing whistleblowing, including the provision of financial incentives in cases of fraud, bribery, and corruption. In considering this possibility, it will examine lessons learned from similar successful provisions in the United States where individuals who work with prosecutors and law enforcement are entitled to receive a share of financial penalties accrued against a company.³¹⁰

The Serious Fraud Office considers self-reporting as a relevant consideration in determining whether it should prosecute fraud and corruption cases. Each instance is evaluated on a case by case basis. The SFO has stated that between 2009 and 2012, approximately twenty companies self-reported and of these, only four have been subject to prosecution or other measures.³¹¹ A legislative proposal on deferred prosecution agreements was passed into law in 2013 (Schedule 17

of the *Crime and Courts Act*), allowing prosecuting authorities to suspend charges subject to stringent conditions (such as judicial scrutiny), which are made publicly available.³¹² Possible outcomes may include an increase in settlements as well as an increase in transparency.

A notable case concluded in 2012 involved Oxford Publishing Ltd. The publishing company which produces text books, dictionaries, and other educational materials in East Africa agreed to pay approximately £1.9 million (US\$2.95 million) in fines as a settlement relating to the bribery of foreign government officials by two of its subsidiary companies for contracts to supply school textbooks in East Africa.³¹³ Oxford University Press also agreed to introduce enhanced compliance procedures to reduce the risk of future acts of bribery.³¹⁴ The two subsidiaries at fault have been excluded from competing for World Bank contracts for three years.

Another notable foreign bribery case was concluded in January of 2013. The Mabey Bridge case settled with a £130,000 (US\$196,000) fine paid by the company's shareholder and parent company Mabey Engineering (Holdings) Ltd. following charges of corruption for bribes in the amount of £470,000. Mabey and Johnson (M&J) approached authorities and highlighted irregularities it had identified as a result of an internal investigation. Following a subsequent investigation by the SFO, the company pleaded guilty to charges of corruption. This case is significant in that it extended the concept of liability of foreign bribery to the company's shareholders, whose dividends were considered proceeds of crime. Cooperation and self-reporting were also central to charges being laid, and may explain the low fine in this case, relative to other recent notable cases.³¹⁵

There have not yet been many domestic bribery prosecutions under the recent *UK Bribery Act*. However of note, in 2013 four individuals were charged with domestic bribery (making and accepting a financial advantage contrary to sections 1 and 2 of the *Act*) as well as fraud-related offences under the *Criminal Law Act*. The charges came following an investigation into the sale of bio fuel investment products by Sustainable AgroEnergy Plc and Sustainable Wealth Investments UK Ltd (and other associated companies) to United Kingdom investors. All four individuals are British nationals, three of which were senior management employees of Sustainable AgroEnergy Plc. The value of the alleged fraud is approximately £23 million and the offences are alleged to have taken place between April 2011 and February 2012. A trial is set for later in 2014.³¹⁶

iii) Australia

Australia's foreign bribery cases are investigated and enforced by the Australian Federal Police (AFP)³¹⁷ and the Criminal Director of Public Prosecutions (CDPP).³¹⁸ The AFP is the main criminal investigative agency for criminal law offences. It can also investigate State criminal offences in instances where they contain a federal aspect. Cooperation during investigations is a regular occurrence. For example, the AFP seeks legal advice from the CDPP before any charges are brought against suspects.³¹⁹ The Minister of Justice has recently issued priority areas that the AFP is required to address. These include fraud, money laundering, and both foreign and domestic corruption offences.³²⁰

Whistleblower protection is available through a newly passed piece of legislation. In 2013, the *Commonwealth Public Interest Disclosure Act*³²¹ came into force. This new law protects both internal and external disclosures as well as disclosures made to an attorney in certain

circumstances. The *Act* sets out specific requirements on how agencies should handle disclosures, including when it must be investigated and who should be in charge of the investigation. A maximum ninety-day limit is given to complete a whistleblowing investigation. Similarly to Canada's whistleblowing Act, the Australian law does not offer any financial incentives for cooperating with authorities.

TI has classified Australia in its "moderate enforcement" category for the past two years, raising its status from the "little enforcement" category.³²² That being said, there have been very few foreign bribery cases tried in court. In 2012, the former Managing Director of the Australian Wheat Board admitted to negligence in the performance of his duties as Director and was fined AU\$100,000. He was also disqualified from managing a corporation for two years. These sanctions related to reported payments of nearly US\$300 million to the Iraqi Government in connection with the United Nations Oil-for-Food Programme and were the result of a civil action brought by the Australian Securities and Investment Commission. Another executive admitted to having contravened the *Corporations Act* by failing to act upon available information in regard to the possible payment of fees to the Iraqi Government. On appeal, his penalty was increased from AU\$10,000 to AU\$40,000 and his disqualification from managing a corporation was increased from less than five months to fifteen months.³²³ These civil actions followed a 2009 criminal investigation into the Australian Wheat Board's conduct that was terminated, leading to concerns about Australia's enforcement capabilities in regard to foreign bribery cases. The criminal investigation was initiated following the *Inquiry into certain Australian companies in relation to the United Nations Oil-for-Food Programme*.³²⁴

A criminal investigation initiated in 2011, which resulted in the prosecution of several individuals, brought some reassurance. Authorities investigated alleged bribes paid to foreign public officials in Indonesia, Malaysia, Nepal and Vietnam by two companies owned by the Australian Reserve Bank. These companies and several former executives were charged with foreign bribery offences. One former Chief Financial Officer pleaded guilty in 2012 to false accounting and was spared incarceration, receiving a suspended sentence. As part of the court's motives on sentencing, mitigating factors were considered such as the defendant's criminal history, the lack of personal gain from the offence, and his cooperation with authorities.³²⁵ Judicial proceedings against the other accused individuals are still under way.

Although TI considers Australia a moderate enforcer of the *OECD Anti-Bribery Convention*, the OECD has criticized Australia's enforcement of bribery offences in the past. In reviewing sentencing of domestic bribery cases, the review panel raised concerns that the penalties imposed for domestic bribery were significantly lower than the maximum penalty available and that it was unclear whether monetary sanctions were typically sought. Sentencing statistics show that fourteen individuals have been convicted of domestic bribery offences from 2005 to 2012. These convictions yielded thirteen imprisonment sentences (five of which were suspended). Sentences have included namely incarceration, fines, and community service orders. The longest sentence imposed was a 29-month period of imprisonment. Other concerns that some investigations were dropped prematurely have also surfaced in civil society and monitoring review reports.³²⁶

4 Conclusion

4.1 Trends in Canada

Recent high profile Canadian corruption cases have occurred in different sectors. Although foreign bribery cases under the CFPOA have occurred in the energy, construction, and security and defense industries, there are too few to discern a pattern. Domestic bribery offences under the *Criminal Code*, specifically sections 120 to 123, have been charged alongside organized crime and drug investigations, for instance against customs agents and airport security officers accepting bribes in order to facilitate drug trafficking and importation.³²⁷ Similar domestic bribery charges were also brought against public officials accused of fraudulent activity in relation to municipal corruption and corruption in the construction industry.

Although investigations under the CFPOA have also brought about accusations of fraud and secret commissions under the *Criminal Code*,³²⁸ the 2013 books and records offence has not yet been prosecuted due to its recent coming into force.

Since the Hydrokleen case, monetary fines for foreign bribery have risen in Canada. However, the prosecution and sentencing of natural and legal persons is sparse. Only one trial involving a Canadian national under the CFPOA has taken place, and sentencing, although not yet pled in court, is imminent. Under the *Criminal Code*, sentencing for cases involving domestic bribery and organized crime has often led to incarceration.³²⁹

4.2 Weaknesses and Best Practices

Certain types of corruption have received weaker responses and focus from the media in Canada. This is the case with private-to-private corruption, provided for by section 426 of the *Criminal Code*. Although there are no clear statistics in this respect, caselaw and media research has allowed us to conclude that there have been few prosecutions under the secret commissions offence in recent years. Focus by the media and enforcement authorities seems to be put instead towards public corruption.

Although foreign bribery has been the source of much discussion with the recent amendments to the CFPOA in 2013, there has been much more activity surrounding domestic corruption by criminal enforcement bodies and in the media in the last few years, often in relation with organized crime charges and investigations. This might however change in the future: the RCMP has stated that it is investigating over 30 ongoing foreign corruption cases.

The media has been active in reporting grand or political corruption involving elected or high ranking government officials, as well as systemic corruption, involving the infiltration of organized crime into the public sector. One clear example of this is the significant focus on the *Charbonneau Commission* by the media in recent years. Canadian enforcement bodies however seem to investigate instances of both grand and petty corruption.

Most cases in Canada have included acts of conventional corruption, as opposed to unconventional corruption. The few prosecuted cases of unconventional corruption were brought alongside other charges which include conventional corruption (this is the case in *R v. Kandola*, *R v. Serré*, as well as the Michael Applebaum and Benoit Roberge prosecutions). Reasons for this weaker response might be related to the difficulty in obtaining evidence in cases where no clear transaction or *quid pro quo* takes place, including the absence of any witnesses or paper trail.

Assessing other jurisdictions' strengths and weaknesses can offer insight into our own. The goal of the following paragraphs is to underline opportunities for improvement, all the while seeking possible solutions used within Canada and by foreign states. The following paragraphs discuss an attempt to offer best practices towards weaknesses identified throughout this study.

i) Nature of prosecutions

One weakness relates to the nature of prosecutions under the CFPOA. Only criminal prosecutions can be brought against legal entities under existing anti-corruption legislation, in comparison with the lighter burden of proof afforded to civil actions. In this respect, TI has speculated that the lack of civil or administrative provisions undermines the CFPOA's effectiveness. The Canadian *Competition Act*³³⁰ might serve as an example of legislation permitting both civil and criminal prosecutions. Furthermore, in the United States, the SEC has a parallel investigative and prosecutorial power on certain FCPA-related offences. This might facilitate enforcement by allowing or fostering close cooperation between both institutions.

ii) Voluntary disclosure and self-reporting

Voluntary disclosure or self-reporting to regulatory authorities is not provided for. Such provisions might encourage corporations to cooperate with authorities as well as identify and investigate cases of corruption. One of the possible consequences of such procedures is the subsequent use of deferred prosecution agreements. These are essentially probationary agreements made between both parties that avoid lengthy and complex trials. Both the United States and the United Kingdom are among countries that have such provisions in place.

iii) Disclosure incentives

Although Canada has a disclosure protection law, it does not encourage disclosure by offering financial incentives, as is the case in the United States. The large number of reports in the United States, even when considering the size of the economy or population, may be related to the incentive structure in place.

iv) Compliance program requirements

Legal entities in Canada lack provisions requiring them to introduce and follow compliance programs. The Canadian government has recently stated it will adopt legislation requiring that companies in the extractive industry publicly report certain payments, and might consider adopting similar legislation in other high risk industries. The *UK Bribery Act's* affirmative defense provision requires companies to implement internal controls and procedures aimed at

preventing corruption. Failure to do so could result in the successful prosecution of the offence of failing to prevent bribery under the *Act*. Similar provisions in Canada would persuade organizations to be more proactive and might also increase voluntary disclosures.

v) Legislative guidance

The CFPOA is silent in regard to possible defenses under its books and records provisions. Issuing legislative guidance regarding these new provisions would allow companies to address weaknesses in their current internal accounting procedures which would promote proactive changes within commercial entities, rather than waiting for courts to interpret the notion of “adequate” books and records. The *UK Bribery Act* has issued such guidance clarifying what measures should be in place in order for companies to benefit from the “adequate measures” defense applicable to accusations of failing to prevent bribery (section 7 of the Act).

vi) Limited enforcement agencies

Limiting the prosecution of the CFPOA to one enforcement agency (the RCMP) might limit enforcement capabilities in the long term. By barring provincial enforcement agencies from prosecuting offences under the CFPOA, the burden ultimately lies on the RCMP, who is therefore prohibited from delegating such investigations in the event of prioritization, budget or human resource restrictions. In other areas of criminal investigation, federal and provincial enforcement agencies share investigative and prosecutorial responsibilities. This is the case namely with fraud, organized crime, and terrorism-related charges in Canada. Limiting enforcement to the RCMP might however contribute to the organization’s specialization and competence with CFPOA investigations, but increased financial and human resources as well as training should be considered to increase their activity and ensure the organization is able to continue cooperating with prosecuting authorities after charges have been laid.

vii) Sentencing

There have been criticisms by the international community towards sentencing in corruption cases in Canada. The chosen cases examined in this study demonstrate the lack of successful prosecutions of individuals for foreign corruption offences: to date, only one individual has been convicted under the CFPOA and is awaiting sentencing. In the other foreign corruption cases, charges against individuals were either dropped or were never laid. Domestic corruption charges have however elicited significant sentences against individuals, including lengthy periods of incarceration. Other means of sentencing are underused, such as probation orders and the recovery of assets.

The *Criminal Code* provides that the court can order policy standards and procedures to prevent future offences.³³¹ This section was used in the Niko case: the court imposed a probation order by which the defendant was obliged to comply with several compliance requirements.³³² Probation orders offer significant flexibility in imposing conditions which should be taken advantage of when possible. Other potential conditions could include imposing restrictions on natural and legal persons from carrying out certain transactions for a period of time or under supervision.

Proceeds of crime provisions relating to foreign bribery, allowing the recovery of assets under certain conditions, were previously part of the CFPOA. They were removed in 2001 and added to the *Criminal Code*, namely at sections 354, and Part XII.2. Although no actions have yet been taken under these provisions in relation to offences committed under the CFPOA, the Crown has stated that it intends to seek the recovery of sums in the Griffiths case.³³³ Similar actions could be taken in domestic corruption cases.

viii) Debarment

The CFPOA does not provide for any debarment sanctions following an individual's or a business' conviction for bribery or books and records provisions. Furthermore, Section 750(3) of the *Criminal Code*, which provides for automatic debarment following the conviction of certain offences, could be extended to other domestic corruption-related offences, such as sections 120 and 123 (bribery of officers and municipal corruption). As it stands, the only domestic corruption-related offences it applies to are sections 121 (frauds on the government) and 124 (selling or purchasing office), as well as, more broadly, fraud (section 380 CCC).

Québec's recent *Integrity in Public Contracts Act* has put in place an authorization procedure for companies who wish to enter into public contracts and subcontracts with Québec government departments. This legislation could serve as a model for other provinces and for federal agencies alike.

ix) Publicly available information

Canada has been criticized in various implementation reports for the lack of availability of enforcement information and statistics relating to past and ongoing investigations in Canada (at both the federal and provincial levels) as well as information relating to the implementation of review mechanism reports. Prosecution and sentencing information, such as press releases, indictments and probation orders, could be made publicly and centrally available. The United States has a wealth of information available online, including judicial proceedings and documentation, on prosecutions carried out by the SEC and the DOJ.

x) Unexplained wealth laws

Canada and the United States have both issued reservations regarding the implementation of illicit enrichment offences, provided for in the UNCAC and the IACAC. The main rationale behind this decision is that such a provision would infringe the presumption of innocence. In Australia, several jurisdictions have adopted unexplained wealth laws. These have however been subject to public criticism for the same reason Canada and the United States have refused to adopt similar legislation. There might however be room for compromise: without creating an outright criminal offence, specific criteria could be established on the basis of illicit enrichment, affording enforcement bodies additional investigative powers that would ultimately facilitate the investigation and prosecution of offences related to money laundering, organized crime, fraud, and corruption.

Future Research

In conclusion, additional research might be of assistance in exploring other areas of remediation.

- First is the incidence of information sharing between enforcement authorities (such as between the Canadian Revenue Agency and the RCMP) and its admissibility before Canadian criminal courts. Delving into the use and necessity of production orders among institutions, such as those required by *R v. Jarvis*,³³⁴ as well as an evaluation of their success and difficulties, might shed some light as to the ease with which enforcement authorities can share information and cooperate. Comparing the current state of law in Canada with the heightened cooperation mechanisms that exist in the United States between the SEC and the DOJ is relevant when considering the volume of investigations and cases brought against corporations under the FCPA.
- Second is an assessment of the domestic and international asset recovery and mutual legal assistance framework under the Canadian *Criminal Code* (under sections 354 and Part XII.2 relating to proceeds of crime), federal laws (such as the *Freezing Assets of Corrupt Foreign Officials Act*), the World Bank/UNODC joint Stolen Asset Recovery Initiative and other revenue transparency initiatives in cases relating to fraud and corruption. Such a study might lead to further research into the effectiveness of bank secrecy laws and bilateral treaties. Third and more directly related to Canadian foreign bribery law, would be to assess the *UK Bribery Act*'s success in prosecuting its more restrictive provisions, such as private sector corruption, demand side corruption, and the failure of a corporation to prevent bribery.
- Lastly, the incidence on prosecutions following the use of proactive investigation tools in other jurisdictions (such as sweep letters) deserves further examination. The merit of proactive investigation tools in Canada would have to be studied alongside their potential effects on the *Canadian Charter of Rights and Freedoms* as well as their potential for admissibility in court.

Appendix A – Scope

Although our literature review was not limited in time, our review of media sources was limited from March 2011 to March 2014. The table below outlines the keywords used:

1	Embezzlement
2	Misappropriation
3	Kick-back
4	Extortion OR "extortion charges"
5	Collusion OR collude
6	Criminal organization AND corruption
7	Bribery AND (trial OR case OR investigation OR charges OR scandal)
8	Corruption AND (trial OR case OR investigation OR charges OR scandal)
9	Illegal payment
10	Illicit payment
11	Undue advantage

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² *Ibid.* at 11.

³ *Ibid.*

⁴ Enery Quinones, “L’évolution du droit international en matière de corruption: La Convention de l’OCDE,” (2003) 49 *Annuaire français de droit international*, 563 at 563 [Quinones].

⁵ Colin Nicholls et al., *Corruption and Misuse of Public Office*, Oxford University Press, Oxford and New York, 2006 at 1 [Nicholls, *Corruption and Misuse of Public Office*].

⁶ M. Patrick Yingling, Conventional and Unconventional Corruption: Analysis and Solutions for the United States and Kenya, (2013) 51 *Duquesne Law Review*, 263 at 263 [Yingling].

⁷ Margaret Beare, *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, University of Toronto Press, Toronto, Buffalo and London, 2003 at 89 [Beare].

⁸ Yingling, *supra* note 6 at 266.

⁹ UNODC, *Anti-corruption toolkit*, 3rd Edition, United Nations, Vienna, 2004, at 11.

¹⁰ Hereafter “OECD.”

¹¹ Organization for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, December 17th 1997, hereafter “*OECD Anti-Bribery Convention*.”

¹² UN General Assembly, United Nations Convention Against Corruption, A/58/422 (2003), hereafter “UNCAC.”

¹³ Organization of American States, *Inter-American Convention Against Corruption*, March 29th 1996, hereafter “IACAC.”

¹⁴ RSC, 1985, c. C-46, hereafter “*Criminal Code*.”

¹⁵ UNODC, *supra* note 9 at 12.

¹⁶ Inge Amundsen, *Political Corruption: An Introduction to the issues*, Chr. Michelsen Institute Development Studies and Human Rights, 1999, at 3 [Amundsen].

¹⁷ Simeon Aisabor Igbinedion, “A Critical Appraisal of the Mechanism for Prosecuting Grand Corruption Offenders Under the United Nations Convention Against Corruption,” (2009) 6 *Manchester Journal of International Economic Law*, 56 at 58 [Igbinedion]. Whereas petty corruption often refers to an exchange of smaller amounts of currency or favors, grand corruption tends to involve higher-ranking officials: it is distinguishable by the importance or level of wealth appropriated and the seniority of the government officials involved.

¹⁸ Yingling, *supra* note 6 at 271.

¹⁹ UNODC, *supra* note 9 at 10.

²⁰ Antonio Argandona, “The United Nations Convention Against Corruption and its Impact on International Companies,” Chair of Economics and Ethics, Research Paper No 656, October 2006, at 1.

²¹ Facilitation payments are legal in the United States, Australia, New Zealand, South Korea, and are still legal in Canada until the amendment under the CFPOA is in force.

²² Amundsen, *supra* note 17 at 3.

²³ Joel S. Hellman, Geraint Jones, and Daniel Kaufmann, *Seize the State, Seize the Day*, World Bank, Policy research working paper, September 2000 at 2.

²⁴ Claes Sandgren, “Combating Corruption: The Misunderstood Role of Law,” (2005) 39 *The International lawyer*, 717 at 724 [Sandgren].

²⁵ Joel S. Hellman, Geraint Jones, and Daniel Kaufmann, *supra* note 23 at 2.

²⁶ Yingling, *supra* note 6 at 270.

²⁷ *Ibid.*

²⁸ OECD, *Principles for Transparency and Integrity in Lobbying*, 2012, available here:

<https://portal.publicpolicy.utoronto.ca/en/StudyReports/OECD/10PrinciplesforTransparencyandIntegrityinLobbying/Documents/10%20Principles%20for%20Transparency%20and%20Integrity%20in%20Lobbying.pdf>.

²⁹ Amundsen, *supra* note 17 at 3.

³⁰ *Ibid.*

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- ³¹ UN General Assembly, *United Nations Convention against Transnational Organized Crime*, A/RES/55/25 (2001) [UNTOC]. This Convention is the UNCAC's predecessor.
- ³² OECD, *Consultation Paper: Review of the OECD Instruments Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption*, Working Group on Bribery in International Business Transactions, 2008, available here: <http://www.oecd.org/dataoecd/18/25/39882963.pdf>
- ³³ UNCAC, sections 21 and 22.
- ³⁴ Sandgren, *supra* note 24 at 723.
- ³⁵ Irwin Arieff, *UN Anti-Corruption Pact Raises Last-Minute Alarms*, Reuters, June 29, 2003 [Arieff] (comments made by Jeremy Pope of Transparency International).
- ³⁶ Corruption of Foreign Public Officials Act (S.C. 1998, c. 34), hereafter "CFPOA."
- ³⁷ World Bank, *Helping Countries Combat Corruption*, at 11.
- ³⁸ UN General Assembly, *United Nations Convention Against Corruption*, A/58/422 (2003), hereafter "UNCAC."
- ³⁹ Organization of American States, *Inter-American Convention Against Corruption*, March 29th 1996, hereafter "IACAC."
- ⁴⁰ Although Canada does not adopt the definitions of Treaties, it interprets them to create its own legal definitions, pursuant to the Canadian Constitution and rule of law.
- ⁴¹ Ruth Nicholls, "Corruption in the South Pacific: The Potential Impact of the UN Convention Against Corruption on Pacific Island States," (2005) 2 *New Zealand Yearbook of International Law*, 207-277 at 225 [Nicholls, "Corruption in the South Pacific"].
- ⁴² Such as the IACAC, the *OECD Anti-Bribery Convention* and the *Council of Europe Criminal Law Convention*.
- ⁴³ Transparency International is a non-governmental organization. Its mission is to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society. Hereafter "TI."
- ⁴⁴ Transparency International, *The Anti-Corruption Plain Language Guide*, July 2009, at 5.
- ⁴⁵ Peter J. Henning, "Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law," (2001) 18 *Arizona Journal of International and Comparative Law*, 793 at 796 [Henning].
- ⁴⁶ UNCAC, section 19. This section calls on State Parties to "consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."
- ⁴⁷ UNCAC, sections 17 and 22. Section 17 criminalizes embezzlement, misappropriation or other diversion of property by a public official, for his or her benefit, or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position. Section 22 on the other hand criminalizes embezzlement of property in the private sector, although it does not contain the same mandatory quality: it merely calls on States to "consider" adopting such measures.
- ⁴⁸ *Ibid.*, section 20. This measure calls on Member States to consider criminalizing, subject to their constitution, a public official's intentional illicit enrichment. The latter is defined as a "significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."
- ⁴⁹ *Ibid.*, section 18. This section calls on States to consider adopting measures criminalizing the offering or acceptance of an undue advantage in order that a public official or other person "abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person."
- ⁵⁰ *Ibid.*, section 25. This section criminalizes the use of force, intimidation or the promise of an advantage for the purpose of inducing false testimony or interfering with the production of evidence or exercise of official duties law enforcement officials in relation to the commission of offences established under the Convention.
- ⁵¹ *Ibid.*, section 23. This section seeks to criminalize the conversion, transfer, concealment, and disguise of property with knowledge that such property results in proceeds of crime.
- ⁵² *Ibid.*, sections 15 and 16.
- ⁵³ *Ibid.*, sections 15, 16 and 21.
- ⁵⁴ Guy Stessens, "The International Fight Against Corruption," (2001) 72 *International Review of Penal Law* 892 at 904; Martin Polaine, "Criminalizing the Bribery of National and Foreign Public Officials," (2005) Background Paper,

ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, 3rd Master Training Seminar, Pakistan, 14-17 February 2005 at 14 [Polaine].

⁵⁵ African Union, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, hereafter “African Union CPCC.”

⁵⁶ UNCAC art.15, 16; *OECD Anti-Bribery Convention* art.1(1), 7(1).

⁵⁷ David A. Gantz, “Globalizing Sanctions Against Foreign Bribery,” (1997-1998) 18 *Northwestern Journal of International Law and Business*, 457 at 480 [Gantz]. There are however multilateral instruments that criminalize both the supply and demand sides of bribery, such as the AU Corruption Convention and the IACAC.

⁵⁸ Stephen R. Salbu, “A Delicate Balance: Legislation, Institutional Change and Transnational Bribery,” (2000) 33 *Cornell International Law Journal*, 657 at 685.

⁵⁹ Cyrille Fijnaut and Leo Huberts, *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague, 2002, at 349.

⁶⁰ Ibrahim Shihata, *International Finance and Development Law*, Kluwer Law International, Boston, 2001, 908p. at 237 [Shihata].

⁶¹ *OECD Anti-Bribery Convention*, art.1

⁶² *OECD Anti-Bribery Convention*, section 1.

⁶³ For ratification status, see the following website: <http://www.oas.org/juridico/english/sigs/b-58.html>.

⁶⁴ An example of a conditional commitment under both the IACAC and the UNCAC is the offence of “illicit enrichment” (section 20 of the UNCAC and section IX of the IACAC).

⁶⁵ IACAC, paragraph 6(1)(a) and (b) and section 8.

⁶⁶ OECD, *Canada: follow-up to the phase 3 report & recommendations*, Working Group on Bribery in International Business Transactions, 2013; United Nations, Conference of the States Parties to the United Nations Convention against Corruption, Fifth Session, *Canada Civil Society Report*, CAC/COSP/2013/NGO/4.

⁶⁷ OECD, “OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions,” Working Group on Bribery in International Business Transactions, 2009; Recommendation VI.

⁶⁸ Jon Jordan, “The OECD’s Call for an End to Corrosive Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act,” (2011) 13 *U. of Pennsylvania Journal of Business Law*, 882 at 882. See also OECD, *supra* note 66.

⁶⁹ MESICIC, *Canada Final Report*, Eighteenth Meeting of the Committee of Experts, SG/MESICIC/doc.270/10 rev. 4, 25 March 2011, at 10.

⁷⁰ World Bank, *Helping Countries Combat Corruption*, Poverty Reduction and Economic Management, September 1997, at 8.

⁷¹ *Ibid.*, at 9.

⁷² *Ibid.*

⁷³ TI website, http://www.transparency.org/whoware/organisation/faqs_on_corruption/2/#defineCorruption, consulted March 5, 2014.

⁷⁴ Transparency International, *supra* note 44 at 5.

⁷⁵ Collusion is defined as “a secret agreement between parties, in the public and/or private sector, to conspire to commit actions aimed to deceive or commit fraud with the objective of illicit financial gain. The parties involved often are referred to as ‘cartels’” in TI’s Plain Language Guide, at 9.

⁷⁶ Conflict of interest is defined as a “situation where an individual or the entity for which they work, whether a government, business, media outlet or civil society organisation, is confronted with choosing between the duties and demands of their position and their own private interests” in TI’s Plain Language Guide, at 11.

⁷⁷ Embezzlement is defined as “when a person holding office in an institution, organisation or company dishonestly and illegally appropriates, uses or traffics the funds and goods they have been entrusted with for personal enrichment or other activities” in TI’s Plain Language Guide, at 17.

⁷⁸ Extortion is defined as the “act of utilising, either directly or indirectly, one’s access to a position of power or knowledge to demand unmerited cooperation or compensation as a result of coercive threats” in TI’s Plain Language Guide, at 19.

⁷⁹ Fraud is defined as “the act of intentionally deceiving someone in order to gain an unfair or illegal advantage (financial, political or otherwise). Countries consider such offences to be criminal or a violation of civil law” in TI’s Plain Language Guide, at 21.

⁸⁰ Nepotism is defined as a “form of favouritism based on acquaintances and familiar relationships whereby someone in an official position exploits his or her power and authority to provide a job or favour to a family member or friend, even though he or she may not be qualified or deserving” in TI’s Plain Language Guide, at 28.

⁸¹ *Ibid.*

⁸² *Ibid.*, at 7.

⁸³ Sandgren, *supra* note 24 at 723.

⁸⁴ Also known as the *Charbonneau Commission*.

⁸⁵ Katz Karen, “Here Comes the Bribe: Canada’s Efforts to Combat Corruption in International Business,” (2011) 69 *Advocate Vancouver* 501, at 502.

⁸⁶ Sections 119 *et seq.* of the *Criminal Code*.

⁸⁷ [2006] 2 SCR 49.

⁸⁸ *R v. Boulanger*, [2006] 2 SCR 49, p.73.

⁸⁹ Section 120, *Criminal Code*.

⁹⁰ *Ibid.*, subsection 120(a).

⁹¹ *Ibid.*

⁹² Paragraphs 120(a)(i), (ii), (iii), *Criminal Code*.

⁹³ Section 118, *Criminal Code*.

⁹⁴ *Ibid.*, section 426.

⁹⁵ *R v. Kelly* [1992] 2 R.C.S. 170.

⁹⁶ The United States and Australian counterparts also do not have any private bribery provisions. One rare foreign corruption law containing private bribery provisions is the *UK Bribery Act*.

⁹⁷ CFPOA, section 2.

⁹⁸ *Ibid.*, subsection 3(1).

⁹⁹ *Ibid.*, subsection 3(2).

¹⁰⁰ *Ibid.*, subsection 4(1).

¹⁰¹ Section 11g), *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*.

¹⁰² CFPOA, subsection 3(4). Note that this exception is still visible in the amended law, and its removal is not yet in force.

¹⁰³ *Ibid.*, section 2.

¹⁰⁴ OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, Working Group on Bribery in International Business Transactions, 2011 at 11.

¹⁰⁵ *R. v. Libman*, [1985] S.C.J. No. 56 at paragraph 74 (S.C.C.). In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, the Supreme Court of Canada enumerated a non-exhaustive list of “presumptive connecting factors” which would allow the presumption of jurisdiction. These include cases where: the defendant is domiciled or resident in the province, the defendant carries on business in the province, the tort was committed in the province and a contract connected with the dispute was made in the province.

¹⁰⁶ CFPOA, subsection 3(3).

¹⁰⁷ *R v. Karigar* 2013 ONSC 5199.

¹⁰⁸ *Ibid.*, paragraph 22.

¹⁰⁹ *Ibid.*, paragraph 28.

¹¹⁰ *Ibid.*, paragraph 29.

¹¹¹ Kim Mackrael, “Crown Seeks 4-Year Sentence in Landmark Bribery Case,” *Globe and Mail*, April 2, 2014.

¹¹² Katz Karen, “Here Comes the Bribe: Canada’s Efforts to Combat Corruption in International Business,” (2011) 69 *Advocate Vancouver* 501, at 501.

¹¹³ *Ibid.*, at 502.

¹¹⁴ André Normandeau and Samir Rizkalla , “Economic and Social Consequences of Crime: New Challenges for Research and Planning in Canada,” (1977) 19 *Canadian J. Criminology & Corrections* 224, at 224.

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- ¹¹⁵ Frederic Lemieux, « L'utilisation des connaissances policières et des renseignements policiers dans les actes de corruption : une étude de cas », (2001) 43 *Canadian Journal of Criminology*, at 450.
- ¹¹⁶ *Ibid.*, at 451.
- ¹¹⁷ Colin Goff and Nancy Nason-Clark, (1998) "Perceptions Towards White Collar Crime," *Canadian Journal of Criminology*, at 28.
- ¹¹⁸ *Ibid.*
- ¹¹⁹ Michael M. Atkinson, Discrepancies in corruption perception or, why is Canada so corrupt, JSGS Working Paper Series, November 2009 Issue 1 at 2.
- ¹²⁰ *Ibid.*
- ¹²¹ *Ibid.*
- ¹²² *Ibid.*, at 7 and 9.
- ¹²³ A total of 354 Canadian news articles were reviewed, dating between March 2011 and March 2014.
- ¹²⁴ Les Perreux, "Probe's work has only just begun; Province's latest corruption scandal could leave more ruined reputations in its wake," *The Globe and Mail*, November 17, 2012.
- ¹²⁵ Jean-Louis Fortin, "Official 'shocked' by corruption / SCANDAL: Head of Quebec's UPAC anti-corruption unit touts arrests of 66 people in 2013 as proof system works," *The London Free Press*, December 18, 2013.
- ¹²⁶ Sophie Cousineau, Tu Thanh Ha, and Justin Giovannetti, "Behind the bribery allegations that have enveloped Montreal's mayor; Arrest warrants for three men arrested on Monday outline two different sets of allegations involving Michael Applebaum – that he arranged separate bribes in exchange for a political favour and approving a project," *The Globe and Mail*, June 18, 2013.
- ¹²⁷ The Canadian Press, "Dessau Inc. CEO and president resigns over corruption scandal," *The Montreal Gazette*, June 13, 2013.
- ¹²⁸ Shannon Kari, "He was beaten in custody, man tells drug squad trial," *The Globe and Mail*, January 17, 2012.
- ¹²⁹ Les Leyne, "Questions linger in corruption case," *Victoria Times Colonist*, November 16, 2011.
- ¹³⁰ Alexander Panetta and Andy Blatchford, "Mayor charged in corruption case," *Waterloo Region Record*, June 18, 2013.
- ¹³¹ Greg McArthur, "Canadian firm to admit to overseas bribery; Lengthy RCMP probe ends with Niko Resources' guilty plea over attempts to influence Bangladeshi minister," *The Globe and Mail*, June 24, 2011.
- ¹³² David Baines, "Justice Vancouver stock promoter Louis Dion charged in FBI sting; Arrested for stock fraud and bribery charges in New York City," *The Vancouver Sun*, December 15, 2011.
- ¹³³ Tu Thanh Ha, "Canadian business mogul faces bribery charges," *The Globe and Mail*, October 27, 2011.
- ¹³⁴ Charlie Fidelman, "Montreal cardiologist fined, suspended for accepting 'gifts'; Gazette investigation launched Collège probe of payments to doctors from Valery Fabrikant," *The Montreal Gazette*, October 2, 2012.
- ¹³⁵ Kim Bolan, "Delays doom Hells Angels case; B.C. Supreme Court stays proceedings against senior member of Nanaimo chapter who faced extortion charges laid in 2010," *The Vancouver Sun*, June 5, 2013.
- ¹³⁶ John Burman, "Hells Angels pair face extortion charges," *The Hamilton Spectator*, August 18, 2011.
- ¹³⁷ The Montreal Gazette, "Adviser guilty of misappropriation," *The Montreal Gazette*, October 27, 2011.
- ¹³⁸ Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (1997), hereafter "FCPA."
- ¹³⁹ 15 U.S.C. § 78a.
- ¹⁴⁰ Stephen R. Salbu, "A Delicate Balance: Legislation, Institutional Change and Transnational Bribery," (2000) 33 *Cornell International Law Journal*, 657 at 661.
- ¹⁴¹ Hereafter "DOJ."
- ¹⁴² Hereafter "SEC."
- ¹⁴³ *Id.* § 13(b), 15 U.S.C. § 78m (2000). The "books and records" requirements oblige companies to maintain internal controls that adequately reflect all transactions carried out. The focus of these provisions is on secret or "off books" funds used to hide corrupt payments the businesses own auditors, shareholders, outside directors and from the government.
- ¹⁴⁴ Priya Cherian Huskins, "FCPA Prosecutions: Liability Trend to Watch," (2007-2008) 60 *Stan. L. Rev.*, 1447 at 1448.
- ¹⁴⁵ United States Department of Justice, *A Resource Guide to the FCPA*, 2012 at 10.
- ¹⁴⁶ 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (1998).

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- ¹⁴⁷ Elizabeth K. Spahn, “Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the UN Convention against Corruption,” (2013) 23 *Ind. Int’l & Comp. L. Rev.* 1, at 9.
- ¹⁴⁸ 15 U.S.C. § 78dd-1(f)(3)(A)(2012) (issuers); 15 U.S.C. § 78dd-2(h)(4)(A) (2012) (domestic concerns); 15 U.S.C. § 78dd-3(f)(4)(A) (2012) (“persons other than issuers and domestic concerns”) (emphasis added).
- ¹⁴⁹ 15 U.S. Code § 78dd-1 (f) (1) a).
- ¹⁵⁰ United States Department of Justice, *supra* note 145 at 15.
- ¹⁵¹ Jordan, *supra* note 68 at 884.
- ¹⁵² 15 U.S.C. § 78m(b)(2)(A) (2010).
- ¹⁵³ *Ibid.*, § 78m(b)(2)(B).
- ¹⁵⁴ *Ibid.*, § 78m(b)(4), (5) (2010); Jordan, *supra* note 68 at 885.
- ¹⁵⁵ United States Department of Justice, *supra* note 145 at 10.
- ¹⁵⁶ *Ibid.* at 11.
- ¹⁵⁷ *Ibid.* at 4.
- ¹⁵⁸ Maximum penalties are stricter under the FCPA’s accounting provisions, allowing a maximum incarceration period of 20 years and a maximum fine of US\$25,000,000 for entities.
- ¹⁵⁹ 18 U.S.C. § 201.
- ¹⁶⁰ *Ibid.*, (b)(4).
- ¹⁶¹ *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-405 (1999).
- ¹⁶² *Ibid.* at 6.
- ¹⁶³ *Ibid.*
- ¹⁶⁴ 18 U.S.C. § 201 (b) (4).
- ¹⁶⁵ Ryan J. Rholfsen, “Recent Developments in Foreign and Domestic Criminal Commercial Bribery Laws,” (2012) *U. Chi. Legal F.*, 151 at 151.
- ¹⁶⁶ Pub L No 87-228, 75 Stat 498 (1961), codified at 18 USC § 1952 (“Travel Act”).
- ¹⁶⁷ 18 USC § 1952(a).
- ¹⁶⁸ Rholfsen, *supra* note 165 at 160.
- ¹⁶⁹ 18 USC § 1952(a)(3).
- ¹⁷⁰ A legislative guide is available here: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/rico.pdf.
- ¹⁷¹ 18 U.S.C.A. § 1961(1)(A).
- ¹⁷² *Bribery Act 2010* (c.23). Hereafter “*UK Bribery Act.*”
- ¹⁷³ *Criminal Law Act 1977* (c.45).
- ¹⁷⁴ Lee G. Dunst, Michael S. Diamant and Teresa R. Kung, “Hot Off the Press: Resetting the Global Anti-Corruption Thermostat to the UK Bribery Act,” (2011) 12 *Bus. L. Int’l*, 257 at 262.
- ¹⁷⁵ Eileen Skinnider, *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response*, International Centre for Criminal Law Reform and Criminal Justice Policy, March 2012 at 8.
- ¹⁷⁶ Art.12.
- ¹⁷⁷ Ministry of Justice, *The Bribery Act 2010*, 2011, available here: <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.
- ¹⁷⁸ *Ibid.* at 6.
- ¹⁷⁹ *Ibid.* at 15. See also Section 7(5) of the *UK Bribery Act.*
- ¹⁸⁰ *Ibid.*
- ¹⁸¹ *Ibid.* at 10.
- ¹⁸² *Ibid.*
- ¹⁸³ Art.6(5).
- ¹⁸⁴ Section 11.
- ¹⁸⁵ Act No. 12 of 1995. Hereafter “*Australian Criminal Code.*”
- ¹⁸⁶ Keith Thompson, “Does Anti-Corruption Legislation Really Work,” (2013) 16 *Int’l Trade & Bus. L. Rev.*, 99 at 115.
- ¹⁸⁷ Division 70.1.
- ¹⁸⁸ Divisions 70.3 and 70.5.

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- ¹⁸⁹ Division 70.4(3).
- ¹⁹⁰ OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, Working Group on Bribery in International Business Transactions, 2012 at 5.
- ¹⁹¹ *Ibid.* at 9.
- ¹⁹² Foreign Bribery Fact Sheet, p.3, available here: <http://www.crimeprevention.gov.au/Financialcrime/Documents/Fact%20Sheet%20-%20-%20The%20Offence%20-%20Foreign%20Bribery%20Information%20Pack.PDF>.
- ¹⁹³ Division 70.2(4).
- ¹⁹⁴ Division 70.2(5).
- ¹⁹⁵ *Corporations Act 2001*, Section 206B.
- ¹⁹⁶ *Superannuation Industry (Supervision) Act 1993* Section 126H; *Banking Act 1959* Section 21; *Insurance Act 1973*, Section 25A; *Life Insurance Act 1995*, Section 245A. See also OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, Working Group on Bribery in International Business Transactions, 2012 at 13.
- ¹⁹⁷ Division 70.2.
- ¹⁹⁸ Shu Ying Wee, “The OECD convention on combating bribery of foreign public officials and its effectiveness in Australia: are we doing enough?,” (2012) 15 *Int'l Trade & Bus. L. Rev.*, 360 at 370.
- ¹⁹⁹ More information on the RCMP’s Commercial Crime Program is available here: <http://www.rcmp-grc.gc.ca/ccb-sddc/index-eng.htm>.
- ²⁰⁰ Art.6, CFPOA.
- ²⁰¹ Hereafter PPSC.
- ²⁰² MESICIC, *Canada Final Report*, Eighteenth Meeting of the Committee of Experts, SG/MESICIC/doc.270/10 rev. 4, 25 March 2011 at 2. The report mentions that “no aggregate data is publicly available for investigations or charges laid by the various provincial and municipal police forces related to corrupt acts involving Canadian government officials.”
- ²⁰³ *Ibid.*
- ²⁰⁴ The RCMP’s press release is available here: <http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2013/0603-launch-lancement-eng.htm>.
- ²⁰⁵ Charges were laid in February of 2014. The National Division’s press release is available here: <http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2014/0204-ms-cp-eng.htm>.
- ²⁰⁶ The RCMP’s press release is available here: <http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2013/0918-lavalin-eng.htm>.
- ²⁰⁷ The press releases are available here: <http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2013/0918-lavalin-eng.htm> and <http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2013/1203-lavalin-eng.htm>.
- ²⁰⁸ This information is available on the Branch’s website : <http://www.opp.ca/ecms/index.php?id=186>.
- ²⁰⁹ Ontario Provincial Police, *Annual Report 2012*, at 18, available here: <http://www.opp.ca/ecms/files/250258838.6.pdf>.
- ²¹⁰ The UPAC press release is available here: https://www.upac.gouv.qc.ca/fileadmin/Unite_permanente_anticorruption/SALLE_DE_PRESSE/Communiqués_de_presse/MODIFICATION_2013-12-17_Bilan_2013__communiqué%20C3%A9_UPAC.pdf.
- ²¹¹ Art. 2, *Anti-Corruption Act*, CQLR c L-6.1.
- ²¹² *Ibid.*
- ²¹³ UPAC Press Release, *Bilan de fin d’année*, 2013, available here : <http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?aiguillage=ajd&idMenuItem=1&lang=fr&idArticle=2112174982>
- ²¹⁴ Hereafter “AMF.”
- ²¹⁵ 2012, c.25.
- ²¹⁶ The guide is available here: <http://www.lautorite.qc.ca/files/pdf/contrats-public/guide-accompagnement-cp-demande-sel-an.pdf>.
- ²¹⁷ Art.21.26 of the Act.
- ²¹⁸ *Competition Act* (R.S.C. , 1985, c.34).
- ²¹⁹ *Income Tax Act*, RSC 1985, c 1 (5th Supp).
- ²²⁰ A complete list of offences is available in Schedule I of the *Integrity in Public Contracts Act*.

²²¹ Art.21.28 of the Act.

²²² More information on this process can be found on the AMF's website: <http://www.lautorite.qc.ca/en/faq-cp-en.html>.

²²³ Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction, *Rapport d'étape*, 13 janvier 2014, available here: <http://www.mce.gouv.qc.ca/publications/rapport-etape-2014-01-13.pdf>.

²²⁴ *Ibid.* at 4.

²²⁵ Except in regard to perjury.

²²⁶ More information on the Commission can be found here: <https://www.ceic.gouv.qc.ca/la-commission/fonctionnement.html>.

²²⁷ S.C.2000, c.17

²²⁸ FINTRAC Guidelines are available here: <http://www.fintrac-canafe.gc.ca/publications/guide/guide-eng.asp>.

²²⁹ The recommendations are available here:

http://www.revenuewatch.org/sites/default/files/working_group_transparency_recommendations_eng20140116.pdf.

²³⁰ *Ibid.* at 4.

²³¹ CACP's Annual Report 2013 is available here:

<https://www.cacp.ca/default/committees/viewcommittee?committeeId=9>.

²³² Including one voluntary disclosure, discussed in this section.

²³³ [2005] A.J. No. 568.

²³⁴ Art.3 (1)a) CFPOA.

²³⁵ *R. v. Garcia*, [2002] ABPC 156.

²³⁶ For more information on offences prosecuted by the PPSC, see their website: <http://www.ppsc-sppc.gc.ca/eng/bas/index.html#mandate>.

²³⁷ OECD, *Canada Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, Working Group on Bribery in International Business Transactions, 2004, at 22, available here: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31643002.pdf>.

²³⁸ The RCMP press release is available here: <http://www.rcmp-grc.gc.ca/ab/news-nouvelles/2011/110624-niko-eng.htm>.

²³⁹ World Bank/UNODC Stolen Asset Recovery Initiative, Niko Case Summary available here:

<http://star.worldbank.org/corruption-cases/node/20123>.

²⁴⁰ The RCMP's press release is available here and includes a summary of the facts: <http://www.rcmp-grc.gc.ca/ab/news-nouvelles/2011/110624-niko-eng.htm>.

²⁴¹ Daryl Slade, "Griffiths Energy fined \$10.35-million in bribery case; Calgary CEO says company 'blew the whistle' on themselves," *The Calgary Herald*, January 25, 2013.

²⁴² Gordon Kaiser, "Corruption in the Energy Sector, Criminal Fines, civil judgments, and lost arbitrations," (2013) 34 *Energy L.J.*, 193 at 228.

²⁴³ Section 462.3, *Criminal Code*.

²⁴⁴ S.C.1996, c.19.

²⁴⁵ *R v. Kandola*, [2012] BCSC 968. Both individuals were not accused of all seven counts.

²⁴⁶ The value is estimated at \$5M to \$6M, as stated in the decision (para.178).

²⁴⁷ Kim Bolan, "Cocaine smuggler from B.C. sentenced to 18 years, border guard to 15," *The Vancouver Sun*, July 15, 2012.

²⁴⁸ *R v. Serré*, [2012] ONSC 3672.

²⁴⁹ The judgment on sentencing is available here:

<http://www.canlii.org/en/on/onsc/doc/2013/2013onsc1732/2013onsc1732.html>. The following news article discusses the sentence and case: <http://www.cbc.ca/news/canada/ottawa/former-immigration-official-sentenced-to-4-years-for-fraud-1.1410828>.

²⁵⁰ *R v. Cogger* [1997] 2 R.C.S. 845; *R v. Hinchey* [1996] 3 R.C.S. 1128.

²⁵¹ Pierre Saint-Arnaud and Sidhartha Banerjee, "Ex-Cop Accused of Selling Info to Biker Gang," *The Canadian Press*, October 7, 2013, available here: <http://globalnews.ca/news/887206/organized-crime-cop-arrested-in-montreal->

for-allegedly-tipping-off-criminals/. See also : <http://www.cbc.ca/news/canada/montreal/beno%C3%AEt-roberge-to-go-straight-to-trial-in-hells-leak-case-1.2543328>.

²⁵² Peter Rakobowchuk, “Fraud case against ex-interim mayor Michael Applebaum put off until late January,” *The Canadian Press*, December 11, 2013; Monique Muise, “Ex-Montreal mayor Michael Applebaum makes cameo court appearance,” *The Montreal Gazette*, February 6, 2014.

²⁵³ UPAC Press Release, 17 June 2013, available here: https://www.upac.gouv.qc.ca/index.php?id=83&tx_tnews%5Btt_news%5D=72&cHash=54b1d8314653f6040e046e824557a57a.

²⁵⁴ OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, Working Group on Bribery in International Business Transactions, 2011.

²⁵⁵ OECD, *Canada: Follow-Up to the Phase 3 Report & Recommendations*, Working Group on Bribery in International Business Transactions, 2013 at 3.

²⁵⁶ The numbered recommendations refer to the OECD’s 2009 recommendations.

²⁵⁷ Canada has agreed to report back to the OECD Working Group on Bribery this year on its progress.

²⁵⁸ For a full list of recommendation implementation status, see the OECD’s report available here:

<http://www.oecd.org/daf/anti-bribery/canada-oecdanti-briberyconvention.htm>.

²⁵⁹ Transparency International, *Exporting Corruption, Country Enforcement of the OECD Anti-Bribery Convention, Progress Report 2012* at 4.

²⁶⁰ Transparency International, *Exporting Corruption, Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Corruption*, 2013 at 5.

²⁶¹ *Ibid.* at 9.

²⁶² United Nations, Conference of the States Parties to the United Nations Convention against Corruption, Fifth Session, *Canada Civil Society Report*, CAC/COSP/2013/NGO/4, available here;

<http://www.unodc.org/documents/treaties/UNCAC/COSP/session5/V1387709e.pdf>.

²⁶³ *Ibid.* at 3 (Table 2).

²⁶⁴ Article 20, UNCAC.

²⁶⁵ Lisette Lafontaine, *Canada’s Experience with the Implementation of International Conventions against Corruption*, International Centre for Criminal Law Reform and Criminal Justice Policy, 2006 at 8. See also Ndiva Kofele-Kale, *The International Law of Responsibility for Economic Crimes*, Burlington, USA: Ashgate Publishing House, 2006 at 186. Canada’s response is available in the OAS report 2011 at p.25, available here:

http://www.oas.org/juridico/english/mesicic3_can_rep.pdf.

²⁶⁶ The Australian government has issued a report discussing its various unexplained wealth laws in “Unexplained Wealth Laws in Australia,” *Trends & Issues in Crime and Criminal Justice*, No.395, July 2010.

²⁶⁷ *Ibid.* at 5.

²⁶⁸ S.C.2005, c.46.

²⁶⁹ Art.2, S.C.2005, c.46.

²⁷⁰ CSIS, the CSE, and the DND all have internal policies with respect to the disclosure of wrongdoings in the workplace, discussed in the OAS’ review mechanism report, 2011, p.45 available here:

http://www.oas.org/juridico/english/mesicic3_can_rep.pdf.

²⁷¹ S.C.2005, c.46. A fact sheet is available here: <https://www.tbs-sct.gc.ca/ve/oaal-eng.asp>.

²⁷² Hereafter “OAS.”

²⁷³ Hereafter “MESICIC.”

²⁷⁴ MESICIC, *Canada Final Report*, Eighteenth Meeting of the Committee of Experts, SG/MESICIC/doc.270/10 rev. 4, 25 march 2011, available here: http://www.oas.org/juridico/english/mesicic3_can_rep.pdf.

²⁷⁵ G20, *First Monitoring Report of the G20 Anti-Corruption Working Group to G20 Leaders on Individual and Collective Progress Made by G20 Countries in the Implementation of the Seoul Action Plan*, anti-corruption working group, 2011, available here: http://www.g20civil.com/documents/Final_G20_Anti-corruption_Working_Group_progress_Report.pdf.

²⁷⁶ The review report is available here: www.g20russia.ru/load/783594084.

²⁷⁷ S.C.2011, c.10.

²⁷⁸ SOR/2012-284.

²⁷⁹ Section 4.

²⁸⁰ Section 2.

²⁸¹ Hereafter “FBI.”

²⁸² USAM 9-47.110 and 9-47.130. OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, Working Group on Bribery in International Business Transactions, 2010 at 13, available here: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/unitedstatesphase3reporten.pdf>.

²⁸³ OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, Working Group on Bribery in International Business Transactions, 2010 at 14.

²⁸⁴ 15 U.S.C. § 78u; USAM 9-47.130.

²⁸⁵ Facilitation payments fall under an exception in the FCPA and are still permitted, notwithstanding the OECD’s recommendations of 2009, which encourage the prohibition of these payments.

²⁸⁶ Cassin, Richard L., *Domestic Bribery Enforcement*, FCPA Blog, July 2012, available here: <http://www.fcpcbog.com/blog/2012/7/2/domestic-anti-bribery-enforcement.html#>.

²⁸⁷ The FCPA guide lists the following cases: “United States v. Franco, 632 F.3d 880, 882-84 (5th Cir. 2011) (affirming bribery convictions of inmate for paying correctional officer \$325 to obtain cell phone, food, and marijuana, and noting that 18 U.S.C. § 201 does not contain minimum monetary threshold); United States v. Williams, 216 F.3d 1099, 1103 (D.C. Cir. 2000) (affirming bribery conviction for \$70 bribe to vehicle inspector); United States v. Traitz, 871 F.2d 368, 396 (3rd Cir. 1989) (affirming bribery conviction for \$100 bribe paid to official of Occupational Health and Safety Administration); United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 822 (9th Cir. 1985) (affirming bribery convictions including \$100 bribe to immigration official); United States v. Bishton, 463 F.2d 887, 889 (D.C. Cir. 1972) (affirming bribery conviction for \$100 bribe to division chief of District of Columbia Sewer Operations Division).”

²⁸⁸ Huskins, *supra* note 144 at 1449.

²⁸⁹ OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, Working Group on Bribery in International Business Transactions, 2010 at 18.

²⁹⁰ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Public Law 111-203 [HR 4173].

²⁹¹ SEC, *Annual Report to Congress on the Dodd-Frank Whistleblower Program, 2013* at 8 and Appendix D, available here: <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

²⁹² In the Matter of *ALCOA INC.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, available here: <http://www.sec.gov/litigation/admin/2014/34-71261.pdf>. The DOJ plea agreement is available here: <http://www.justice.gov/criminal/fraud/fcpa/cases/alcoa-world-alumina/01-09-2014plea-agreement.pdf>. Forbes issued a news report on this case, available here: <http://www.forbes.com/sites/jordanmaglich/2014/01/09/sec-doj-file-fcpa-charges-against-alcoa/>. The terms “corrupt payments” were used in this article to describe the illicit transactions carried out. Another news article by Bloomberg uses the term “bribes”: Alan Katz, “Alcoa Pays \$384 Million to Resolve Bahrain-Bribery Probe,” *Bloomberg*, January 10, 2014 (available here: <http://www.bloomberg.com/news/2014-01-09/alcoa-pays-384-million-to-resolve-foreign-bribery-probe.html>).

²⁹³ The complete press release is available here: <http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html>.

²⁹⁴ A news article release by Bloomberg, discussing the settlement using the terms “improper sales” and “bribes”: Tom Schoenberg, “Weatherford International Settles Foreign Bribery Probes,” *Bloomberg*, November 26, 2013 (available here: <http://www.bloomberg.com/news/2013-11-26/weatherford-international-settles-u-s-foreign-bribery-probes.html>). A Washington Post news article on the settlement is available here: http://www.washingtonpost.com/business/economy/weatherford-settles-global-corruption-charges-agrees-to-253-million-fine/2013/11/26/458fb424-56d0-11e3-8304-caf30787c0a9_story.html.

²⁹⁵ The complete press release is available here: <http://www.justice.gov/criminal/fraud/fcpa/cases/totalsa/2013-05-29-total-press-release-final.pdf>.

²⁹⁶ Lauren Garcia, “Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of “Implicit” Quid Pro Quos Under the Federal Funds Bribery Statute,” (2012-2013) 65 *Rutgers L. Rev.*, 229 at 249. The FBI press release is available here : http://www.fbi.gov/news/stories/2009/july/corruption_072409.

²⁹⁷ Ashley Woods, “Kwame Kilpatrick 28-year prison sentence for corruption is long, but not ‘extreme’: Experts,” *The Huffington Post*, October 11, 2013.

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- ²⁹⁸ Baldas, Tresa, “Kilpatrick to Pay \$4.6 million in Restitution, Federal Judge Rules,” *Detroit Free Press*, December 10, 2013, available here: <http://www.freep.com/article/20131210/NEWS01/312100053/Kwame-Kilpatrick-case-Judge-to-decide-restitution>
- ²⁹⁹ Hereafter “SFO.”
- ³⁰⁰ SFO, *2012-2013 Annual Report* at 5.
- ³⁰¹ Transparency International, United Kingdom Chapter, UK Corruption Statistics, available here: <http://www.transparency.org.uk/corruption/statistics-and-quotes/uk-corruption>.
- ³⁰² *Crime and Courts Act*, 2013 c.22. Barry Vitou and Richard Kovalevsky, *Huge shake up in UK bribery enforcement, US style whistleblowing & UK False Claims Act*, 2013, available here: <http://thebriberyact.com/2013/10/07/breaking-in-the-small-print-huge-shake-up-in-uk-bribery-enforcement-us-style-whistleblowing-uk-false-claims-act/>.
- ³⁰³ Serious Organized Crime Office, *Serious and Organized Crime Strategy*, October 2013, at 60, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf.
- ³⁰⁴ City of London Police, *Annual Report 2012-2013* at 16, available here: <http://www.cityoflondon.police.uk/about-us/your-right-to-information/Pages/Annual-Report.aspx>.
- ³⁰⁵ Serious Fraud Office, *2012-2013 Annual Report and Accounts* at 4, available here: <http://www.sfo.gov.uk/media/256255/30597%20hc%209.pdf>.
- ³⁰⁶ Transparency International, *Exporting Corruption, Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Corruption*, 2013 at 3.
- ³⁰⁷ Serious Fraud Office, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*, available at: <http://www.sfo.gov.uk/media/167348/bribery-act-2010-joint-prosecution-guidanceof-the-director-of-the-serious-fraud-officeandthedirector-of-publicprosecutions.pdf>.
- ³⁰⁸ This data is available at the following website: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090428/text/90428w0024.htm>.
- ³⁰⁹ Kaiser, *supra* note 242 at 236.
- ³¹⁰ Serious and Organized Crime Strategy, October 2013 at 61, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf.
- ³¹¹ Kaiser, *supra* note 242 at 238.
- ³¹² Transparency International, *Exporting Corruption, Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Corruption*, 2013 at 84.
- ³¹³ The amount of the bribes is not stated in SFO’s claim, only the amount of the contracts. The claim can be viewed here: http://www.sfo.gov.uk/media/215458/part_8_claim_form_n208.pdf.
- ³¹⁴ Jeevan Vasagar, “Oxford University Press fined £1.9m over bribery by African subsidiary firms,” *The Guardian*, July 3, 2012.
- ³¹⁵ SFO’s press release is available here: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx>. Joe Palazzolo, “Former Mabey & Johnson Execs Sentenced To Prison for Iraq Bribes,” *The Wall Street Journal*, February 23, 2011.
- ³¹⁶ Information on this case is available on the Serious Fraud Office’s website, located here: <http://www.sfo.gov.uk/our-work/our-cases/case-progress/sustainable-agroenergy-plc-and-sustainable-wealth-investments-uk-ltd.aspx>.
- ³¹⁷ Hereafter “AFP.”
- ³¹⁸ Hereafter “CDPP.”
- ³¹⁹ OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, Working Group on Bribery in International Business Transactions, 2012 at 19.
- ³²⁰ *Ibid.*
- ³²¹ *Public Interest Disclosure Act*, 1994, § 10.
- ³²² Transparency International, *Exporting Corruption, Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Corruption*, 2013.
- ³²³ OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, Working Group on

Bribery in International Business Transactions, 2012 at 13; Evan Whitton, “Kickback: Inside the Australian Wheat Board Scandal,” *The Australian*, May 19, 2007. An inquiry into the role of Australian companies in the Oil for Food Programme was held in 2004-2006 and led to the criminal investigation.

³²⁴ Also known as the Cole Inquiry.

³²⁵ Maris Beck, “Former Securrency executive spared jail after guilty plea,” *The Sydney Morning Herald*, August 20, 2012.

³²⁶ OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, Working Group on Bribery in International Business Transactions, 2012 at 13.

³²⁷ *R v. Kandola*, [2012] BCSC 968 ; *R. c. Béliveau*, [2013] QCCQ 1309.

³²⁸ SNC employees have been charged with bribery of a foreign public official under the CFPOA as well as with fraud under the *Criminal Code*. In the case of HydroKleen Systems, the foreign public official who was working in Canada at the time the offence was committed, was charged under Section 426 of the *Criminal Code* (Secret Commissions) for accepting bribes.

³²⁹ See *R v. Kandola*, [2012] BCSC 968; *R v. Serré*, [2012] ONSC 3672; *R. c. Béliveau*, [2013] QCCQ 1309.

³³⁰ R.S.C., 1985, c. C-34.

³³¹ Section 732.1.

³³² Kaiser, *supra* note 242 at 229.

³³³ Kaiser, *supra* note 242 at 228.

³³⁴ [2002] 3 R.C.S. 757.