



**Transparency International Canada Inc.**

**Transparency International Canada Inc.**

**UNCAC Implementation Review**

**Civil Society Organization Report**

**October 2013**



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## Introduction

Canada signed the United Nations Convention against Corruption (UNCAC) on May 21, 2004 and ratified it on October 2, 2007.<sup>1</sup>

This report reviews Canada's implementation and enforcement of selected articles in chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation) of the UNCAC from the perspective of civil society. The report is intended as a contribution to the UNCAC implementation review process currently underway covering those two chapters. Canada was selected by the UNCAC Implementation Review Group in July 2010 by a drawing of lots for review in the third year of the process. A draft of this report was provided to the government of Canada.

**Scope.** This report particularly focuses on the UNCAC articles covering bribery (Article 15), foreign bribery (Article 16), illicit enrichment (Article 20), money laundering (Article 23), and protection of reporting persons or "whistleblower protection" (Article 33).

**Structure.** Section I of the report is an executive summary, with the condensed findings, conclusions and recommendations about the review process and the availability of information, as well as about implementation and enforcement of selected UNCAC articles. Section II covers in more detail the findings about the review process in Canada as well as access to information issues. Section III reviews implementation and enforcement of the convention, including key issues related to the legal framework and to the enforcement system, with examples of good and bad practice. Section IV covers recent developments and Section V elaborates on recommended priority actions.

**Methodology.** The report was prepared by Transparency International Canada Inc. (TI-Canada) with partial funding from UNCAC Small Grants. The group made efforts to obtain information for the reports from government offices and to engage in dialogue with government officials. As part of this dialogue, a draft of the report was made available to them.

On May 29, 2013, TI-Canada hosted the *Third Annual Spotlight on Anti-Corruption: Government Under the Microscope*. The event facilitated discussion among members of civil society, business, academia and government; panellists were a diverse collection of RCMP and government officials, lawyers, journalists, businesspeople, and representatives of non-governmental organizations. The event was conducted in accordance with the Chatham House Rule, which required that any statements made at the event cannot be attributed to specific speakers. As such, the Rapporteur Reports from the event summarize proceedings without attributing views to specific speakers.<sup>2</sup> The Rapporteur Reports, agenda and list of speakers are publicly available through TI-Canada's website. They are also appended to this report as Appendix C.

This report was prepared using guidelines and a report template designed by Transparency International for the use of Civil Society Organizations (CSOs). These tools reflected but simplified the United Nations Office on Drugs and Crime (UNODC) checklist and called for relatively short assessments as compared with the detailed official checklist self-assessments. The report template asked a set of questions about the review process and, in the section on implementation and enforcement, asked for examples of good

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<sup>1</sup> United Nations Office on Drugs and Crime, "[United Nations Convention against Corruption: UNCAC Signature and Ratification Status as of 29 May 2013](#)".

<sup>2</sup> [Rapporteur Reports](#), TI-Canada Third Annual Spotlight on Anti-Corruption: Government Under the Microscope (29 May 2013).



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practices and areas in need of improvement in selected areas, namely with respect to UNCAC Articles 15, 16, 20, 23 and 33.

Selected additional CSOs and experts working in the relevant areas were consulted and their views are sometimes noted herein (see Appendix A). In preparing this report, the authors took into account the recent reviews of Canada carried out by the Organization for Economic Co-operation and Development (OECD)<sup>3</sup> and the Organization of American States (OAS).<sup>4</sup>

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<sup>3</sup> Canada's implementation of the OECD Anti-Bribery Convention was most recently reviewed through the OECD Working Group on Bribery's [Phase 3 Report](#) in March 2011. In May 2013 Canada submitted a [Follow-Up Report](#) providing information on Canada's progress implementing the Phase 3 Report's recommendations.

<sup>4</sup> Canada's implementation of the [Inter-American Convention against Corruption](#) was most recently reviewed through the [MESICIC](#) process.



## I. Executive Summary

### Conduct of process

Table 1: Transparency and CSO participation in the review process

Did the government make public the contact details of the country focal point?	Yes
Was civil society consulted in the preparation of the self-assessment?	Yes (limited)
Was the self-assessment published online or provided to CSOs?	No
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	Yes (October 21 to 24, 2013)
Was civil society invited to provide input to the official reviewers?	Yes (selected CSOs and private sector representatives were invited to participate in a conference call with peer reviewers)
Has the government committed to publishing the full country report?	The government has not decided if it will publish the full country report, prepared by the peer reviewers, Iraq and Switzerland. The relevant Minister will decide once Canada has received the report.

### Availability of information

There is little public information about investigations of corruption-related offences. Canadian authorities do not publish any statistics or other details about the investigations commenced or concluded in a given year. The Royal Canadian Mounted Police (RCMP) has declined to provide information about corruption investigations due to historical Canadian police practices and a concern about the risk of litigation claims in the event of adverse publicity to the target of an investigation. In a recent international peer review mechanism, Canada reported that it has 35 active investigations underway pursuant to the [Corruption of Foreign Public Officials Act](#).<sup>5</sup>

Once charges have been laid, details thereof and some evidence immediately become public. All court proceedings are public and well-reported in the press. Courts have discretion to close courts, seal warrants, and keep some evidence secret in very limited circumstances.

However, Canadian government officials have engaged in dialogue with civil society about anti-corruption efforts, for example through consultations on amendments to the *CFPOA* in 2013. Canada's Focal Point also provided some statistics at TI-Canada's request. As such, TI-Canada did not feel it would be necessary or useful to seek an Access to Information request in order to obtain further information. Government sources confirmed that information such as the Self-Assessment Checklist could not be made available through an Access to Information request.

<sup>5</sup> OECD, "[Canada: Follow-Up to the Phase 3 Report and Recommendations](#)" (May 2013) at 3.



## Implementation into law and enforcement

Table 2: Implementation and enforcement summary table

UNCAC article	Status of implementation (Is the article Fully / Partially / Not implemented?)	How are these provisions enforced in practice? (Good/ Moderate/ Poor)
<b>Art 15 (bribery)</b>	Fully	Moderate
<b>Art. 16 (foreign bribery)</b>	Fully	Moderate
<b>Art.17 (embezzlement)</b>	Fully	Good
<b>Art. 20 (illicit enrichment)</b>	Not implemented	N/A
<b>Art.23 (Money laundering)</b>	Fully	Moderate
<b>Art. 26 (Liability of legal persons)</b>	Fully	Good
<b>Art. 32 and 33 (protection of witnesses, and whistleblower)</b>	Partially	Poor
<b>Art. 35 (compensation for damage)</b>	Partially	Poor
<b>Article 46(9)(b) &amp;(c) (mutual legal assistance)</b>	Fully	Good

## Recommendations for priority actions

**Recommendation #1. Domestic bribery.** Federal and provincial governments must ensure that combating domestic bribery is a focus of law enforcement efforts. Absent dedicated efforts and resources, corruption will go uninvestigated. The strong role of journalists in uncovering corruption in Quebec speaks to the vital role that the media plays in uncovering corruption; however the responsibility for enforcing domestic bribery laws rests with law enforcement officials.

**Recommendation #2. Foreign Bribery.** When enacting the revenue transparency legislation promised by Prime Minister Stephen Harper, consider the recommendations of civil society actors such as the Resource Revenue Transparency Working Group.<sup>6</sup>

Among other things, the Working Group recommends that mandatory disclosure requirements be implemented through provincial securities regulators, which have the expertise and the capacity to ensure that Canadian public companies and foreign companies who seek to raise capital in Canadian markets comply with these disclosure obligations.<sup>7</sup> TI-Canada further recommends that Parliament consider how such requirements can be applied to private companies or state-owned enterprises which are not subject to the jurisdiction of securities regulators. Federal, provincial and civil society collaboration will help ensure Canada's legislation in this area both responds to transparency concerns and works appropriately within Canada's federal structure.

<sup>6</sup> The Resource Revenue Transparency Working Group was formed jointly by the Mining Association of Canada, the Prospectors & Developers Association of Canada, Publish What You Pay Canada, and the Revenue Watch Institute. The objective of the Working Group is to develop a reporting framework for Canadian extractive companies, with the overarching goal of establishing greater transparency in the mining sector in Canada and overseas. The Resource Revenue Transparency Working Group, "[Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments, Draft for Consultation](#)" (14 June 2013) at 3.

<sup>7</sup> The Resource Revenue Transparency Working Group, "[Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments, Draft for Consultation](#)" (14 June 2013) at 4.



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**Recommendation #3. Foreign Bribery.** Provide a civil (non-criminal) enforcement option for corruption offences to provide greater enforcement flexibility. A civil enforcement option would permit appropriate cases to be investigated and pursued without full-blown criminal investigations and prosecutions. Following the U.S. experience, the civil offence could omit the intent required by the criminal offence. It would operate based on a reasonableness standard, particularly respecting financial misrepresentation since bribes may be concealed, if grouped with other legitimate expenses.<sup>8</sup> Alternative and potentially non-criminal proceedings could, for example, be part of the oversight of public companies by provincial securities regulators.

**Recommendation #4. Foreign Bribery.** All federal and provincial government departments, agencies and Crown corporations should introduce strict sanctions for corruption offenders. Export Development Canada (EDC) provides one such model: it requires companies to provide an anti-corruption undertaking, has publicly-available Debarment Procedures, and has developed anti-corruption compliance requirements for past offenders.<sup>9</sup>

**Recommendation #5. Illicit Enrichment.** Canada should build on the disclosure regimes it already has in place for public servants. For example, within 60 days of being elected, Members of Parliament are required to disclose their finances in detail, listing assets and liabilities greater than \$10,000 and any income greater than \$1,000 received for the twelve months prior to being elected.<sup>10</sup> Summaries of this disclosure are published on the Conflict of Interest and Ethics Commissioner's website.<sup>11</sup> In order to strengthen Canada's ability to detect illicit enrichment or other forms of corruption, Members of Parliament should also declare their assets when they leave office, so that any questionable changes can be investigated.

**Recommendation #6. Money Laundering.** To avoid the criminal misuse of legal entities, Canada should require the disclosure of beneficial ownership by trusts and companies registered in Canada. This information should be collected and made available to Canadian law enforcement authorities.

**Recommendation #7. Whistleblower Protection.** Canada should ensure that there is adequate statutory protection for whistleblowers within both the public and private sectors. This requires the federal government to amend the Criminal Code and all levels of government to introduce more robust legislative protection for whistleblowers in the private sector. Similarly, all provinces and territories should have whistleblower protection statutes for both public and private sector employees. Following the Supreme Court of Canada's ruling in *Merk*, legislation should ensure that whistleblowing employees are protected whether they choose to take their information "up the ladder" or outside the organization, directly to law enforcement officials.<sup>12</sup>

**Recommendation #8. Whistleblower Protection.** A civil remedy that would enable whistleblowers who experience reprisals to recover damages for their treatment would enhance the protection of

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<sup>8</sup> On June 4, 2013, TI-Canada's Legal Committee spoke with members of the US SEC in order to assist TI-Canada's development of submissions on the amendments to the CFPOA.

<sup>9</sup> Export Development Canada, "[Business Ethics](#)"; EDC's [Anti-Corruption Policy Guidelines](#).

<sup>10</sup> [Conflict of Interest Code for Members of the House of Commons](#), Standing Orders, Appendix (June 2011), ss. 20 and 21.

<sup>11</sup> [Public Registries](#), Office of the Conflicts of Interest and Ethics Commissioner (1 April 2011).

<sup>12</sup> [Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771](#), 2005 SCC 70, [2005] 3 S.C.R. 425 at 437 [*Merk*].



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whistleblowers. For example, employment standards legislation could be amended to provide for greater entitlement to damages if a wrongful dismissal were the result of a reprisal for whistleblowing.

**Recommendation #9. Access to Information About the UNCAC Review.** The federal government should publish information about the review process in an accessible location on government websites. This information should include: timely information about the process (focal point, schedule); Canada's Self-Assessment Checklist (even without appendices, due to translation costs); the full country report; and links to relevant information on the UNODC website.<sup>13</sup>

**Recommendation #10. UNCAC Review Process.** The federal government should establish a follow-up process to review recommendations with civil society. Canada should announce the changes it makes as a result of the UNCAC Review Process.

**Recommendation #11. Enforcement Resources.** The federal government should ensure that changes to the structure of the law enforcement operations of the RCMP do not reverse the recent progress, but focus on corruption-related offences, both in Canada and by Canadians abroad.

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<sup>13</sup> Recommended by Transparency International and the UNCAC Coalition, "[The First Three Years of the UNCAC Review Process: A Civil Society Perspective](#)" (16 May 2013).





## II. Assessment of Review Process for Canada

### A. Report on the review process

Table 3: Transparency of the government’s UNCAC review process

Transparency of the Government’s Undertaking of the Review Process		
Did the government make public the contact details of the country focal point?	Yes	TI-Canada inquired about the identity of the Focal Point and were informed accordingly. The contact details of the Focal Point are not published.
Was civil society consulted in the preparation of the self-assessment?	Yes If yes, who? (please tick) <input type="checkbox"/> Access to information groups <input type="checkbox"/> Academic networks <input checked="" type="checkbox"/> Anti-corruption groups <input type="checkbox"/> Trade unions <input type="checkbox"/> Women’s groups <input type="checkbox"/> Other (please list)	Government officials consulted Transparency International Canada Inc. by teleconference on January 11 and 22, 2013. We are not aware of other organizations the government may have consulted.
Was the self-assessment published online or provided to the expert assessing? If so, by whom?	No	According to government officials, the full self-assessment was over four hundred pages long with over eight hundred pages of appendices. We have been told that translation of the whole self-assessment into both official languages in order to publish it would be prohibitively costly. The full self-assessment will not be published.
Did the government agree to a country visit?	Yes	The peer reviewers visited Canada from October 21 to 24, 2013.
Was a country visit undertaken?	Yes	
Was civil society invited to provide input to the official reviewers? Please enter the form of input invited.	Yes If yes, who? (please tick) <input type="checkbox"/> Access to information groups <input type="checkbox"/> Academic networks <input checked="" type="checkbox"/> Anti-corruption groups <input type="checkbox"/> Trade unions <input type="checkbox"/> Women’s groups <input checked="" type="checkbox"/> Other (please list)  TI- Canada recommended that the government invite the following CSOs to participate: FAIR; North-South Institute; CBA Anti-Corruption Team; International Centre for Criminal Law Reform and Criminal Justice Policy; Canadian Journalists for Free Expression; Mining Association of Canada; Prospectors	We understand that only TI-Canada, the Canadian Bar Association, the Global Organization of Parliamentarians Against Corruption, and selected private sector representatives provided input to the peer reviewers. TI-Canada does not know if the other CSOs it recommended were invited to participate.  TI-Canada was invited to present to the peer reviewers through a teleconference call and provided the Executive Summary of this Report. Two Board Members and the Senior Advisor participated in the call and responded to questions from the peer reviewers.



	and Developers Association of Canada; Publish What You Pay – Canada; Canadians for Accountability; Democracy Watch; and the Centre for Law and Democracy.	TI-Canada intends to send the full text of this Report to the peer reviewers through any appropriate channels.
Has the government committed to publishing the full country report	No	We understand that the Canadian government has publicly said it intends to publish the full country report, but that this decision will be made by the relevant Minister, after the Minister has reviewed the full country report.

## B. Access to Information

### Laws and Regulations

Canadian laws and government regulations are readily accessible through government websites and official publications such as the *Canada Gazette* and *Hansard*.

### Investigations and Cases

There is little public information about investigations of corruption-related offences. Canadian authorities do not publish the investigations commenced or concluded in a given year. Details emerge in court, if a prosecution results. The RCMP has historically declined to provide information about corruption investigations due to its concern that adverse publicity about the target of an investigation may lead to litigation claims. In a recent international peer review mechanism, Canada reported that it has 35 active CFPOA investigations underway.<sup>14</sup>

Once charges have been laid, details thereof and some evidence immediately becomes public. All court proceedings are public and well-reported in the press. Courts have discretion to close courts, seal warrants, and keep some evidence secret in very limited circumstances.

However, Canadian government officials have engaged in dialogue with civil society about anti-corruption efforts. As such, TI-Canada did not feel it would be necessary or useful to seek an Access to Information request in order to obtain further information. Government sources confirmed that information such as the Self-Assessment Checklist could not be made available through an Access to Information request.

Through its Senior Advisor, Bronwyn Best, TI-Canada has also been in regular contact with Canada's Focal Point, Marcus Davies at the Department of Foreign Affairs, Trade and Development (DFATD). With Mr. Davies' assistance, TI-Canada was able to obtain information such as statistical data that may have otherwise been difficult to access.

In order to prepare this report, the authors relied on reports and commentary by civil society organizations and experts in the various subject areas covered by the UNCAC, as well as media reports. Judgements in corruption cases are available through published case reporters. In the sphere of foreign bribery cases, organizations such as the Canadian Bar Association (CBA) ensure that court documents which are otherwise not electronically available are made accessible.<sup>15</sup> The CBA created this resource in 2013.<sup>16</sup>

<sup>14</sup> OECD, "[Canada: Follow-Up to the Phase 3 Report and Recommendations](#)" (May 2013) at 3.

<sup>15</sup> See, for example, the CBA's [Anti-Corruption Team portal](#) which includes documents such as the Agreed Statements of Fact in foreign bribery cases.

<sup>16</sup> Canadian Competition and Regulatory Law, "[New Website: CBA Anti-Corruption Team Website](#)" (29 January 2013).



### III. Implementation and Enforcement of the Convention

#### A. Key issues related to the legal framework and enforcement of laws

##### Article 15: Bribery of national public officials

Canada is a federation composed of a national government, ten provinces and three territories within a constitutional framework that assigns exclusive legislative jurisdiction in specific subject areas to each. While the RCMP is a national police force (with national policing responsibilities) it also performs general policing functions under contract in several provinces. Generally, however, domestic crime is investigated by provincial or municipal police forces and prosecutorial responsibilities lie with the provincial Attorneys General.

Offences under the Canadian Criminal Code (a federal statute) are prosecuted almost exclusively by provincial justice officials.

Corruption broadly defined can be prosecuted under a number of different provisions of the Criminal Code by provincial authorities. The Criminal Code prohibits both “passive” (demand-side) and “active” (supply-side) bribery. Sections 119-125 of Part IV “Offences Against the Administration of Law and Justice” criminalize both the demand and the supply-side of the bribery of national officials. Government reporting on corruption-related offences is inadequate; statistical information and relevant factual data is not readily available.

##### STRENGTHS

Key strengths of Canada’s legal framework and enforcement efforts include:

- **Journalists have played a vital role in uncovering instances of corruption.** Canada’s constitutional protection of freedom of expression and particularly press freedom is of fundamental importance to the fight against corruption.
- **Use of a provincial Commission of Inquiry to uncover systemic corruption.** Following high-profile news reports into corruption in Quebec’s construction industry, on October 19, 2011 the provincial government created the [Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry](#). The Charbonneau Commission, named for Justice France Charbonneau who chairs the commission, has heard hundreds of hours of testimony from over 80 witnesses so far.

The Commission’s jurisdiction is limited to the province of Quebec. It was originally given a two-year mandate, which has now been extended to four years, and is scheduled to complete its work in 2015. To date, the Commission has heard wide-ranging testimony, uncovering alleged illegal political party financing, collusion on public construction contracts,<sup>17</sup> and the connection between organized crime and the construction industry in Quebec.<sup>18</sup>

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<sup>17</sup> Monique Muise, “[As price of asphalt soared, quality dropped, witness testifies](#)” The Gazette (15 August 2013).

<sup>18</sup> Lia Levesque, “[Quebec’s explosive corruption inquiry is back from its summer break](#)” Maclean’s (3 September 2013); CBC News, “[Key players in the Quebec corruption inquiry](#)” CBC.ca (22 May 2012).



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One of the strengths of the Commission is how transparent and accessible it is to all Canadians. Hearings are live streamed through the Commission website; some have likened them to “must-see reality TV”<sup>19</sup> and have compiled lists of the “Top Ten Moments at Charbonneau Inquiry.”<sup>20</sup>

Journalists throughout Canada cover the hearings extensively in both national and local media outlets. Commissions of inquiry commonly have statutory authority to compel witness testimony (subpoena powers) and must publicly report their findings.

- **Creation of a dedicated anti-corruption police unit.** In response to the same concerns that led to the creation of the Charbonneau Commission, the Quebec provincial police (Sûreté du Québec, or the “SQ”) created the [Unité permanente anticorruption](#) (UPAC), a permanent anti-corruption police squad tasked with preventing, auditing and investigating corruption, collusion and embezzlement related to the public sector in Quebec.
- **Cooperation between the UPAC and federal agencies.** The UPAC has successfully engaged in joint investigations with federal agencies such as the Competition Bureau, enabling charges to be laid under both provincial and federal statutes.<sup>21</sup>
- **Cooperation between the Charbonneau Commission and the UPAC.** At the beginning of the Charbonneau Commission’s work, the UPAC’s head, Robert Lafrenière, took a public stance against a public inquiry being held at the same time as on-going criminal investigations. He was concerned that testimony at a public inquiry would compromise criminal proceedings. However, so far the UPAC and the Commission have succeeded in harmoniously administering their respective mandates.<sup>22</sup> According to panellists at the TI-Canada Third Annual Spotlight on Anti-Corruption, some witnesses have made deals with the police before coming to the Commission and in other situations arrests have been timed to occur prior to testimony before the Commission.<sup>23</sup>

### WEAKNESSES

Key weaknesses of Canada’s legal framework and enforcement efforts include:

- **Press freedom depends on the protection of journalists’ sources and is easily vulnerable to “chill” from law enforcement investigations.** Although journalists have played a vital role in uncovering instances of corruption, their ability to do so depends on the willingness of informants and other sources to disclose information on a confidential basis. As such, investigations into the identity of journalists’ sources may have a chilling effect on press freedom and effectiveness.

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<sup>19</sup> Lisa Fitterman, [“Mr. Three Percent to the Max”](#) The Walrus Magazine Blog (28 March 2013).

<sup>20</sup> Monique Muise, [“Top 10 moments at Charbonneau inquiry”](#) The Gazette (15 August 2013).

<sup>21</sup> Competition Bureau, Announcement, [“UPAC and the Competition Bureau of Canada Lay 77 Charges Against 11 Individuals and 9 Companies”](#) (21 June 2012).

<sup>22</sup> Monique Muise, [“UPAC coexisting ‘very well’ with inquiry”](#) The Gazette (6 March 2013); Monique Muise, [“Charbonneau Commission: Inquiry casualties mount”](#) The Gazette (15 August 2013).

<sup>23</sup> [Rapporteur Reports](#), TI-Canada Third Annual Spotlight on Anti-Corruption: Government Under the Microscope (29 May 2013) at 13.



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- **Penalties for domestic bribery are inconsistent with those for foreign bribery.** Section 121 of the Criminal Code establishes a maximum penalty of five years' incarceration for influence peddling, either on the demand or the supply side of the transaction.<sup>24</sup> This penalty increases to a maximum of fourteen years only in the case of judges, Members of Parliament, members of a provincial legislature, or officials involved in the administration of the criminal justice system, such as police officers.<sup>25</sup> By contrast, as of June 2013, the bribery of a foreign public official carries a maximum of fourteen years, regardless of the position of the foreign public official.<sup>26</sup>
- **Other provinces have not followed Quebec's strong anticorruption efforts.** Quebec has made significant public strides in addressing domestic corruption in response to the confluence of high profile scandals and the political will to address endemic corruption in public contracting and the construction industry.

It is unclear whether other provinces will follow suit. Although the RCMP has a specific mandate to investigate the bribery of foreign public officials, offences under the Criminal Code (such as bribing domestic officials) remain subject to the jurisdiction and investigatory discretion of provincial and municipal police. As one panellist noted at the TI-Canada Third Annual Spotlight on Anti-Corruption, "although Quebec may not have more or fewer problems with corruption than the rest of the country, at the present time there are more resources focused on uncovering and combating the problem" in Quebec.<sup>27</sup>

### RECOMMENDATIONS

**Recommendation #1. Domestic bribery.** Federal and provincial governments must ensure that combating domestic bribery is a focus of law enforcement efforts. Absent dedicated efforts and resources, corruption will go uninvestigated. The strong role of journalists in uncovering corruption in Quebec speaks to the vital role that the media plays in uncovering corruption; however the responsibility for enforcing domestic bribery laws rests with law enforcement officials.

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<sup>24</sup> *Criminal Code*, R.S.C. 1985, c. C-46, [s.121](#).

<sup>25</sup> *Criminal Code*, R.S.C. 1985, c. C-46, [ss. 119 and 120](#).

<sup>26</sup> [Corruption of Foreign Public Officials Act](#), S.C. 1998, c. 34, s. 3(2) and 4(2) [CFPOA].

<sup>27</sup> [Rapporteur Reports](#), TI-Canada Third Annual Spotlight on Anti-Corruption: Government Under the Microscope (29 May 2013) at 12.



## Article 16: Bribery of foreign public officials

### STRENGTHS

In recent years there have been several significant developments in Canada's implementation of its obligations under Article 16, including 2013 revisions to the CFPOA and increased enforcement activity<sup>28</sup> by the RCMP.

Key strengths of Canada's legal framework include:

- **Inclusion of nationality jurisdiction for foreign bribery offences.** In 2013, Canada amended the CFPOA to include nationality jurisdiction. Under the new CFPOA, the Crown will no longer have to show a "real and substantial connection" between the impugned activities and Canada. Instead, the RCMP may assert jurisdiction over the conduct of Canadian companies and individuals based on their nationality, regardless of where the alleged bribery took place.<sup>29</sup>
- **The creation of books and records offences.** As amended, the CFPOA makes it a crime to conceal the bribery of foreign officials through financial record-keeping.<sup>30</sup> According to officials from the US SEC, the vast majority of bribery cases are civil enforcement cases.<sup>31</sup>
- **Stronger penalties for foreign bribery offences.** Recent revisions to the CFPOA increased the penalty for offences to a maximum of 14 years incarceration.<sup>32</sup>
- **Removal of the "for profit" qualifier from the definition of a business.**<sup>33</sup>
- **Use of debarment powers for government contracts.** In 2012, Public Works and Government Services Canada (PWGSC) extended the list of offences that render companies and individuals ineligible to bid on Canadian government contracts to include the bribing of a foreign public official under the CFPOA.<sup>34</sup>
- **Expected introduction of revenue transparency legislation for the extractive industries.** On June 12, 2013 Prime Minister Harper announced that the government will establish new mandatory reporting standards for Canadian companies operating in the extractive industries.

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<sup>28</sup> Please see "Key issues related to enforcement system" section below.

<sup>29</sup> [CFPOA](#), s. 5.

<sup>30</sup> [CFPOA](#), s. 4.

<sup>31</sup> On June 4, 2013, TI-Canada's Legal Committee spoke with members of the US SEC in order to assist TI-Canada's development of submissions on the amendments to the CFPOA.

<sup>32</sup> [CFPOA](#), ss.3(2) and 4(2).

<sup>33</sup> Bill S-14, [An Act to amend the Corruption of Foreign Public Officials Act](#), 1<sup>st</sup> sess., 41<sup>st</sup> Parl., 2013, cl. 2(3).

<sup>34</sup> Thirteenth Annual Report to Parliament, "[Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act \(September 2011 – August 2012\)](#)" (25 June 2013).



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Our understanding is that the intent of this initiative is to require companies in the extractive industries to disclose any payments made to foreign governments and officials. The precise nature of the reporting regime will be developed in consultation with provincial and territorial counterparts, First Nations and Aboriginal groups, and industry and civil society counterparts.<sup>35</sup> The timing of this initiative is unknown.

Key strengths of Canada's enforcement efforts include:

- **Centralized federal enforcement through the RCMP's National Division.** Until recently, the RCMP's International Anti-Corruption Unit (IACU) has been responsible for the investigation of foreign bribery. The IACU was comprised of two seven-person teams based in Ottawa and Calgary. On June 3, 2013 the RCMP launched the new National Division based in Ottawa, replacing the IACU.<sup>36</sup>

The National Division's mandate includes investigations into significant threats to Canada's political, economic and social integrity. On its website, the RCMP has stated that the National Division will focus on the corruption of Canadian and foreign officials, though it is unclear what institutional partnerships may be necessary to combat domestic bribery.<sup>37</sup> The 2013 amendments to the CFPOA granted the RCMP exclusive jurisdiction to lay charges relating to foreign bribery.<sup>38</sup>

In discussions with CSOs, RCMP officials have indicated that this change will not result in fewer resources being devoted to anti-corruption investigations, but that instead resources can be more flexibly deployed.<sup>39</sup> Despite this potential benefit, it is too soon to fully assess the impact of this change on anti-corruption enforcement.<sup>40</sup>

- **Ever-increasing and high profile enforcement activity by the RCMP.** In 2013, the Canadian government reported that the RCMP has 35 active investigations currently underway.<sup>41</sup>
- **The use of enforcement powers developed to fight organized crime to fight corruption.** Recent high-profile cases such as investigations into the conduct of SNC-Lavalin have demonstrated the willingness of enforcement officials to use a broad range of powers to pursue investigations. For example, in May 2013 the RCMP obtained a court order to freeze bank accounts belonging to former SNC-Lavalin executive vice-presidents alleged to have participated

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<sup>35</sup> TI-Canada, "[Response to the Questionnaire, MESICIC-Fourth Round of Review, June, 2013](#)" at 16.

<sup>36</sup> TI-Canada, "[Response to the Questionnaire, MESICIC-Fourth Round of Review, June, 2013](#)" at 2-3; Daniel Leblanc, "[RCMP launches new unit to investigate corruption in federal government](#)" The Globe and Mail (30 May 2013).

<sup>37</sup> RCMP, "[About the RCMP National Division](#)" (14 May 2013).

<sup>38</sup> [CFPOA](#), s. 6.

<sup>39</sup> TI-Canada Third Annual Spotlight on Anti-Corruption: Government Under the Microscope (29 May 2013); TI-Canada, "[Response to the Questionnaire, MESICIC-Fourth Round of Review, June, 2013](#)" at 2-3.

<sup>40</sup> Please see discussion of the potential negative impacts of this change in the "Weaknesses" section below.

<sup>41</sup> OECD, "[Canada: Follow-Up to the Phase 3 Report and Recommendations](#)" (May 2013) at 3.



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in fraud and the bribery of foreign officials.<sup>42</sup> However, the related preliminary hearing into bribes allegedly offered and/or paid to win contracts related to the Padma Bridge project in Bangladesh was subject to a publication ban.<sup>43</sup> One panelist at the Third Annual Spotlight on Anti-Corruption described the use of these powers as an example of the RCMP “applying laws for gangsters to fraudsters and treating companies accused of paying bribes like criminal organizations.”<sup>44</sup>

- **Major convictions of corporations and an individual under the CFPOA.** Although Canada obtained its first conviction of a foreign bribery offence in 2005,<sup>45</sup> its second conviction was not until 2011.<sup>46</sup> Subsequently the volume and scale of convictions has increased: to date, Canada has obtained three convictions<sup>47</sup> of legal persons as well as the first conviction of a natural person in 2013.<sup>48</sup>

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<sup>42</sup> John Nichol and Dave Seglins, “[RCMP moving to freeze assets in widening SNC-Lavalin probe](#)” CBC News (23 May 2013).

<sup>43</sup> Greg McArthur, “[World Bank locks out SNC-Lavalin over Bangladesh bribery scandal](#)” CBC News (17 April 2013).

<sup>44</sup> [Rapporteur Reports](#), TI-Canada Third Annual Spotlight on Anti-Corruption: Government Under the Microscope (29 May 2013) at 12.

<sup>45</sup> *R. v. Watts*, [2005] A.J. No. 568 (Alta. Q.B.). In January 2005, Hydro Kleen Group Inc. admitted guilt under s. 3(1) of the CFPOA for having paid \$28,299 in bribes to a U.S. official. As part of its plea bargain agreement, the company was fined \$25,000 and the charges against individuals (a director and an officer) were stayed. See also [Phase 3 Report on the Implementation of the OECD Anti-Bribery Convention in Canada](#) (March 2011) at 9.

<sup>46</sup> In 2011, Niko Resources Ltd. pled guilty to offering two bribes valued at US\$200,000 to the Bangladeshi State Minister for Energy and Mineral Resources. According to the [\(Niko\) Agreed Statement of Facts](#), following explosions at its north-eastern Bangladesh natural gas field, Niko provided a vehicle worth approximately \$190,000 to the Energy Minister in Bangladesh and paid his travel costs of \$5,000 to attend an Energy Expo in Calgary and for a personal trip to New York. Niko provided these bribes to persuade the Minister to exercise his influence to ensure that Niko could obtain a favourable gas purchase and sales agreement and to ensure the company would be dealt with fairly in relation to claims relating to the gas field explosions. The Court accepted the sentencing recommendation, which consisted of a fine and victim surcharge totaling \$9,499,000 and a [probation order](#). The probation order makes Niko subject to Court supervision and regular audits to confirm its compliance with the CFPOA.

<sup>47</sup> In addition to the Hydro Kleen and Niko Resources cases, in 2013 Griffiths Energy International Inc. voluntarily disclosed that a previous CEO had paid US\$2 million to entities controlled by Chad’s then-ambassador to Canada and his wife. The purpose of the payment was to gain an advantage for Griffiths’ application for extraction rights. After an extensive internal investigation and cooperation with law enforcement officials, Griffiths pled guilty and agreed to pay a fine and victim surcharge totaling \$10.35 million. See [\(Griffiths\) Agreed Statement of Facts](#).

<sup>48</sup> In 2010, the RCMP charged Nazir Karigar with offering a bribe to an Indian minister to rig a bid for an airport security services contract in favour of Cryptometrics, a Canadian company for which Mr. Karigar acted as an agent. On August 15, 2013, Justice Hackland of the Ontario Superior Court of Justice found Mr. Karigar guilty of agreeing to offer bribes to foreign public officials contrary to s. 3(1) of the CFPOA. The *Karigar* case is particularly significant as it is the first prosecution under the CFPOA that proceeded to trial and therefore required a court to interpret the provisions of the CFPOA. The court confirmed that the CFPOA may be violated even if no bribe was actually paid: “it is sufficient if the party alleged to have paid a bribe to such an official believes that a bribe is being paid to such an official and that, otherwise, the *actus reus* of conspiracy is met.” *R. v. Karigar*, 2013 ONSC 5199 at para. 33. This is also the first conviction of a natural person under the CFPOA.





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- **Subject-matter expert prosecutor.** The Public Prosecution Service of Canada (PPSC) has a subject-matter expert on international corruption cases to ensure that there is a standard approach to the prosecution of offences under the CFPOA.<sup>49</sup>
- **Continuing education of government officials.** DFATD provides information and training to staff such as Heads of Mission, Trade Commissioners and Political Officers on the CFPOA and Canada's obligation to prevent and combat corruption. Over 1400 staff have participated in training that includes anti-corruption education since 2005.<sup>50</sup>
- **Raising awareness among at-risk companies.** Members of the RCMP IACU team have identified at-risk companies and have offered them education and guidance. The RCMP contributes to public legal education by presenting at local and international conferences and workshops.<sup>51</sup>

### WEAKNESSES

Key weaknesses of Canada's legal framework include:

- **The application of the new books and records offence is unclear.** The new provisions of the CFPOA dealing with accounting offences requires that books and records be kept in accordance with applicable auditing and accounting standards. However, without further specification, it is not possible to know which standards are "applicable." No mention is made as to which organizations' accounting standards should be used and no other federal legislation defines what constitutes adequate books and records.<sup>52</sup> As such, the law will be unclear until it is tested in court.<sup>53</sup>
- **Penalties for foreign bribery may not allow for the effective prosecution of less severe breaches of the CFPOA.** The CBA Anti-Corruption Team has observed that conditional and absolute discharges<sup>54</sup> and conditional sentences of imprisonment (sentences served in the community) are not available for crimes punishable by a maximum of fourteen years' incarceration. In the CBA Anti-Corruption Team's view:

This considerably reduces the ability of prosecutors and courts to deal with less severe breaches of the CFPOA. There is no statutory threshold in the CFPOA for differentiating between less and more serious instances of corruption. Under the CFPOA, a bribe of *any* amount, no matter how low, is an indictable offence. Moreover, once the facilitation payment exception is repealed, even quite small payments to officials to secure the

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<sup>49</sup> Twelfth Annual Report to Parliament, "[Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act \(September 2010 – August 2011\)](#)" (17 October 2011).

<sup>50</sup> TI-Canada, "[Response to the Questionnaire, MESICIC-Fourth Round of Review, June, 2013](#)" at 8.

<sup>51</sup> TI-Canada, "[Response to the Questionnaire, MESICIC-Fourth Round of Review, June, 2013](#)" at 4-5.

<sup>52</sup> Peter Dent, "[Canada: Too soft on bribery](#)" Financial Post (22 October 2010).

<sup>53</sup> TI-Canada, "[Response to the Questionnaire, MESICIC-Fourth Round of Review, June, 2013](#)" at 29.

<sup>54</sup> *Criminal Code*, R.S.C. 1985, c. C-46, [s. 730](#).



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performance of their duties will attract penalties in Canada that may, in some cases, be disproportionate to the gravity of the offence. These sentencing options remain available for domestic bribery offences under the *Criminal Code* (except with certain public officials such as judges and members of Parliament).<sup>55</sup>

- **Facilitation payments remain an exception to the CFPOA.** Although Bill S-14 repealed sections 3(4) and 3(5) of the CFPOA (the facilitation payment provisions), clause 5 of the Bill provides that this change will come into force on a future date, to be fixed by an order of the Governor in Council (i.e. federal Cabinet).<sup>56</sup> According to testimony before the House of Commons Standing Committee on Foreign Affairs and International Development which considered the Bill, the purpose of this delay is to “provide Canadian companies time to adjust their own practices and internal policies, if they have not already done so, to ban the use of facilitation payments in their day-to-day operations.”<sup>57</sup> The government has not committed to a timeline within which it will allow this amendment to enter into force.
- **Canada does not have sufficient mechanisms for self-reporting.** Canada should consider the U.S. Securities and Exchange Commission (US SEC)’s 30 years of experience enforcing corruption offences and create more and better avenues for self-reporting<sup>58</sup> through cooperation with provincial securities regulators. According to US SEC officials, over 40% of bribery cases come to the US SEC through self-reporting.<sup>59</sup>
- **Canada division of powers requires greater efforts of coordination between provincial and federal enforcement authorities.** As recently confirmed by the Supreme Court of Canada, the provinces have exclusive jurisdiction over securities law.<sup>60</sup> Provincial securities commissions currently have jurisdiction over financial disclosures by public companies and can impose limited sanctions for false or misleading disclosures. However, the authors are unaware of any prosecution of such breaches in circumstances as would be covered by the CFPOA.

One regulator, the Ontario Securities Commission (OSC), has recently introduced a partnership with provincial and local police to investigate and prosecute “boiler room” operations.<sup>61</sup> It is unknown if this partnership will include the cooperation required to effectively investigate and prosecute *CFPOA* offences such as the books and records offence.

In addition, Canada’s enforcement efforts suffer from the following weaknesses:

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<sup>55</sup> CBA Anti-Corruption Team’s [Submissions on Bill S-14 – Fighting Foreign Corruption Act](#) (March 2013) at 6.

<sup>56</sup> Bill S-14, [An Act to amend the Corruption of Foreign Public Officials Act](#), 1<sup>st</sup> sess., 41<sup>st</sup> Parl., 2013, cls. 3(2) and 5.

<sup>57</sup> Testimony of Alan H. Kessel, Legal Advisor, Department of Foreign Affairs and International Trade, House of Commons, Standing Committee on Foreign Affairs and International Trade, [Evidence](#), 41<sup>st</sup> Parl., 1<sup>st</sup> sess., (11 June 2013).

<sup>58</sup> [Rapporteur Reports](#), TI-Canada Third Annual Spotlight on Anti-Corruption: Government Under the Microscope (29 May 2013) at 14.

<sup>59</sup> On June 4, 2013, TI-Canada’s Legal Committee spoke with members of the US SEC in order to assist TI-Canada’s development of submissions on the amendments to the CFPOA.

<sup>60</sup> [Reference re Securities Act](#), 2011 SCC 66, [2011] 3 S.C.R. 837.

<sup>61</sup> Teresa Tesdesco, [“Ontario’s market watchdog adds criminal offences unit”](#) National Post (13 June 2013)



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- **Replacing the IACU with the National Division has the potential to adversely affect the quality and timeliness of enforcement actions.** Although RCMP officials have said that the creation of the National Division will increase the number of police resources potentially able to work on anti-corruption matters, the purpose of the National Division is to enable flexible deployment, which may mean that resources could be allocated away from anti-corruption investigations depending on changing priorities.<sup>62</sup>
- **It is disappointing that the PPSC has only one anti-corruption subject-matter expert.** While it is positive that the PPSC has a subject-matter expert, compared to other jurisdictions (e.g. the U.S.), having only one expert suggests that there is a shortage of expertise and absence of government financial support focused on the prosecution of corruption.<sup>63</sup>
- **Provincial securities regulators should be involved in the enforcement of the CFPOA.** The OSC's powers regarding misleading disclosures would enable the investigation of potential misconduct as that power extends to a filer's inaccurate reporting of transactions. In the U.S., authorities have relied on this power as a significant part of their anti-corruption enforcement arsenal, but in Canada the provincial securities regulators have not played a significant role in the investigations and prosecutions publicly known about to date.<sup>64</sup> Canada could learn from the experiences of the U.S. Department of Justice (US DoJ) and US SEC in this regard.<sup>65</sup>
- **Inadequacy of Canada's enforcement infrastructure to enforce the new books and records provisions of the CFPOA.** At TI-Canada's Third Annual Spotlight on Corruption, civil society participants questioned whether Canada's enforcement infrastructure is sufficiently robust to be able to pursue expanded corruption-related offences. Participants noted that the U.S. government collects over \$1 billion annually from corruption-related fines, and that part of this success can be attributed to a system of "competitive enforcement" involving the US SEC and the US DoJ where the US SEC's special expertise and resources enable it to enforce books and records provisions.

In Canada, corruption offences are a federal matter, but the provinces have jurisdiction over securities regulation. As such, federal and provincial cooperation is required for provincial securities commissions to assume a role similar to the SEC.

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<sup>62</sup> TI-Canada, "[Response to the Questionnaire, MESICIC-Fourth Round of Review, June, 2013](#)" at 24-25.

<sup>63</sup> TI-Canada, "[Response to the Questionnaire, MESICIC-Fourth Round of Review, June, 2013](#)" at 18-19.

<sup>64</sup> TI-Canada, "[Response to the Questionnaire, MESICIC-Fourth Round of Review, June, 2013](#)" at 19.

<sup>65</sup> On June 4, 2013, TI-Canada's Legal Committee spoke with members of the US SEC in order to assist TI-Canada's development of submissions on the amendments to the CFPOA.



### RECOMMENDATIONS

**Recommendation #2. Foreign Bribery.** When enacting the revenue transparency legislation promised by Prime Minister Stephen Harper, consider the recommendations of civil society actors such as the Resource Revenue Transparency Working Group.<sup>66</sup>

Among other things, the Working Group recommends that mandatory disclosure requirements be implemented through provincial securities regulators, which have the expertise and the capacity to ensure that Canadian public companies and foreign companies who seek to raise capital in Canadian markets comply with these disclosure obligations.<sup>67</sup> TI-Canada further recommends that Parliament consider how such requirements can be applied to private companies or state-owned enterprises which are not subject to the jurisdiction of securities regulators. Federal, provincial and civil society collaboration will help ensure Canada's legislation in this area both responds to transparency concerns and works appropriately within Canada's federal structure.

**Recommendation #3. Foreign Bribery.** Provide a civil (non-criminal) enforcement option for corruption offences to provide greater enforcement flexibility. A civil enforcement option would permit appropriate cases to be investigated and pursued without full-blown criminal investigations and prosecutions. Following the U.S. experience, the civil offence could omit the intent required by the criminal offence. It would operate based on a reasonableness standard, particularly respecting financial misrepresentation since bribes may be concealed, if grouped with other legitimate expenses.<sup>68</sup> Alternative and potentially non-criminal proceedings could, for example, be part of the oversight of public companies by provincial securities regulators.

**Recommendation #4. Foreign Bribery.** All federal and provincial government departments, agencies and Crown corporations should introduce strict sanctions for corruption offenders. Export Development Canada (EDC) provides one such model: it requires companies to provide an anti-corruption undertaking, has publicly-available Debarment Procedures, and has developed anti-corruption compliance requirements for past offenders.<sup>69</sup>

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<sup>66</sup> The Resource Revenue Transparency Working Group was formed jointly by the Mining Association of Canada, the Prospectors & Developers Association of Canada, Publish What You Pay Canada, and the Revenue Watch Institute. The objective of the Working Group is to develop a reporting framework for Canadian extractive companies, with the overarching goal of establishing greater transparency in the mining sector in Canada and overseas. The Resource Revenue Transparency Working Group, "[Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments, Draft for Consultation](#)" (14 June 2013) at 3.

<sup>67</sup> The Resource Revenue Transparency Working Group, "[Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments, Draft for Consultation](#)" (14 June 2013) at 4.

<sup>68</sup> On June 4, 2013, TI-Canada's Legal Committee spoke with members of the US SEC in order to assist TI-Canada's development of submissions on the amendments to the CFPOA.

<sup>69</sup> EDC, "[Business Ethics](#)"; EDC's [Anti-Corruption Policy Guidelines](#).



## Article 20: Illicit enrichment.

### STRENGTHS

- N/A

### WEAKNESSES

- **Canada declined to implement Article 20.** When Canada ratified the UNCAC it deposited the following declaration:

Article 20: Article 20 provides that the obligation of a State Party to criminalize illicit enrichment shall be 'subject to its constitution and the fundamental principles of its legal system.' An offence of illicit enrichment is incompatible with the Constitution of Canada, more specifically with the Canadian Charter of Rights and Freedoms, and the fundamental principles of the Canadian legal system. Canada will therefore not create the offence of illicit enrichment.<sup>70</sup>

Canada does not have a statutory offence that implements its obligations under Article 20. However, it does have other legislation that relates to conflicts of interest for government officials, such as the *Conflict of Interest Act*. Canadian common law recognizes the concept of restitution, which permits the reversal of unjust enrichment. However this is only a private cause of action.

### RECOMMENDATIONS

**Recommendation #5. Illicit Enrichment.** Canada should build on the disclosure regimes it already has in place for public servants. For example, within 60 days of being elected, Members of Parliament are required to disclose their finances in detail, listing assets and liabilities greater than \$10,000 and any income greater than \$1,000 received for the twelve months prior to being elected.<sup>71</sup> Summaries of this disclosure are published on the Conflict of Interest and Ethics Commissioner's website.<sup>72</sup> In order to strengthen Canada's ability to detect illicit enrichment or other forms of corruption, Members of Parliament should also declare their assets when they leave office, so that any questionable changes can be investigated.

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<sup>70</sup> Canada – Depository Notification, UN Convention Against Corruption, Reference: C.N.981.2007.TREATIES-25 (2 October 2007), online: <http://treaties.un.org/doc/Treaties/2003/12/20031209%2002-50%20PM/Related%20Documents/CN.981.2007-Eng.pdf>; United Nations Treaty Collection, online: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-14&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en).

<sup>71</sup> [Conflict of Interest Code for Members of the House of Commons](#), Standing Orders, Appendix (June 2011), ss. 20 and 21.

<sup>72</sup> [Public Registries](#), Office of the Conflicts of Interest and Ethics Commissioner (1 April 2011).



## Article 23: Laundering of proceeds of crime

### STRENGTHS:

- **Canada has enacted a variety of legislation in order to combat money laundering.**<sup>73</sup> It has made sustained efforts to improve existing legislation, having progressively expanded the scope of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.<sup>74</sup>

### WEAKNESSES:

- **Canada has not been supportive of beneficial ownership transparency.** Canada has constitutional and structural difficulties relating to its federal system that pose a challenge for adopting beneficial ownership transparency requirements.<sup>75</sup>

In June 2013, the G8 committed to implementing individual national action plans on transparency of company ownership and control.<sup>76</sup> However, the Supreme Court of Canada has recently ruled that proposed legislation creating a national securities commission is unconstitutional.<sup>77</sup> As such it is unclear how Canada will achieve a national consensus in order to introduce beneficial ownership transparency requirements.

### RECOMMENDATIONS

**Recommendation #6. Money Laundering.** To avoid the criminal misuse of legal entities, Canada should require the disclosure of beneficial ownership by trusts and companies registered in Canada. This information should be collected and made available to Canadian law enforcement authorities.

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<sup>73</sup> Duhaime's Anti-Money Laundering Law in Canada, "[AML Legislation in Canada](#)" (2013).

<sup>74</sup> [Proceeds of Crime \(Money Laundering\) and Terrorist Financing Act](#), S.C. 2000, c. 17.

<sup>75</sup> Duhaime's Anti-Money Laundering Law in Canada, "[Tax evasion, beneficial ownership and money laundering – what are the issues facing Canada at the G8 Summit next week?](#)" (15 June 2013); Adrienne Margolis, "[Global Witness exposes banks' role in corruption](#)" (August 2009).

<sup>76</sup> UK Prime Minister's Office, Policy Paper "[G8 action plan principles to prevent the misuse of companies and legal arrangements](#)" (18 June 2013).

<sup>77</sup> [Reference re Securities Act](#), 2011 SCC 66, [2011] 3 S.C.R. 837 at para. 7-9.



## Article 33: Protection of reporting persons (whistleblower protection)

### STRENGTHS

Canada's legal framework benefits from the following strengths:

- **Six provinces out of the thirteen provinces and territories have provincial legislation to protect whistleblowers in public service.** In December 2012, Alberta's new whistleblower protection legislation, the [Public Interest Disclosure \(Whistleblower Protection\) Act](#), entered into force. Alberta joined Manitoba<sup>78</sup>, New Brunswick,<sup>79</sup> Nova Scotia,<sup>80</sup> Ontario,<sup>81</sup> and Saskatchewan<sup>82</sup> in providing statutory protection for whistleblowers within government institutions.

### WEAKNESSES

However, Canada's legal framework suffers from the following weaknesses:

- **Canada has not reviewed its federal legislation in accordance with the statutory timeline.** Section 54 of the [Public Servants Disclosure Protection Act](#) (PSDPA) specifies that five years after the section comes into force, the Treasury Board should review the Act, its administration and operation and report its findings to Parliament. The review was due to commence in April 2012. Although the government has committed to conducting a review, to date it has not disclosed what form the review will take or who will be involved.<sup>83</sup>
- **The federal law fails to make the public interest a central consideration in whistleblower protection.** The preamble of the PSDPA refers to the need to balance an employee's freedom of expression and simultaneous duty of loyalty to an employer. However, as FAIR Canada has commented, "[p]ublic servants' overriding loyalty must be to the public interest [...] public servants have an ethical, professional and sometimes legal duty to disclose misconduct."<sup>84</sup>
- **Whistleblowers often have to bear their own legal costs, while accused wrongdoers will typically have access to the financial and legal resources of the organization.**<sup>85</sup> Even in

<sup>78</sup> [The Public Interest Disclosure \(Whistleblower Protection\) Act](#), CCSM c. P217.

<sup>79</sup> [Public Interest Disclosure Act](#), SNB 2012, c. 112.

<sup>80</sup> [Public Interest Disclosure of Wrongdoing Act](#), SNS 2010, c. 42.

<sup>81</sup> [Public Service of Ontario Act, 2006](#), SO 2006, c 35, Sch A, Part VI.

<sup>82</sup> [The Public Interest Disclosure Act](#), SS 2011, c P-38.1, SS 2011, c P-38.1.

<sup>83</sup> The Federal Accountability Initiative for Reform (FAIR Canada), "[Report to Whistleblowing for Change Conference, Berlin](#)" (11 March 2013) [FAIR Canada March 2013 Report].

<sup>84</sup> FAIR Canada, "[What's Wrong with Canada's Federal Whistleblower Legislation: An Analysis of the Public Servants Disclosure Protection Act \(PSDPA\)](#)" (9 April 2012) at 1.

<sup>85</sup> Gerry Ferguson, "[Protection and Treatment of Witnesses and Informants under the United Nations Convention against Corruption and under Canadian Law](#)" International Centre for Criminal Law Reform and Criminal Justice Policy, *Symposium on Canada China Cooperation in Promoting Criminal Justice Reform*, June 2007 at 17.



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situations where a worker's union may provide some support to a whistleblower, the whistleblower may not be permitted to give direct instructions to legal counsel or have the full protection of the solicitor-client relationship. In order to level the playing field, the government could also fund independent legal counsel for public sector whistleblowers.

- **The federal Public Sector Integrity Commissioner is prohibited from pursuing investigations that require investigating the private sector.** Pursuant to section 34 of the PSDPA, if the Commissioner believed that a matter under investigation required information that is outside the public sector, the Commissioner is required to end that part of the investigation. Although the Commissioner retains the discretion to refer the matter to another authority (e.g. law enforcement officials with jurisdiction over private sector investigations), there is no requirement that the Commissioner do so.<sup>86</sup>

This limit on the Commissioner's power prevents the Commissioner from obtaining information relevant to ongoing investigations from sources such as former public sector employees.<sup>87</sup> Second, "in any case where subcontractors play a role the Commissioner's ability to investigate is fatally undermined."<sup>88</sup> Indeed, as FAIR has observed, the major public scandals of the last few decades—"the tainted blood scandal, the gun registry overrun, the sponsorship scandal—all had significant private sector involvement."<sup>89</sup>

- **The federal Public Sector Integrity Commissioner lacks appropriate powers to investigate reprisals against whistleblowers.** Under the PSDPA, the Integrity Commissioner has full powers under Part II of the *Inquiries Act* to investigate disclosures of wrongdoing.<sup>90</sup> However, when investigating complaints of reprisals against a whistleblower, the Commissioner is not given comparable powers.<sup>91</sup>
- **Protection of whistleblowers in the private sector is limited.** Section 425.1 of the Criminal Code makes it an offence to commit reprisals against whistleblowers in the private sector who provide information to federal or provincial law enforcement authorities about criminal offences.
  - **There is no statutory protection for whistleblowers who experience retaliation for attempting to use internal reviews or other compliance mechanisms within private sector organizations in order to report corruption or related misconduct.**

<sup>86</sup> [Public Servants Disclosure Protection Act](#), S.C. 2005, c. 46, s. 34 [PSDPA].

<sup>87</sup> Report of the Auditor General of Canada to the House of Commons, "[The Public Sector Integrity Commissioner of Canada](#)" (9 December 2010) at 1. Private Member's Bill, [Bill C-505](#), which had its first reading before the House of Commons on May 2, 2013 would amend the PSDPA to allow the Public Sector Integrity Commissioner to examine former public servants.

<sup>88</sup> FAIR Canada, "[What's Wrong with Canada's Federal Whistleblower Legislation: An Analysis of the Public Servants Disclosure Protection Act \(PSDPA\)](#)" (9 April 2012) at 3-4; Gerry Ferguson, "[Protection and Treatment of Witnesses and Informants under the United Nations Convention against Corruption and under Canadian Law](#)" International Centre for Criminal Law Reform and Criminal Justice Policy, *Symposium on Canada China Cooperation in Promoting Criminal Justice Reform*, June 2007 at 17.

<sup>89</sup> FAIR Canada, "[What's Wrong with Canada's Federal Whistleblower Legislation: An Analysis of the Public Servants Disclosure Protection Act \(PSDPA\)](#)" (9 April 2012) at 4.

<sup>90</sup> [PSDPA](#), S.C. 2005, c. 46, s. 29.

<sup>91</sup> [PSDPA](#), S.C. 2005, c. 46, ss. 19.7-19.9.





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Provincial whistleblower protection statutes offer a better model. For example, section 74 of Saskatchewan's *Labour Standards Act* protects whistleblowers who report or propose to report to a lawful authority.<sup>92</sup> In *Merk*, the Supreme Court of Canada interpreted this provision in light of the statutory purpose and concluded that a "lawful authority" could include authorities within a private sector organization.<sup>93</sup> Indeed, "the employee's duty of loyalty and the public's interest in whistleblowing is best reconciled with the "up the ladder" approach."<sup>94</sup> However, the Court was careful to acknowledge that "there may well be circumstances where an employee is fully justified in not seeking an internal remedy but in going directly to the police [...] Whether or not an employee is justified in bypassing internal remedies will depend on the circumstances."<sup>95</sup>

Only Saskatchewan and New Brunswick have whistleblower protection legislation that applies to the private sector.<sup>96</sup> While the Criminal Code may deter reprisals against whistleblowers who report directly to law enforcement officials, this protection does not protect those who go "up the ladder" internally.

- **The Criminal Code's theoretical deterrence of reprisals is not the same as effective protection for whistleblowers.** Even assuming that this section of the Criminal Code was rigorously enforced, punishing those who commit reprisals may not redress the harm that whistleblowers suffer. This discrepancy has led some civil society organizations to conclude that Canada does not protect whistleblowers in the private sector.<sup>97</sup>

In addition, Canada's enforcement efforts suffer from the following weaknesses:

- **The federal government appointed a Public Sector Integrity Commissioner who failed to investigate reports of reprisals against whistleblowers and engaged in reprisals against her own staff.** In 2010, the Auditor General reported that the first Public Sector Integrity Commissioner, Christiane Ouimet, failed to finalize or implement operational guidance to enable investigations to be conducted.<sup>98</sup> The Commissioner's Office failed to robustly investigate complaints: from 2007 to 2010, the Commissioner's Office received 228 disclosures of wrongdoings or complaints; out of these only seven received a formal investigation.<sup>99</sup> Of the 86 closed operational files, in "many cases" the decision to not formally investigate or otherwise

<sup>92</sup> [Labour Standards Act](#), R.S.S. 1978, c. L-1, s. 74.

<sup>93</sup> [Merk](#) at 446.

<sup>94</sup> [Merk](#) at 437.

<sup>95</sup> [Merk](#) at 446.

<sup>96</sup> Yosie Saint-Cyr, "[The State of Whistleblowing in Canada](#)" Slaw (6 June 2013).

<sup>97</sup> [Rapporteur Reports](#), TI-Canada Third Annual Spotlight on Anti-Corruption: Government Under the Microscope (29 May 2013) at 13; [FAIR Canada March 2013 Report](#); FAIR Canada, "[What's Wrong with Canada's Federal Whistleblower Legislation: An Analysis of the Public Servants Disclosure Protection Act \(PSDPA\)](#)" (9 April 2012) at 4.

<sup>98</sup> Report of the Auditor General of Canada to the House of Commons, "[The Public Sector Integrity Commissioner of Canada](#)" (9 December 2010) at 9.

<sup>99</sup> Report of the Auditor General of Canada to the House of Commons, "[The Public Sector Integrity Commissioner of Canada](#)" (9 December 2010) at 9-10.



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dismiss disclosures of wrongdoing and complaints was not supported by the material in the Commissioner's file.<sup>100</sup>

In addition, the Auditor General's investigation found that the Commissioner had engaged in retaliatory action against employees whom the Commissioner believed had complained about her.<sup>101</sup> A new Commissioner was appointed in December 2011.

- **Very few inquiries by whistleblowers receive full investigations.** According to statistics compiled from reports by the Office of the Integrity Commissioner, between 2007 and 2013 the Commissioner:
  - Received **1365** inquiries and **434** formal disclosures;
  - Began **55** investigations;
  - Completed **34** investigations;
  - Found **5** instances of wrongdoing; and
  - Sanctioned **0** wrongdoers<sup>102</sup>
- **The current Integrity Commissioner's "no-names" practice permits those who behave unethically to escape appropriate adverse consequences.** Wrongdoers may escape sanction by retiring or leaving the public service, "thus facilitating their 'soft landings' in other jobs."<sup>103</sup>
- **Whistleblowers are often ignored and reprisals against them are rarely, if ever, punished.** From 2009-2013, FAIR Canada reported receiving over 250 calls from whistleblowers. Of these, "only a tiny handful have succeeded in having their allegations properly investigated and virtually all have suffered reprisals."<sup>104</sup> FAIR Canada informed the authors of this report that they are not aware of a single case in which reprisals against a whistleblower have been punished.

As far as TI-Canada has been able to determine, no individual or company has been sanctioned under s. 425.1 of the Criminal Code for taking reprisals against a whistleblower in Canada.

### RECOMMENDATIONS

**Recommendation #7. Whistleblower Protection.** Canada should ensure that there is adequate statutory protection for whistleblowers within both the public and private sectors. This requires the federal government to amend the Criminal Code and all levels of government to introduce more robust legislative protection for whistleblowers in the private sector. Similarly, all provinces and territories should have whistleblower protection statutes for both public and private sector employees. Following the Supreme

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<sup>100</sup> Report of the Auditor General of Canada to the House of Commons, "[The Public Sector Integrity Commissioner of Canada](#)" (9 December 2010) at 10.

<sup>101</sup> Report of the Auditor General of Canada to the House of Commons, "[The Public Sector Integrity Commissioner of Canada](#)" (9 December 2010) at 8.

<sup>102</sup> FAIR Canada, [PSIC Performance 2007-2013](#).

<sup>103</sup> [FAIR Canada March 2013 Report](#). Private member's bill, [Bill C-505](#), which had its first reading before the House of Commons on May 2, 2013 would amend the PSDPA to authorize the Commissioner to disclose the identity of the person found to have committed the wrongdoing.

<sup>104</sup> [FAIR Canada March 2013 Report](#).



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Court of Canada's ruling in *Merk*, legislation should ensure that whistleblowing employees are protected whether they choose to take their information "up the ladder" or outside the organization, directly to law enforcement officials.<sup>105</sup>

**Recommendation #8. Whistleblower Protection.** A civil remedy that would enable whistleblowers who experience reprisals to recover damages for their treatment would enhance the protection of whistleblowers. For example, employment standards legislation could be amended to provide for greater entitlement to damages if a wrongful dismissal were the result of a reprisal for whistleblowing.

### 1. Summary of Areas Showing Good Practice

Please see above discussion of the strengths of Canada's legal framework and enforcement efforts.

### 2. Summary of Areas with Deficiencies

Please see above discussion of the weaknesses of Canada's legal framework and enforcement efforts.

### 3. Additional CSO Recommendations

**Recommendation #9. Access to Information About the UNCAC Review.** The federal government should publish information about the review process in an accessible location on government websites. This information should include: timely information about the process (focal point, schedule); Canada's Self-Assessment Checklist (even without appendices, due to translation costs); the full country report; and links to relevant information on the UNODC website.<sup>106</sup>

**Recommendation #10. UNCAC Review Process.** The federal government should establish a follow-up process to review recommendations with civil society. Canada should announce the changes it makes as a result of the UNCAC Review Process.

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<sup>105</sup> [Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771](#), 2005 SCC 70, [2005] 3 S.C.R. 425 at 437 [*Merk*].

<sup>106</sup> Recommended by Transparency International and the UNCAC Coalition, "[The First Three Years of the UNCAC Review Process: A Civil Society Perspective](#)" (16 May 2013).



## B. Key issues related to enforcement system

### 1. Statistics

Through its Senior Advisor, Bronwyn Best, TI-Canada has also been in regular contact with Canada's Focal Point at the Department of Foreign Affairs, Trade and Development (DFATD). With the Focal Point's assistance, TI-Canada was able to obtain information such as statistical data that may have otherwise been difficult to access. These statistics are included in Canada's self-assessment questionnaire and are based on data provided by Statistics Canada, Canadian Centre for Justice Statistics, Integrated Criminal Court Survey (ICCS). Statistics are recorded using the "most serious offence" methodology, which means that classification is based on the offence that carries the longest maximum sentence under the Criminal Code.

Table 4: Cases statistics

	<b>Trials (ongoing and finalized)</b>	<b>Convictions</b>	<b>Settlements</b>	<b>Acquittals</b>	<b>Pending cases</b>
Bribery of national public officials (supply side) (Article 15(a))	Unknown	From 2007-2010, 43 cases brought, 22 found guilty		From 2007-2010, 21 cases resulted in an acquittal.	Unknown
Bribery of national public officials (demand side) (Article 15(b))	Unknown	From 2007-2010, 53 cases brought, 27 found guilty	Unknown	From 2007-2010, 26 cases resulted in an acquittal.	Unknown
Bribery of Foreign Public Officials (Article 16)	0 <sup>107</sup>	R. v. Karigar (2013)	Niko Resources (2011) Griffiths Energy (2013)	0	R. v. Ramesh Shah and Mohammed Ismael (2013)
Embezzlement, misappropriation or other diversion of property by a public official (Article 17)	Unknown. Government officials were able to share statistics about all theft and fraud offences, but it was not possible to determine how many of these offences were perpetrated by a public official in the course of duty, or which were charges under the Financial Administration Act using the available data.				
Illicit Enrichment (Article 20)	N/A				
Money laundering linked to corruption (Article 23)	Money laundering is prosecuted through a variety of federal and provincial crimes. According to the government officials consulted, there are no statistics kept that capture the full extent of government enforcement activity relating to Article 23. Under section 462.31 of the Criminal Code, from 2007 to 2010 there were 258 cases tried, resulting in 71 guilty verdicts.				

### 2. Selected information on cases and investigations

Given TI-Canada's expertise in anti-corruption efforts focused on the corruption of foreign public officials, the authors have summarized key cases and investigations below. We assume that Canada's Self-

<sup>107</sup> There is currently an asset forfeiture case ongoing against the wife of the Ambassador of Chad in connection with her founders' shares obtained from Griffiths Energy. See Kelly Cryderman, "[Hunt for Griffiths bribery turns to former ambassador's wife](#)" Globe and Mail (22 March 2013).



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Assessment Checklist comprehensively reports the cases and investigations related to the other UNCAC provisions under review.

<b>Article 16 – Bribery of Foreign Public Officials – Investigations</b>		
<b>Blackfire Exploration Ltd.</b>	<i>Date</i>	Investigation commenced in 2010. At time of writing, no charges have been laid.
	<i>Summary of Principal Charges</i>	Allegations that bribes were offered or paid to a local mayor in the state of Chiapas, Mexico, where the company has a mining operation.
	<i>Penalties or Sanctions Sought</i>	None as of yet.
	<i>Status of the Case</i>	Ongoing.
	<i>Any Obstacles to the Case's Progression?</i>	None reported.
	<i>Sources of Information</i>	Mining Watch Canada Report, " <a href="#">Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy</a> " (May 2013) Mining.com, " <a href="#">New twist in Canadian Blackfire investigation</a> " (6 May 2013) Globe and Mail article, " <a href="#">RCMP raid Calgary miner over bribery allegations</a> " (29 August 2011)
<b>SNC-Lavalin Group (Bangladesh Case)</b>	<i>Date</i>	Investigation commenced in 2011.
	<i>Summary of Principal Charges</i>	Allegations of bribery in connection with the Padma Bridge project in Bangladesh.
	<i>Penalties or Sanctions Sought</i>	Charges against two individual employees laid in 2012 (see below); specific penalties sought are not yet known.
	<i>Status of the Case</i>	Ongoing.
	<i>Any Obstacles to the Case's Progression?</i>	None reported.
	<i>Sources of Information</i>	Globe and Mail article, " <a href="#">New corruption allegations hit SNC-Lavalin</a> " (18 December 2012) CBC News, " <a href="#">10 countries where SNC-Lavalin contracts under scrutiny</a> " (15 May 2013)
<b>SNC-Lavalin Group (Libya/ Tunisia Case)</b>	<i>Date</i>	Investigation commenced in 2011.
	<i>Summary of Principal Charges</i>	Allegations of bribery in connection with projects in Libya and Tunisia during the Gaddafi regime.
	<i>Penalties or Sanctions Sought</i>	None as of yet.
	<i>Status of the Case</i>	Ongoing.
	<i>Any Obstacles to the Case's Progression?</i>	None reported.
	<i>Sources of Information</i>	CBC News, " <a href="#">SNC-Lavalin letter says Gadhafi son was offered VP post</a> " (23 May 2013) CBC News, " <a href="#">SNC Lavalin paid \$160M in Libyan bribes, RCMP allege</a> " (25 January 2013) National Post, " <a href="#">Millions in SNC-Lavalin bribes bought Gaddafi's playboy son luxury yachts, unsealed RCMP documents allege</a> " (25 January 2013)
<b>Cardero Resource Corp.</b>	<i>Date</i>	Investigation commenced in 2012.
	<i>Summary of Principal Charges</i>	The RCMP received a complaint alleging that the company used improper business practices to secure a mining concession in Ghana.
	<i>Penalties or Sanctions Sought</i>	None.
	<i>Status of the Case</i>	Closed in January 2013.
	<i>Any Obstacles to the Case's Progression?</i>	None reported.
	<i>Sources of Information</i>	The Northern Miner, " <a href="#">RCMP looks at Cardero's activities in Ghana</a> " (25 June 2012) 2013 Exporting Corruption Report <sup>108</sup>

<sup>108</sup> At time of writing, this report was not yet publicly available, however it is expected to be published on the TI-Canada website on 8 October 2013.



Article 16 – Bribery of Foreign Public Officials – Cases		
<b>R. v. Karigar</b>	<i>Date</i>	Charges laid in June 2010; judgement rendered on August 15, 2013.
	<i>Summary of Principal Charges</i>	Offering or agreeing to give or offer bribes to secure an airport security equipment contract.
	<i>Penalties or Sanctions Sought</i>	Sentencing is pending.
	<i>Status of the Case</i>	Concluded – guilty verdict.
	<i>Any Obstacles to the Case's Progression?</i>	N/A
	<i>Sources of Information</i>	R. v Karigar, 2013 ONSC 5199
<b>R. v. Niko Resources Ltd.</b>	<i>Date</i>	Charges laid in June 2011
	<i>Summary of Principal Charges</i>	The company pled guilty to having given a luxury SUV (valued at \$190,000) as well as personal travel to a Bangladeshi minister in exchange for help negotiating a contract and dealing with claims for compensation after an explosion at the company's gas field.
	<i>Penalties or Sanctions Sought</i>	\$9.5M fine (including victim surcharge) and Probation Order.
	<i>Status of the Case</i>	Concluded – guilty verdict.
	<i>Any Obstacles to the Case's Progression?</i>	N/A
	<i>Sources of Information</i>	R. v. Niko Resources Ltd., ABQB, June 2011 – <a href="#">Agreed Statement of Facts</a> and <a href="#">Probation Order</a> .
<b>R. v. Ramesh Shah and Mohammad Ismael</b>	<i>Date</i>	Charges laid in spring 2012.
	<i>Summary of Principal Charges</i>	Allegations that the two individuals offered or agreed to pay a bribe on behalf of their employer, SNC-Lavalin, to Bangladeshi officials in connection with the construction of the Padma Bridge and an elevated highway in Dhaka.
	<i>Penalties or Sanctions Sought</i>	N/A
	<i>Status of the Case</i>	The investigation is ongoing.
	<i>Any Obstacles to the Case's Progression?</i>	N/A
	<i>Sources of Information</i>	
<b>R. v. Griffiths Energy International Inc.</b>	<i>Date</i>	Charges laid in January 2013.
	<i>Summary of Principal Charges</i>	Griffiths Energy entered into an agreement with a company owned and controlled by the Ambassador of Chad to Canada, to pay US\$2M to help obtain an oil and gas concession.
	<i>Penalties or Sanctions Sought</i>	\$10.35M fine.
	<i>Status of the Case</i>	Concluded – guilty verdict.
	<i>Any Obstacles to the Case's Progression?</i>	N/A
	<i>Sources of Information</i>	<a href="#">Agreed Statement of Facts</a> CBC News, " <a href="#">Calgary judge OK's \$10M fine for company in Chad bribery case</a> " (25 January 2013)

### 3. Recommendations for the enforcement system for UNCAC-related offences

**Recommendation #11. Enforcement Resources.** The federal government should ensure that changes to the structure of the law enforcement operations of the RCMP do not reverse the recent progress, but focus on corruption-related offences, both in Canada and by Canadians abroad.



## IV. Recent Developments

### Amendments to the CFPOA

The House of Commons Standing Committee on Foreign Affairs and International Trade considered the draft legislation from June 4, 2013 to June 13, 2013.<sup>109</sup> After two days of hearings, the Standing Committee did not recommend any changes to the amendments.

### RCMP Institutional Changes<sup>110</sup>

In 2013, the RCMP announced the creation of a new “National Division” headquartered in Ottawa. The National Division’s two-part mandate is to (i) “focus its expertise in sensitive, high-risk investigations into significant threats to Canada’s political, economic and social integrity” and (ii) “focus its expertise in providing protective services to Canadian dignitaries domestically and internationally, and protecting designated sites in the National Capital Region.”<sup>111</sup> Sensitive and high-risk investigations include: investigations relating to war crimes, commercial crimes, and international anti-corruption, as well as federal and immigration and passport special investigations.<sup>112</sup>

### OSC Institutional Changes

The OSC has partnered with the Ontario Provincial Police (and potentially the Toronto Police and RCMP) to create a new unit to investigate and prosecute stock market manipulations, fraudulent stock promotion schemes, and other federal and provincial securities market offences. It is premature to predict results relating to corruption.<sup>113</sup>

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<sup>109</sup> Canada, House of Commons, Standing Committee on Foreign Affairs and International Development, [“Thirteenth Report to Parliament”](#), Adopted by the Committee 13 June 2013, Presented to Parliament 14 June 2013.

<sup>110</sup> Douglas Quan, [“RCMP to unveil national anti-corruption unit”](#) The Gazette, 2 June 2013; Daniel Leblanc, [“RCMP launches new unit to investigate corruption in federal government”](#) The Globe and Mail, 30 May 2013.

<sup>111</sup> RCMP, Press Release, [“RCMP’s New National Division to Focus on Sensitive and International Investigations”](#) (3 June 2013).

<sup>112</sup> RCMP, [“Sensitive and International Investigations”](#) (Last Modified 23 April 2013).

<sup>113</sup> Teresa Tesdesco, [“Ontario’s market watchdog adds criminal offences unit”](#) National Post, 13 June 2013.



## **Acknowledgements**

The report was prepared by TI-Canada with partial funding from UNCAC Small Grants and the support of the Transparency International Secretariat (TI-S). The authors are Thomas Marshall, Q.C., and Michael Robinson, Q.C., Directors, Bronwyn Best, Senior Advisor, and Sabrina A. Bandali, Legal Committee Member. The authors would also like to thank the International Senior Lawyers Project, David Moritt and Eric Morgan.





## Appendix A: Sources consulted

The authors interviewed or relied on written commentary by the following individuals or organizations.

Table A – Government Experts		
Organization	Individual (if any)	Notes
Standing Committee on Foreign Affairs and International Trade		Committee proceedings on June 11 and 13, 2013, regarding Bill S-14
Department of Foreign Affairs, Trade and Development, Canada	Alan Kessel, Legal Advisor	Consulted for TI-Canada 2013 OECD Questionnaire Testimony before the House Standing Committee (June 11, 2013)
Department of Justice, Canada	Douglas R. Breithaupt, General Counsel, Criminal Law Policy Section	Consulted for TI-Canada 2013 OECD Questionnaire
Public Prosecution Service of Canada	Marke Kilke	Consulted for TI-Canada 2013 OECD Questionnaire Participant at the 2013 TI-Canada Third Annual Spotlight on Anti-Corruption
Department of Foreign Affairs, Trade and Development, Canada	Marcus Davies, Legal Officer, Criminal, Security and International Law Division	Canadian Focal Point
Royal Canadian Mounted Police	Stephen Foster, Director, Commercial Crime Branch	Speaker at the 2013 TI-Canada Third Annual Spotlight on Anti-Corruption
		Speaker at the 2013 TI-Canada Third Annual Spotlight on Anti-Corruption

Table B – Civilian Experts		
Name	Role	Notes
Federal Accountability Initiative for Reform (FAIR) Canada	David Hutton, Executive Director Joanna Gualtieri, Founder	
North-South Institute	Joseph Ingram	Testimony before the House Standing Committee (June 13, 2013)
Canadian Bar Association Anti-Corruption Team	Michael Osborne Noah Arshinoff	Testimony before the House Standing Committee (June 11, 2013) <a href="#">Submissions on Bill S-14 – Fighting Foreign Corruption Act</a> (March 2013)
OECD Working Group on Bribery		Phase 3 Report on Canada's Implementation (2011)
International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia	Gerry Ferguson, Author Faculty of Law, University of Victoria	<a href="#">"Protection and Treatment of Witnesses and Informants under the United Nations Convention against Corruption and under Canadian Law"</a> Paper presented at the <i>Symposium on Canada China Cooperation in Promoting Criminal Justice Reform</i> , June 2007
Canadian Journalists for Free Expression		
Mining Association of Canada		Resource Revenue Transparency Working Group
Prospectors and Developers Association of Canada (PDAC)		Resource Revenue Transparency Working Group
Publish What You Pay – Canada		Resource Revenue Transparency Working Group
Revenue Watch Institute		Resource Revenue Transparency Working Group
Deloitte Forensic	Peter Dent, Partner	<a href="#">"Canada: Too soft on bribery"</a> Financial Post (22 October 2010)



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Transparency International Secretariat	Maggie Murphy, Global Outreach, Advocacy and Campaigns Coordinator	
Bennett Jones LLP	Milos Barutciski, Partner	
Selwyn Resources Limited	Joe Ringwald, Interim President	

<b>Table C – Journalists and Media Sources</b>		
<i>Organization</i>	<i>Individual (if any)</i>	<i>Notes</i>
Radio-Canada	Luc Tremblay, Producer	
The Gazette	Monique Muise Douglas Quan	<p><a href="#">“UPAC coexisting ‘very well’ with inquiry”</a> (6 March 2013)</p> <p><a href="#">“As price of asphalt soared, quality dropped, witness testifies”</a> (15 August 2013)</p> <p><a href="#">“Charbonneau Commission: Inquiry casualties mount”</a> (15 August 2013)</p> <p><a href="#">“RCMP to unveil national anti-corruption unit”</a> The Gazette (2 June 2013)</p>
Maclean’s	Lia Levesque	<p><a href="#">“Quebec’s explosive corruption inquiry is back from its summer break”</a> (3 September 2013)</p>
CBC	Greg McArthur John Nichol Dave Seglins	<p><a href="#">“World Bank locks out SNC-Lavalin over Bangladesh bribery scandal”</a> (17 April 2013)</p> <p><a href="#">“Key players in the Quebec corruption inquiry”</a> (22 May 2012)</p> <p><a href="#">“RCMP moving to freeze assets in widening SNC-Lavalin probe”</a> CBC News (23 May 2013)</p>
The Walrus	Lisa Fitterman	<p><a href="#">“Mr. Three Percent to the Max”</a> (28 March 2013)</p>
Globe and Mail	Daniel Leblanc Kelly Cryderman	<p><a href="#">“RCMP launches new unit to investigate corruption in federal government”</a> (30 May 2013)</p> <p><a href="#">“Hunt for Griffiths bribery turns to former ambassador’s wife”</a> (22 March 2013)</p>
National Post	Teresa Tedesco	<p><a href="#">“Ontario’s market watchdog adds criminal offences unit”</a> (13 June 2013)</p>
Slaw	Yosie Saint-Cyr	<p><a href="#">“The State of Whistleblowing in Canada”</a> (6 June 2013)</p>



## **Appendix B: Government Official Self-Assessment Checklist**

At the time of preparing this Report, the Canadian Government's Official Self-Assessment Checklist has not been made publicly available. Notwithstanding TI-Canada's request, government officials declined to make the Self-Assessment Checklist available.

We have been informed that the Self-Assessment Checklist will not be published on its own. According to Canadian government officials, the Self-Assessment Checklist with the peer reviewers' comments inserted will form the final country report. If the relevant Minister approves this final report, it will be published in its entirety, but only in English.

The Executive Summary of the final country report, prepared by the peer reviewers and the UNCAC Secretariat, will be published and made available in the six official languages of the UN.



**Transparency International Canada Inc.**

**Appendix C: Rapporteur Reports, Agenda and Speaker Biographies for the Third Annual Spotlight on Anti-Corruption, May 29, 2013**



**Transparency International Canada Inc.**

# **TI-Canada**

**Third Annual  
Spotlight on Anti-Corruption:  
Government Under the Microscope**

**Rapporteur Reports  
29 May 2013**

## Introduction

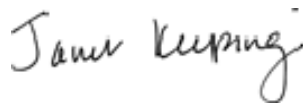
Transparency International Canada (TI-Canada) held its Third Annual Spotlight on Anti-Corruption: Government under the Microscope, on 29 May 2013, in Toronto. This year the topics addressed were:

- Grading Canada's Record on Compliance with International Obligations;
- Corruption in Government – Dealing with the Demand Side;
- Corruption in Canada: Hot on the trail; uncovering what's happening and why, and;
- How organizations can say “no” to bribe solicitations.

As in previous years, participants came from a variety of sectors, including business, government, academia, the media and civil society.

The Spotlight on Anti-Corruption is meant to explore and move forward the discussion on current anti-corruption issues. In order for people not able to attend the event to benefit from it, we have assembled Rapporteur Reports of each session, which were held under the Chatham House Rule, allowing for individuals' comments to be passed on without personal attribution.

We hope you will find these Reports useful and look forward to your participation in future TI-Canada events.



Janet Keeping  
Chair and President

For any questions/suggestions or further information, please contact:  
[ti-can@transparency.ca](mailto:ti-can@transparency.ca); or 416-488-3939.

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# Agenda



## Transparency International Canada Inc.

presents the *Third Annual*

### Spotlight on Anti-Corruption: Government Under the Microscope

Wednesday, 29 May 2013

08:00 – 17:00, followed by reception

Location: #3400, 1 First Canadian Place, Toronto (offices of Bennett Jones LLP)

PD credits are available for Ontario CAs

An application for accreditation of the program for professionalism hours is pending with the Law Society of Upper Canada

#### AGENDA

**08:00 – 08:15** Coffee and Networking

**08:15 – 08:30** Welcome and Introduction to Day

Ms. Janet Keeping, *Chair and President, Transparency International Canada*

**08:30 – 10:00** Grading Canada's Record on Compliance with International Obligations

For many years, Canada was considered a laggard in enforcing compliance with the OECD, UN and other international commitments to combat corruption. But that was then. Increased resources have led to a steady stream of charges, guilty pleas, record fines and on-going investigations over the past four years. Knowledgeable speakers will review Canada's enforcement record to date, including a recap of cases known to be under investigation.

**Moderator:** Mr. Bruce Futterer, *Vice President & General Counsel, GE Canada, Mississauga, Ontario*

**Speakers:** Supt. Stephen Foster, *Director, Commercial Crime Branch, RCMP, Ottawa, Canada*  
Mr. Patrick Moulette, *Head, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs, OECD, Paris, France*

Mr. James M. Klotz, *Partner, Miller Thomson LLP, Toronto, Ontario, Member of FIFA's Independent Governance Group, Toronto, Ontario*

**Rapporteur:** Mr. Ken Mark, *Ken Mark Freelance Writer*

**10:00 – 10:30** Nutrition Break

**10:30 – 12:15** Corruption in Government – Dealing with the Demand Side

Since the mid-1990s the principal focus of the international campaign against corruption has been on the supply-side. Efforts were aimed at largely at the companies that pay bribes. The OECD, UN and other international conventions have aimed to create disincentives for companies and

other private sector participants by imposing severe sanctions including criminal prosecutions. While there remains much to be done on this score, the efforts to counter bribe solicitation, extortion and other corrupt misconduct by governments and public officials have not been nearly so high-profile nor fruitful. The panel will discuss international efforts to deal with demand-side corruption.

**Moderator:** Mr. Michael Robinson, Q. C., *Counsel, Fasken Martineau DuMoulin*, Toronto, Ontario

**Speakers:** Ms. Madeleine Drohan, *Journalist, The Economist*, Ottawa, Ontario  
Mr. Daniel Ritchie, *President, Partnership Transparency Fund*, Washington, DC, USA

Mr. Mike Savage, *National Leader Forensics, Ernst & Young LLP*, Toronto

**Rapporteur:** Ms. Ophelie Brunelle Quraishi, *Manager Forensic/Financial Advisory, Deloitte Forensic*

**12:00 – 13:15 Lunch**

**13:15 – 14:45 Corruption in Canada: Hot on the trail; uncovering what’s happening and why**

The Charbonneau Commission investigating local business and political corruption directs our focus towards Quebec. But journalists and other professionals know that corruption does not recognize borders. The still unfinished investigations at SNC-Lavalin as to how contracts are secured demonstrate that the problem extends well beyond Quebec. The investigation into Ornge and the Computer Leasing Inquiry show that Ontario faces these issues. And British Columbia recently dealt with influence peddling and bribery charges related to a BC Rail transaction. The investigations we know and the active files being pursued by the RCMP suggest that Canada can still do more to deter corruption, conflict of interest and related abuses of power and processes.

**Moderator:** Mr. Julian Sher, *Journalist, Toronto Star*, Montreal, Quebec

**Speakers:** M. Luc Tremblay, *Producer, Radio-Canada*, Montreal, Quebec  
Mr. Greg McArthur, *National Reporter, The Globe & Mail*, Toronto, Ontario  
Mr. John Keefe, *Partner, Goodmans LLP*, Toronto, Ontario

**Rapporteur:** Ms. Sabrina A. Bandali, *Lawyer*

**15:00 – 15:15 Nutrition Break**

**15:15 – 16:45 How organizations can say “no” to bribe solicitations**

Businesses and other organizations that are confronted with demands for bribes or other forms of extortion are faced with a most difficult challenge. Outright rejection runs the risk of de-railing an important business venture, particularly if it occurs after the financial investment is made. A panel of experienced business advisors will review a wide range of strategies that have been used successfully to resist demands for bribes in international business.

**Moderator:** Mr. Milos Barutciski, *TI-Canada Board Member, Partner, Bennett Jones LLP*

**Speakers:** Ms. Dale Turza, *Cadwalader Wickersham & Taft*, Washington DC, USA  
Mr. Peter Dent, *TI-Canada Board Member, Partner and National Leader, Deloitte Forensic*, Toronto, Ontario  
Mr. Patrick Garver, *Former Senior Vice President and General Counsel, Barrick Gold*, Toronto, Ontario

**Rapporteur:** Mr. Elliot Burger, *Associate, International Trade and Customs, Bennett Jones LLP*

**16:45 – 17:00 Closing Remarks**

Ms. Janet Keeping, Chair and President, TI-Canada

**17:00 – 17:45 Cocktail Reception**





# Rapporteur Reports

## Grading Canada's Record on Compliance with International Obligations

*Moderator: Bruce Futterer, Vice President & General Counsel, GE Canada*

*Stephen Foster, Supt., Director, Commercial Crime Branch, RCMP*

*Patrick Moulette, Head, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs, OECD*

*James M. Klotz, Partner, Miller Thomson LLP, Member of FIFA's Independent Governance Group*

*Rapporteur: Ken Mark, Ken Mark Freelance Writer*

For several years after Canada ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions by passing the Corruption of Foreign Public Officials Act (CFPOA) in 1999, its activities in such matters were quiet on all fronts. As one panel member concluded, early peer reviews by the OECD Working Group on Bribery did not consider Canada an A student.

However, in recent years, the volume of cases has increased. A major turning point occurred when Canada ratified the UN Convention against Corruption, in 2007, followed by the establishment of the RCMP International Anti-Corruption Unit in 2008. More recent OECD reviews have given Canada a passing grade.

Prior to that, in 2005, the RCMP prosecuted a minor case involving the Hydro-Kleen Group that paid a U.S. immigration official \$28,299 in bribes. The resulting fine was \$25,000. It was a simple, straightforward action.

In contrast, the Niko Resources Ltd. case was much more complex. Briefly, the firm's executives pleaded guilty in Calgary to offering two bribes valued at about US\$200,000 to the Bangladeshi state minister for energy and mineral resources. They included a sports-utility vehicle and paying the expenses for a trip to Calgary, New York City and Chicago. After pleading guilty in June 2011, the firm was fined \$9.5 million.

A speaker commented that the case was not a true test of the new legislation. Executives pleaded guilty, paid the fine and "cleared the books". Still, the size of the fine caught many by surprise.

Alberta-based Griffiths Energy was the next shoe to drop. Prior to a proposed IPO in 2008, its new board of directors discovered that the previous CEO had paid US\$2 million to the wife of the then Chad ambassador to the Canada to gain an advantage for the

firm's application for extraction rights. In January 2013, after an extensive probe, the firm pleaded guilty to bribery charges and agreed to pay a \$10.35-million penalty.

In both cases, companies were fined but no executives were charged. A panel member noted that although the Griffiths bribe was 10 times greater than Niko Resources' improper payment, the fines were very similar. As well, both cases resulted from voluntary disclosures not from official discoveries.

There is also an ongoing case involving Nazir Karigar, an Indian-born Canadian. In 2010 the RCMP charged him with allegedly offering a bribe to an Indian minister to rig a bid for an airport security services contract to favour his company, CryptoMetrics. The matter is still before the courts.

Currently, there is a backlog of about 35 cases under investigation. It was noted that the RCMP has two dedicated anti-corruption units in Ottawa and Calgary not to mention Headquarters' oversight.

Questions from the floor included questions on the adequacy of Canada's enforcement infrastructure to handle such probes with the same vigour as the US. It is estimated that the US government collects US\$1 billion annually from corruption-related fines. Part of that success comes from "competitive enforcement" involving the Securities and Exchange Commission (SEC) and the Department of Justice (DoJ). The former deals with books and records offenses, which make up the majority of US cases, and which, at this time, are not offenses under Canadian law.

Another issue is the need for greater federal-provincial cooperation to pursue wrongdoers. In Canada, matters related to securities are a provincial concern while dealing with international corruption is a federal matter based on multilateral treaties and agreements signed by Ottawa.

Finally, the federal government recently introduced Senate Bill S-14, An Act to amend the Corruption of Foreign Public Officials Act. Proposed changes include:

- Expanding jurisdiction for prosecuting CFPOA offences
- Phasing out facilitation payment exemptions
- Creating a books and records offence
- Broadening the definition of "business" to include non-profits and NGOs
- Increasing the length of prison sentences
- Granting the RCMP exclusive enforcement jurisdiction.

**The goal of the amendments is to enable Canada to move towards the top of the class in terms of eliminating corruption of foreign officials.**

**What the RCMP's anti-corruption crackdown means for miners**

<http://www.miningmarkets.ca/news/what-the-rcmps-anti-corruption-crackdown-means-for-miners/1000913926/>



## Corruption in Government – Dealing with the Demand Side

*Moderator: J. Michael Robinson, Q. C., Counsel, Fasken Martineau DuMoulin LLP  
Madeleine Drohan, Journalist, Canadian Correspondent, The Economist, Ottawa, Ontario  
Daniel Ritchie, President, Partnership Transparency Fund, Washington, DC, USA  
Mike Savage, National Leader Forensics, Ernst & Young LLP, Toronto  
Rapporteur: Ophelie Brunelle Quraishi, Manager Forensic/Financial Advisory, Deloitte Forensic*

The moderator referred to two hand-outs distributed to attendees giving background on “hard” and “soft” law on the supply side and posing questions for discussion of the demand side.

The presentation kicked off with informal descriptions by panellists on their personal experiences involving the demand side of bribery.

The enforcement of sanctions by international development banks, such as debarment, was used as a basis for discussion of possible application of such regimes for the demand side also.

The panel talked in further detail about its experiences with demand side bribery and lessons learned. Several examples were given describing difficult, sometimes dangerous, situations involving officials soliciting bribes, for instance at airports or roadblocks. Some of the lessons learned are: not assume one has to accept to pay a bribe; never flaunt or expose that one has something to offer - such as jewelry or money; never give the demand side an excuse for asking for a bribe by putting oneself in a difficult situation (for instance by not obeying a curfew), and not assume that one will be asked to pay a bribe.

What follows summarizes suggestions made by panelists and the audience, without attribution. Corruption is not only about the “big fish”. It is also about people who deal with corruption on a day-to-day basis in their daily lives. We should be cognisant that individuals facing corruption can demand integrity and we must not overlook the importance and power of citizen groups as agents of change and a solution to the demand side of corruption. This change cannot be imposed but rather has to come from within and will never be rapid. As a precondition, individuals must have access to information. A step forward would be for development banks to better fund civil society organisations espousing that.

The tone from the top in government or organisations is important and has a trickle-down effect. It is usually decisive in determining the type of corruption that prevails. If sanctions are enforced, it affects behaviour. The case of one of Kenya's previous Presidents, Daniel Arap Moi (page 5 of the Memorandum distributed as one of the hand-outs) demanding \$US 2M cash for an airport vendor's licence and claiming that was the Kenyan "tradition", was an example. The question was debated as to whether the tone at the top needs to be genuine to be effective. When government changes, it disrupts the existing culture and the new government usually conveniently finds corruption by the former. Even if only for a short period, there can be a benefit to disrupting an existing corrupt government. (The panel referred to Question 10 of the Memorandum). One practical solution for those willing to operate in foreign countries is to go straight to the top, or as high as possible in government, and explain at the onset that bribes will not be paid, hoping the word, and fear of domestic sanctions, will trickle down within officialdom.

Key elements relating to the root causes of demand side bribery and efficient foreign enforcement may offer solutions to bribery. Transparent and efficient procurement laws and processes ensure competitiveness for the awarding of contracts and diminish the ability of corrupt players to influence behaviour. In regards to enforcement efficiency, cross border support can be pivotal for emerging markets.

The example of leading Canadian engineering firm Acres International's debarment by the World Bank (not prosecuted as the OECD convention was not in force then) was discussed as an early example of "soft law" sanctions being effective and the possibility of being replicated on the demand side. That would entail international development banks refusing to lend to countries which do not have or, as more often, do not enforce their domestic anti-corruption legislation. One lesson learned is the huge effect such debarments can have on a company's reputation. These development banks (the "Big Five") however face a new challenge due to the fact that they are not as powerful as they used to be, with countries like India and China borrowing less and some, like China, lending more internationally.

Several lively discussions and comments were made throughout the presentation on issues such as bribery being considered as a human rights violation. Export Development Canada providing stricter sanctions, similar to those of development banks, was suggested, not only for Canada's export credit agency but for the many ECA's, in the OECD and elsewhere, and considering extending that to delinquent countries.

A risk was identified from demand-side sanctions against countries. Would those countries be driven to seek development loans from countries with poorer anti-

corruption regimes? China was singled out, based on the probability that it would replace World Bank for the Padma Bridge in Bangladesh, the World Bank having cancelled its loans for corruption and the IMF cancelling a loan to the D.R. Congo for not providing transparency when awarding mining concessions. Could this drive countries into the hands of lenders which might bribe - an unintended consequence?

# Corruption in Canada: Hot on the trail; uncovering what's happening and why

*Moderator: Julian Sher, Journalist, Toronto Star, Montreal, Quebec*

*Luc Tremblay, Producer, Radio-Canada, Montreal, Quebec*

*Greg McArthur, National Reporter, The Globe & Mail, Toronto, Ontario*

*John Keefe, Partner, Goodmans LLP, Toronto, Ontario*

*Rapporteur: Sabrina A Bandali, Barrister and Solicitor; Member of the Legal Committee, TI-Canada*

## **The Development of Anti-Corruption Enforcement in Canada**

Despite a story of small-town fraud and perjury in Alberta breaking the day before the panel discussion, corruption scandals are not new to Canadian headlines. The recent history of corruption scandals can be traced back to the Airbus Affair in the 1980s, where the only penalty for secret commissions being paid to sitting government officials was delayed tax consequences.

The RCMP's subsequent creation of an anti-corruption unit and the development of Canadian anti-corruption law dramatically changed this landscape. Panelists commented that recent investigations into the activities of SNC-Lavalin demonstrate the RCMP's application of powers intended to fight organized crime to corruption: affidavits unsealed in May 2013 indicate that the investigation was able to freeze the accounts of a former SNC-Lavalin VP; the preliminary hearing into bribes allegedly paid to win contracts related to the Padma Bridge project in Bangladesh was subject to a publication ban. One panelist described the exercise of such powers as an example of the RCMP applying laws for gangsters to fraudsters and treating companies accused of paying bribes like criminal organizations.

## **Uncovering Corruption in Canada**

Journalists have played a prominent role in uncovering corruption in Canada. Often, one investigation has led to another: the discovery that a bid was rigged or investigation into a political campaign reveals a larger network of corruption or fraud. In Quebec, investigative journalists decided to increasingly focus on corruption issues as information came to light. At the same time, the police set up a special corruption squad to investigate allegations of municipal corruption. Thus, although Quebec may not have more or fewer problems with corruption than the rest of the country, at the present time there are more resources focused on uncovering and combating the problem.

In the case of SNC-Lavalin, it was an internal investigation of suspicious payments that set off a chain of investigations. Although the company may have had a system of checks

and balances to guard against such payments being made, the panelists noted that safeguards of this kind cannot work if they are not rigorously applied. If one VP signs off on the payment sought by another VP based on trust rather than independent verification, this is not a true check and balance. Precisely because there may be unwitting participants, uncovering who knew what and when is vital.

The panelists also questioned the relationship between a “culture of compliance” and a company’s internal “moral compass.” Although companies may feel that they have a strong culture of compliance, other structural aspects of the company’s operations, such as a bonus system or quarterly targets, may focus employees too narrowly on getting the job done rather than assessing the morality of their actions. Linking to the morning panel discussion on the demand side of bribery transactions, the panelists noted that although public servants in Quebec are not poorly paid, witnesses before the Charbonneau Commission have frequently offered a variety of justifications for why people took money inappropriately. One panelist commented that more attention should be paid to the psychology of these decisions within companies, as well as the pressure that is placed on people to perform and produce specific results.

### **Whistleblowers**

Often whistleblowers are a source of information for journalists about the activities of a company. Notwithstanding whatever legal protections may exist, a whistleblower is still doomed to face years of litigation without support. Typically the whistleblower leaves the company and reports to the authorities; more often than not the person has been part of the dishonesty. Whistleblowers do not always get to be witnesses and may be prosecuted themselves. For example, in the US, a whistleblower formerly employed by UBS gave information and was recently rewarded with a \$104 million bounty but nonetheless served three years in jail. The panel also discussed some of the complexities of engaging with whistleblowers: as one panelist noted, unlike in the movies, whistleblowers may have complex motivations for coming forward when they do.

Currently, Canada only has whistleblower legislation for the public sector, not the private sector, and the existing legislation is under government review. The panel noted that US-style reforms which award a 20% bounty from any resulting penalty and anti-firing protections (part of the Dodd-Frank amendments) are controversial in Canada. Commissions of inquiry such as the Charbonneau Commission may have other protections: what is said by a witness before the Commission cannot be used in a resulting criminal prosecution. According to the panel, some witnesses have made deals with the police before coming to the Commission, and in other situations, such as the investigation into events in Laval, arrests were timed to occur prior to testimony before the Commission. Interestingly, one of the Charest government’s arguments against

having a commission was that it would impede investigation. Based on the experience of the Charbonneau Commission, it seems that the opposite is true, as there have been many resulting investigations into alleged corruption and fraud.

### **Risks of Investigating Corruption**

The panelists were asked to comment on the risks faced by journalists and lawyers who work in this area. Although journalists may be subject to personal threats, the panelists commented that the more prevalent danger is reputational: that the parties subject to investigation or impacted by the journalist's work will seek to discredit the journalist or make the journalist personally part of the story. For lawyers, the major risk is being subject to litigation or complaints to the Law Society, which are expensive and time-consuming to defend, as professional insurance may not apply.

### **Lessons from other Jurisdictions**

The panelists observed that anti-corruption efforts in the US are firmly embedded in a culture of criminal enforcement with an emphasis on penal consequences for corrupt activities. By contrast, in Canada, we have a culture of commissions, of wanting people to speak publicly to uncover what has been going on. South of the border, both the US Federal Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have jurisdiction over corruption offences, with the FBI providing enforcement capacity and working with both institutions. Companies' own internal investigations provide evidence and material. Because there is a much greater penalty for failing to self-report, companies have an incentive to come forward rather than perpetuating inadequate books and records. However, the panel noted that it has taken the SEC 30 years to "grow into" these powers and to achieve today's state of robust enforcement.

By contrast, corruption is a criminal offence in Canada and is under the investigative jurisdiction of the RCMP. Looking to securities law and creating more and better avenues for self-reporting would strengthen Canada's enforcement efforts. The panel noted that there have been some legislative efforts in this direction. Bill 474 – a private member's bill – would compel public reporting of payments made by mining, oil and gas corporations to foreign governments. The current amendments to the Corruption of Foreign Public Officials Act include an amendment to the books and records provision that some panelists described as the most significant among the changes introduced. If passed, a failure to keep adequate books and records would engage the personal liability of a senior official after the fact of the bribe and apply to both private and public companies. However the panel and members of the audience noted that there are still many outstanding questions regarding the books and records offence, including what level of criminal intent would be required and what accounting standards would apply to determine if the books and records were adequate.

**Conclusion**

Overall, the panel concluded that domestic corruption is an ongoing concern and that Canada can do more to combat corruption within its borders, including through the protection and support of whistleblowers. Jurisdictions such as the US may offer alternative enforcement and protection models that Canada should consider. Quebec's recent experiences highlight the importance of both law enforcement agencies and non-government actors such as journalists in focusing attention and resources on combating domestic corruption.

## How Organizations Can Say "No" to Bribe Solicitations

*Moderator: Milos Barutciski, Partner and Co-Chair of International Trade and Customs Group, Bennett Jones LLP*

*Dale Turza, Partner, Cadwalder Wickersham & Taft LLP*

*Patrick Garber, Former Senior Vice President and General Counsel, Barrick Gold*

*Peter Dent, Partner and National Leader, Deloitte Forensic*

*Rapporteur: Elliot Burger, Associate, International Trade and Customs, Bennett Jones LLP*

The objective of this session was to identify strategies that can be used to reduce corruption risk when operating in countries with a high incidence of corruption. An important but often overlooked tool for fighting corruption is a company's corporate social responsibility (CSR) program. Directors and executives often consider CSR as a necessary (but not necessarily productive) cost of doing business, or a "soft" commitment whose principal value is as a means of "buying" local support and enhancing a company's public image. If used strategically, however, CSR can help mitigate the risk of corruption liability and potentially save the corporation significant compliance and legal costs in the long run.

If planned and executed strategically, a CSR program can help a company develop a network of allies in high-risk countries. It is not just building schools or hospitals, or introducing local philanthropic programs in isolation. By helping a company to enlist local stakeholders in support of their operations, a CSR program can give a company facing bribe solicitation or extortion from local officials important allies who may provide countervailing pressure on corrupt officials. Effective CSR is a proactive approach that can help a company insulate itself from bribe solicitation and extortion and provide a means of resisting it when it happens.

When entering high-risk jurisdictions, companies must be proactive in planning how to deal with the inevitable corrupt shakedowns that they will face. It is not a matter of "if" but "when", and companies that plan ahead and develop strategies for responding will reduce their exposure significantly as compared to companies that respond by crisis management alone. CSR is one of several strategies that should be considered in advance and adapted accordingly when entering high-risk jurisdictions.

To be effective, a proactive approach to countering corruption has to come from the top down within the corporation. Employees must see that they have institutional support to resist corruption and develop approaches to push back that will generally be more complicated and time-consuming than just "giving in". Such support must flow from the



Board of Directors, the CEO and compliance managers, through a corruption prevention policy, and into day-to-day decision-making and reporting systems. A corporation's defences against corruption are only as strong as its weakest link. Internal controls, compensation and monitoring should be designed around the goal of promoting transparency and buffering against corruption by creating incentives for resisting corruption rather than taking the path of least resistance.

Another strategy for mitigating corruption risk is to develop relationships with political officials and local business partners, when the corporation enters a locality, and work with them to develop programs for their community and leverage the employment and local economic benefits that will accrue to their constituents. Political officials who have worked with the corporation to develop such programs can be of assistance down the line if the corporation runs into corruption issues at a lower or different level. Similarly, local business partners who have a commercial stake in the company's business will have their own incentives to apply political pressure on corrupt shakedowns that jeopardize the business.

While a customs official or building inspector may not care if the corporation has built a school or community center, or committed to some long-term contribution to a particular community, the local member of parliament or a Minister with responsibility for the region may be more likely to apply pressure if they feel their constituency has something to lose. Similarly, that political official will also be less likely to make corrupt requests if the corporation has some leverage over the benefits that the political official's constituents receive. These relationships (and relevant CSR programs) can thus be used strategically as a buffer against corrupt requests and as leverage to "unclog bottlenecks" when they occur.

One of the key challenges of developing proactive strategies to deflect bribe solicitation is convincing the Board of Directors that it is economically in their best interest to say "no" when faced with bribery. Reference to the experience of US and other companies that have taken active steps to fight corruption (including some companies that have taken such measures after being implicated in corruption scandals) demonstrates that companies are able to compete in the face of corruption and corrupt competitors. It is a myth that you need to engage in bribery in order to be able to compete internationally. Companies can and do compete in very high-risk environments without necessarily engaging in corruption. However, it requires advance planning, a commitment to comply and the determination to walk away if necessary. Increased monitoring and enforcement of anti-corruption laws internationally will mean that corrupt competitors will potentially face heavy economic consequences for failure to resist corruption.

As a result of the aggressive enforcement of the US Foreign Corrupt Practices Act (FCPA), a growing number of US boards and CEO's have determined that investing in robust anti-corruption compliance programs and monitoring are necessary to avoid the financial and reputational cost and management "headaches" that accompany corruption investigations. The "collateral consequences" of a failure to instill a culture of compliance include extraordinary investigative and legal costs (which can run into the \$10's or \$100's of millions), widespread media coverage leading to a public perception of "guilty until proven innocent", a negative impact on stock price, procurement disqualification with key customers or ineligibility to receive licenses or permits.

Companies that choose to develop a robust corruption compliance program must be realistic when designing and tailoring the compliance program for the corporation's international operations. When a company enters a foreign jurisdiction, it should recognize that strong procedures and monitoring will not protect all of their staff equally. Local employees are subject to different political and cultural pressures than those that may be experienced by expatriates. As such, compliance training and support must be tailored to local conditions. Facilitation payments and low level corruption are unlikely to be rooted out quickly (or even entirely) in certain high-risk jurisdictions. However, active compliance efforts can ensure that this sort of corruption is also not likely to attract a high level of liability.

With respect to higher levels of corruption (i.e., large contracts, more senior officials), a company with a robust compliance culture must be prepared to say "no" to corrupt requests, even if they result in a lost contract. It will also be important during this time to complement the compliance program with thorough record keeping. Corruption compliance means nothing if you cannot document how payments were made and for what purpose. That said, if you create a paperwork trail, you also have to audit it yourself to make sure that it is reliable and evidences a culture of compliance.

Compliance officers need to be supported by local counsel familiar with the nuances of corruption regulation in each locality. If these resources are not available, corporations still have a wealth of templates and policies readily available on the internet from sources like Transparency International, the US DOJ website and the World Bank.



# **Speakers' & Moderators' Bios**

**Milos Barutciski** is a partner of Bennett Jones LLP and chairs the firm's International Trade and Investment Group. For more than 25 years Mr. Barutciski has represented Canadian and international companies, including Fortune 500 companies and corporations listed on the TSX, NYSE, NASDAQ, European and Asian exchanges in relation to anti-corruption and other international regulatory matters in Canada and abroad. He has also represented Canadian, US and European companies in corruption investigations by the World Bank, and appeared as counsel before the World Bank's Sanctions Committee. Mr. Barutciski is a founding member of the Task Force on Bribery and Corruption of the Business and Industry Advisory Committee to the OECD and, in that capacity, was intimately involved in the OECD's consultations on the 1997 Anti-Bribery Convention. From 1996-99, Mr. Barutciski was retained by The World Bank to advise with respect to regulatory reform in the Middle East and Africa. He is a Board Member of Transparency International Canada.

**Peter Dent** is Partner and National Leader, Forensic & Dispute Services, Deloitte & Touche. He has 19 years of experience practicing in the areas of investigating and providing expert testimony regarding allegations of fraud and corruption, with a focus in the global arena, in addition to providing anti-fraud and anti-money laundering management strategies in the public and private sectors. From 2007 – 2009, he was part of a leadership team overseeing a large multi-disciplinary team, investigating allegations of widespread corruption involving the activities of Siemens AG. Between 2000 and 2004, Mr. Dent was the Team Leader of the Forensic Services Unit within the Department of Institutional Integrity of the World Bank Group in Washington, D.C., leading international fraud and corruption investigations into World Bank financed projects. He is a Board Member of Transparency International Canada and the Alliance for Excellence in Investigative & Forensic Accounting.

**Madelaine Drohan** is the Canada correspondent for The Economist. For the last 30 years, she has covered business and politics in Canada, Europe, Africa and Asia. She is the author of *The 9 Habits of Highly Successful Resource Economies: Lessons for Canada*, a research report that she wrote in 2012 for the Canadian International Council. Her book, *Making a Killing: How and why corporations use armed force to do business*, was published in 2003 by Random House of Canada and in 2004 by The Lyons Press in the United States. It won the Ottawa Book Award and was short-listed for the National Business Book of the Year Award in 2004. When possible, she conducts journalism workshops for media in Africa and Southeast Asia, with a special focus on business and investigative journalism. Ms. Drohan was awarded a Reuters Fellowship at Oxford University, in 1998, and the Hyman Solomon Award for Excellence in Public Policy Journalism in 2001. She was a 2004-2005 Media Fellow at the Chumir Foundation for Ethics in Leadership and the 2004-

2005 Journalist in Residence at Carleton University. She has been a volunteer director on the boards of the North-South Institute, Transparency International Canada and Partnership Africa Canada, where she was also president. She lives in Ottawa.

**Stephen Foster** is the Director, Commercial Crime Branch, of the Royal Canadian Mounted Police (RCMP). His areas of expertise include major frauds, mass marketing fraud, counterfeit currency, identity theft, and corruption. For the majority of Superintendent Foster's 27 years with the RCMP he has been involved in conducting or supervising a wide variety of complex corruption, fraud, and technological crime investigations. During the past 10 years he has had responsibility for various economic crime units and initiatives including the planning and implementation an International Anti-Corruption program for the RCMP.

**Bruce N. Futterer** received his B.A. from the University of Toronto and his LL.B. from Osgoode Hall Law School. He was called to the Ontario bar in 1981. Mr. Futterer has held General Counsel positions with a number of companies in Canada and the U.S. during his career, including Wardair, Kerr Addison Mines, Stelco and a number of Cadbury Schweppes companies, including Dr Pepper/Seven Up Inc. He was also in private practice during the early 1990s with the Toronto firm of Holden Day Wilson. Mr. Futterer joined GE Canada as Vice President, General Counsel & Secretary in January 2007. He is a Board Member of Transparency International Canada.

**Patrick Garver** is a lawyer in Toronto. From 1978 to 1994 he practiced law with Parsons Behle & Latimer, a leading law firm in the western United States. From 1994 to 2010 he was the Executive Vice President and General Counsel of Barrick Gold Corporation, headquartered in Toronto, Canada. During his tenure at Barrick the company grew to become the largest gold mining company in the world. In 2006 Patrick was named by the National Post as Canada's General Counsel of the Year. Mr. Garver is currently engaged as a Senior Advisor to the Good Governance Group, an international strategic advisory company. He is also serving as an arbitrator in international commercial arbitration and as an independent consultant.

**John Keefe** is a partner in the Litigation Group at Goodmans. John practises commercial litigation with emphasis on commercial disputes, white collar crime and securities fraud, domestic and international arbitration, competition law and injunctions. He has appeared before the Supreme Court of Canada, the Federal Court and all levels of Court in Ontario and before numerous administrative tribunals. Mr. Keefe's practice involves issues involving complex commercial disputes, which are usually international in nature. He has also been involved in numerous matters relating to white collar crime and securities fraud

including corporate governance issues, internal investigations, cross-border investigations, employee dishonesty, conflict of interest, theft of trade secrets, tracing assets, money laundering and the bribery of foreign officials. Mr. Keefe has acted as counsel to boards of directors, audit committees and special committees to investigate allegations of corporate misconduct and conflict of interest. He is the past Secretary of the Section on Business Crime of the International Bar Association. Mr. Keefe has also acted as counsel and arbitrator in numerous domestic and international arbitrations including those that fall under the rules of the International Chamber of Commerce, the American Arbitration Association, UNCITRAL Model Law, the Zurich Chamber of Commerce, and the Ontario International Commercial Arbitration Act. He is a member of the Canadian Panel of Arbitrators of the International Chamber of Commerce and the British Columbia International Commercial Arbitration Centre. He is a past director of the Arbitration and Mediation Institute which has recognized him with its Chartered Arbitration (C. Arb.) designation. He is a past director of the Advocates' Society, the organisation that represents all trial lawyers in Ontario.

**Janet Keeping** is Rule of Law Fellow at the Sheldon Chumir Foundation for Ethics in Leadership, where she served as President from 2006 to early 2012. She has a Bachelor of Science in Art and Design, from MIT, and an MA (Philosophy) and LL.B. from the University of Calgary. She was called to the Alberta Bar in 1981. For many years, Ms. Keeping did legal research and public legal education for the Canadian Institute of Resources Law. There she worked on legal issues connected with human rights, environmental protection and accommodation of Aboriginal interests in the context of resource development. Between 1993 and 2006, she also worked on projects aimed at exposing Russians to market-oriented and democratic processes, including respect for the rule of law, in the regulation of their oil and gas sector. Ms. Keeping is Chair and President of Transparency International Canada.

**James Klotz** is a partner at Miller Thomson LLP in Toronto and Chair of the firm's Anti-Corruption and International Governance Group. He is also Co-Chair of the firm's International Business Transactions Group. International corporate governance and anti-corruption are his areas of speciality. Having led complex corporate and commercial transactions in more than 108 countries, Mr. Klotz is widely respected for his deep knowledge and practical experience in the international business arena. Mr. Klotz provides counsel to public and private organizations and enterprises. He is a graduate of the Institute of Corporate Directors, and is a member of the Management Board of the International Bar Association. He currently is a member of FIFA's Independent Governance Committee. Ms. Klotz has for many years held senior leadership positions in the International, American and Canadian, Bar Associations. He has been an Adjunct Professor of International Law at

Osgoode Hall Law School in Toronto and is a well regarded international business law speaker, lecturer and author, with more than 100 papers on the topics of anti-corruption and international business law to his credit. Mr. Klotz is the immediate Past President of Transparency International Canada and is a member of the Allard Prize Advisory Board. Business enterprises and lawyers around the world have also benefited from his practical textbooks, including “Power Tools for Negotiating International Deals” and “International Sales Agreements: A Drafting and Negotiation Guide”, both of which are in their 2nd edition by Kluwer International. Jim speaks conversational French and Mandarin and is learning Spanish.

**Greg McArthur** is a reporter with The Globe and Mail in Toronto. He has written about everything from terrorism to abuses of power by police -- until he caught the anti-corruption bug while investigating the mysterious cash payments given to former prime minister Brian Mulroney by Karlheinz Schreiber. He has won numerous awards for his work, including a National Newspaper Award, the Canadian Association of Journalist's President's Award, and was nominated for the Governor General's Michener award for public service journalism for his work on the Airbus affair. Most recently he was nominated, along with his colleague Graeme Smith, for three National Magazine Awards for their work on the SNC-Lavalin scandal.

**Patrick Moulette** is Head, Anti-Corruption Division, Directorate for Financial and enterprise Affairs, at the OECD. He began his professional career in 1985 in the Department of the Treasury of the French Ministry of Finance. After five years in the Monetary and Financial Affairs Division, he joined the International Affairs Division of the Treasury in 1990 to work on issues related to G-7 meetings, international trade, anti money laundering and relationships with the IMF and the OECD. Mr. Moulette joined the OECD in 1991 as a member of the Secretariat of FATF (Financial Action Task Force on money laundering). In November 1995, he was promoted to Executive Secretary of the FATF. During his tenure as Executive Secretary, he coordinated two rounds of mutual evaluations of FATF members, the enlargement of FATF mandate to deal with terrorist financing issues and the revision of the FATF 40+9 Recommendations approved in June 2003. In 2004, Mr. Moulette, was appointed Head of OECD Anti Corruption Division. His current position at the OECD involves the design and management of the work programme of the 40-country Working Group on Bribery in International Business Transactions (composed of the 34 OECD Member countries plus Argentina, Brazil, Bulgaria, Colombia, Russia and South Africa). His responsibilities also include leading the process of evaluating the implementation of the OECD Convention and Recommendations by its members and to develop and supervise outreach activities.

**Daniel Ritchie** is President, Partnership Transparency Fund (PTF), in Washington, D. C. Mr. Ritchie worked at the World Bank from 1968 to 1998, as Loan Officer, Yemen and Oman, Deputy Secretary of CGIAR, Chief of Agricultural Projects Division, Assistant Director of Personnel Department, Chief of India Country Operations, Director of Asia Technical Department and Country Director of North Africa and Iran Department. Since 1998, he has served as an independent consultant to international and bilateral development institutions for program evaluation, organizational diagnostic, facilitation and training. As well as serving on a number of boards relating to Africa, South Sudan and India, Mr. Ritchie is the Founder and President of the William and Nancy Budd Scholarship Fund, a scholarship fund for secondary and post-secondary student in Kenya, currently supporting 50 students a year. The PTF is an international anti-corruption fund, established in 2000, to finance civil society organizations, in developing countries, engaged in promoting transparency and accountability in government and combating corruption.

**J. Michael Robinson, Q.C.**, is Counsel at the law firm of Fasken Martineau DuMoulin LLP in its Toronto office. His law practice of 47 years emphasizes international private (business) law - international sales, trade and investment and particularly international public/private partnerships for infrastructure developments. He advised the governments of Canada and Mexico, respectively, on financial services in negotiation of the Canada/US Free Trade Agreement and NAFTA. For over a decade, Mr. Robinson taught international treaty, trade and investment law as an Adjunct Professor at Osgoode Hall Law School (York University), Toronto, and the Faculty of Law, University of Western Ontario, London, Ontario. For 25 years he was active in the Section on Business Law, International Bar Association, London, holding Committee Chair and Co-Chairs and as a member of Council. For over 25 years he was active in the Canada-United States Law Institute and a member of its Executive Committee. In 2011, Mr. Robinson received the Award of Excellence (lifetime achievement in practice and teaching) In International Law of the Ontario Bar Association. He is a Board Member of Transparency International Canada.

**Mike Savage** is the practice leader for fraud investigation and dispute services for Ernst & Young in Canada, a Chartered Accountant and a Certified Fraud Examiner. With regard to dealing with corruption and bribery, Mr. Savage has testified as expert witness in the criminal prosecution of a former Member of Parliament in South Africa for bribery and corruption; advised management of a Fortune 50 company on compliance with a deferred prosecution agreement, including the design of the remedial measures program, interactions with the compliance monitor appointed and regulators; investigated allegations of bribery, corruption or fraud risk for clients in many countries, including Canada, the United States, Mexico, South Africa, Botswana, Zambia, Namibia, Nigeria, Equatorial Guinea, Algeria, Kenya, Tanzania, the UAE, Bahrain, China, India, Brazil, Guatemala,



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