



CANADA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS

May 2013

This report, submitted by Canada, provides information on the progress made by Canada in implementing the recommendations of its Phase 3 report. The OECD Working Group on Bribery's summary of and conclusions to the report were adopted on 14 May 2013.

The Phase 3 report evaluated Canada's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) Summary of findings

1. Canada has continued the enforcement momentum that was already noted by the Working Group on Bribery (WGB) in its Phase 3 Report. Canada now has two additional and major convictions against companies in the oil and gas sector under its Corruption of Foreign Public Officials Act (CFPOA). One company pleaded guilty, was fined CDN 9.5 million, and placed under a three-year probation order to ensure that it establishes and implements an effective internal compliance programme for preventing and detecting foreign bribery. The second company, which voluntarily disclosed its violation of the CFPOA to the RCMP International Anti-Corruption Unit (RCMP IACU), was fined CDN 10.35 million. Canada has also indicted individuals in two further cases (in the high-technology and construction sectors, respectively). Moreover, Canada reports 35 ongoing foreign bribery investigations.

2. The WGB also welcomes significant steps taken by Canada to improve the CFPOA and address three main Phase 3 recommendations through Bill S-14 (*Fighting Foreign Corruption Act*) to amend the CFPOA, which was submitted to Parliament in February 2013. The WGB agreed that if the Bill is assented to as proposed, Canada will have fully implemented recommendations 1, 3, and 4e(i) as follows. First, Bill S-14 eliminates the reference to “for profit” in the definition of “business” to clarify that the offence of foreign bribery applies to all businesses, regardless of profit (Recommendation 1). Second, it extends the jurisdictional scope of the CFPOA so that Canada may prosecute foreign bribery committed by Canadians or Canadian companies, regardless of where the offence was committed, without the need to demonstrate a real and substantial connection to Canada (Recommendation 3). Third, it establishes specific criminal offences for bookkeeping violations committed for the purpose of bribing foreign public officials or hiding such bribery (Recommendation 4e(i)). Canada has agreed to report back in writing to the WGB in one year (March 2014) concerning progress on passing these amendments. Bill S-14 also repeals the exception in the CFPOA for facilitation payments. The decision to include this amendment was made following a comprehensive review by Canada of its policies and approaches on this issue, which included an extensive consultation with stakeholders. Canada has therefore now fully implemented Recommendation 6.

3. Progress is ongoing in certain other areas, in which, however, the WGB’s recommendations have not yet been fully met. The Public Prosecution Service of Canada (PPSC) is in the process of developing its Deskbook, in the course of which it will consider clarifying that it is never proper to consider the following factors in investigating and prosecuting offences under the CFPOA: national economic interest, potential effect upon relations with another State, or the identity of the natural or legal persons involved. Canada will report back in one year in writing on progress on this recommendation (4a). WGB recommendations to enhance audit requirements (4e (ii)-(iv)), including on reporting CFPOA violations, have been partially implemented through ongoing consideration of amendments to the relevant laws. Recommendation 8a, that Canada provide specific training to tax examiners on whether payments to foreign public officials constitute reasonable expenses incurred in good faith or facilitation payments, and on the detection of foreign bribery by non-profit organisations, has been partially implemented. No progress has been made on implementing Recommendation 8b (that Canada complete its review of the prohibition against reporting non-tax criminal offences detected in the course of a tax audit, and identify methods to enable Canadian tax authorities to share information about CFPOA violations).

4. The WGB notes that several recommendations are now fully implemented, including in the following areas. A conviction of a foreign bribery offence under the CFPOA now automatically leads to permanent debarment from contracting with Public Works and Government Services Canada (PWGSC) (Recommendation 2). Resources for investigating CFPOA cases by the RCMP IACU have been

maintained at their intended functional levels (Recommendation 4b), and the PPSC has created a senior cadre of prosecutors with expertise in high profile and complex cases, including foreign bribery (Recommendation 4c). Measures have been taken to establish closer relations between the RCMP IACU and provincial securities regulators, which enables effective information sharing on CFPOA violations within the parameters allowed by Canadian law (Recommendation 4d). The RCMP, Foreign Affairs and International Trade (DFAIT), and Export Development Canada (EDC), have all encouraged the private sector to adopt compliance measures specifically targeting the prevention and detection of CFPOA violations (Recommendation 7). In addition, the Canadian International Development Agency (CIDA) continues to exercise due diligence concerning declarations about corruption-related activities by funding applicants (Recommendation 9). Canada has also fully implemented recommendations 4(f) regarding voluntary disclosure of CFPOA violations, and 5 on raising awareness of the CFPOA and the reasonable expenses and facilitation payments defences.

b) Conclusions

1. The WGB concluded that Canada has now fully implemented recommendations 2, 4b, 4c, 4d, 4f, 5, 6, 7 and 9, partially implemented recommendations 4a, 4e(ii-iv) and 8a, and not implemented recommendations 1, 3, 4e(i) and 8b. Canada has agreed to report back in writing in one year on progress made toward fully implementing recommendations 1, 3, 4a and 4e(i). As noted in paragraph 2, the WGB agreed that Canada will have fully implemented recommendations 1, 3 and 4(e)(i) if Bill S-14, currently before Parliament, is adopted by Parliament without changes.

WRITTEN FOLLOW UP TO PHASE 3 REPORT – CANADA

Name of country:	CANADA
Date of approval of Phase 3 Report:	18 March 2011
Date of information:	08 February 2013

KEY DEVELOPMENTS

Canada is pleased to provide the WGB with its Written Follow-Up to Phase 3 Report. Continuing with the momentum that had begun in Canada prior to its Phase 3 Evaluation by the OECD, this report highlights a number of key developments in Canada's fight against foreign bribery, including:

- Two major convictions of corporations under the *Corruption of Foreign Public Officials Act* (CFPOA) in the past two years, both of which have resulted in significant penalties;
- Charges against three natural persons have been laid under the CFPOA, all of which are currently before Canadian courts;
- Canadian authorities, including the RCMP's International Anti-Corruption Unit, continue their rigorous enforcement efforts with regard to the CFPOA, with 35 investigations currently underway;
- Through Canada's whole-of-government approach to combating foreign bribery through enforcement and prevention, key departments, agencies, and Crown corporations have made significant efforts to raise domestic awareness of the CFPOA; and
- On February 5, 2013, the *Fighting Foreign Corruption Act*, a bill to amend the CFPOA, was tabled in the Canadian Senate.

The proposed amendments to the CFPOA include the introduction of nationality jurisdiction with regard to all of the offences under the CFPOA, the eventual elimination of the facilitation payments exception, the exclusive ability for the Royal Canadian Mounted Police (RCMP) to lay charges, a clarification regarding the definition of "business", increasing the maximum penalties to 14 years imprisonment, and the establishment of a new books and records offence explicitly linked to foreign bribery. (A copy of the bill is annexed to this report.)

PART I: RECOMMENDATIONS FOR ACTION

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

Text of recommendation 1:

2. The Working Group recommends that Canada amend the offence of bribing a foreign public official in the CFPOA so that it is clear that it applies to bribery in the conduct of all international business, not just business ‘for profit’. (Convention, Article 1)

Actions taken as of the date of the follow-up report to implement this recommendation:

Canada maintains that the words “for profit” in the definition of “business” in section 2 of the *Corruption of Foreign Public Officials Act* (CFPOA) do not unduly narrow the foreign bribery offence. As Canada stated during its Phase 3 Evaluation, Canadian authorities continue to apply the business for profit requirement either to the entity or to the transaction, as the case may be and depending upon the circumstances. In the two years since the adoption of the Phase 3 Evaluation report on Canada’s implementation of the Convention, the issue has not arisen before Canadian courts.

To provide greater clarity, and to reflect the broad approach already being taken by Canadian authorities, subsection 2(1) of the *Fighting Foreign Corruption Act* (tabled in the Canadian Senate on February 5, 2013) will replace the definition of “business” in section 2 of the CFPOA with the following:

“business” means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere.

Canada will be pleased to provide updates to the WGB on the progress of the bill to amend the CFPOA, as it progresses through Canada’s Parliament.

Text of recommendation 2:

2. The Working Group recommends that Canada take appropriate measures to automatically apply, on conviction for a CFPOA violation, the removal of the capacity to contract with the Government or receive any benefit under such a contract, consistent with the domestic bribery offence in the Criminal Code. [Convention, Article 3; Commentary 26; 2009 Recommendation XI (i)]

Actions taken as of the date of the follow-up report to implement this recommendation:

Canada reiterates that debarment and other inabilities to contract with the government are considered legal disabilities, rather than “criminal penal[ies]” within the meaning of Article 3(1) of the Convention.

In July 2012, the Minister of Public Works and Government Services Canada (PWGSC) added convictions

for the foreign bribery under section 3 of the CFPOA to the list of offences that would automatically result in permanent debarment from contracting with PWGSC, pursuant to PWGSC's departmental policy. In addition, prior to PWGSC awarding a contract, companies and individuals must now provide consent stating that neither they, nor those on the Board of Governors for their company, nor any of their affiliates have ever committed certain acts or offences. This list of acts / offences includes bribery of a foreign public official. The list of offences applies to PWGSC's real property transactions, such as leasing agreements, letting of space, and the acquisition and disposal of Crown-owned properties. PWGSC will also be able to terminate contracts with companies that are convicted before the end of their contract or lease.

Text of recommendation 3:

3. The Working Group recommends that Canada urgently take such measures as may be necessary to prosecute its nationals for the bribery of foreign public officials committed abroad. (Convention, Article 4.2; Commentary 26; Recommendation V)

Actions taken as of the date of the follow-up report to implement this recommendation:

To remove potential barriers to the enforcement of the foreign bribery offence, section 4 of the *Fighting Foreign Corruption Act* (tabled in the Canadian Senate on February 5, 2013) would allow Canada to take jurisdiction over the offence of foreign bribery under section 3 of the CFPOA, deeming the act or omission to have been committed in Canada if the person committing the act is a Canadian citizen, or a permanent resident as defined in Canada's *Immigration and Refugee Protection Act* and who is present in Canada after the commission of the act or omission, or a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.

Section 4 of the *Fighting Foreign Corruption Act* will also extend nationality jurisdiction to the new offence (the new section 4 of the CFPOA) of establishing off-the-books accounts, making transactions that are not recorded in books and records, recording non-existent expenditures, incorrectly entering liabilities, knowingly using false documents, or intentionally destroying books and records, for the purpose of bribing a foreign public official or for hiding that bribe.

Canada will be pleased to provide updates to the WGB on the progress of the bill to amend the CFPOA, as it progresses through Canada's Parliament.

To note, the proposed expansion to Canada's jurisdiction over offences under the CFPOA is intended to facilitate the enforcement of the offences under the CFPOA. It continues to be Canada's position that Article 4(2) of the Convention does not require every State Party to the Convention to take nationality jurisdiction over the crime of foreign bribery.

Text of recommendation 4(a):

4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:
- a) Clarify that in investigating and prosecuting offences under the CFPOA, considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, are never proper; (Convention, Article 5; Commentary 27; 2009

Recommendation IV, and Annex I, paragraph D)

Actions taken as of the date of the follow-up report to implement this recommendation:

The guidelines to be applied by all prosecutors in the Public Prosecution Service Canada (PPSC) are currently found in the Federal Prosecution Service Deskbook. Canada reiterates that understanding the Deskbook's guidance in its proper context would lead to the conclusion that Article 5 considerations would not come into play in the decision of whether or not to prosecute offences under the CFPOA. First, only where an offence is "not so serious as to plainly require criminal proceedings" would a prosecutor resort to the public interest guidelines, which were the subject of the WGB's criticism. Canadian authorities emphasize that offences under the CFPOA would not be considered as offences "not so serious as to plainly require criminal proceedings"; thus, no resort to the public interest guidelines would be required. Second, in the highly unlikely event that particular violations of the CFPOA were considered to be "not so serious as to plainly require criminal proceedings", the Deskbook sets out as public interest factors whether prosecution would require or cause disclosure of information that would be injurious to international relations, national defence, or national security. Canada maintains this establishes a higher threshold than Article 5 of the Convention, which refers to "considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

This said, the PPSC has been re-writing the Federal Prosecution Service Deskbook – a major undertaking, given that the existing Federal Prosecution Service Deskbook is comprised of 57 chapters and a number of schedules, and new elements are being added. The chapter of the Deskbook dedicated to the CFPOA is part of this review process, and consideration is being given to including specific reference to Article 5 of the Convention. All revisions are subject to a rigorous and lengthy review process before they can be made public. Canada will be pleased to share the relevant chapters with the WGB once the review process is complete and the new PPSC Deskbook is made public.

Text of recommendation 4 (b):

4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:
 - b) Ensure that resources for investigating CFPOA cases by the RCMP International Anti-Corruption Teams remain at least at their intended functional levels of six full-time regular RCMP members and a civilian member or public servant for each Team; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)

Actions taken as of the date of the follow-up report to implement this recommendation:

Canada continues to fund fifteen full-time positions to work on the enforcement of the CFPOA. At this time, the actual number of investigators working on CFPOA investigations between Ottawa and Calgary is significantly greater than fifteen, having drawn additional resources to assist with large investigations.

Text of recommendation 4 (c):

4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:
 - c) Urgently dedicate resources for the soon expected CFPOA prosecution case-load of potentially more than 20 cases; (Convention, Article 5; Commentary 27; 2009

Recommendation IV, and Annex I, paragraph D)

Actions taken as of the date of the follow-up report to implement this recommendation:

Prior to Canada's Phase 3 Evaluation, PPSC had established a full-time position for the coordination of CFPOA prosecutions. The current PPSC coordinator for the CFPOA continues to work actively with the RCMP International Anti-Corruption Unit and PPSC regional offices throughout Canada to provide necessary pre-charge advice and to flag cases as they come forward to the prosecutorial stage. With this centrally-coordinated approach, the PPSC is working with its offices in the affected regions to ensure that the necessary expertise is in place to manage CFPOA cases should charges be laid.

In addition, in 2011, the PPSC created a senior cadre of prosecutors, with expertise of the highest level, to act as a national resource. This group is called upon to provide advice or assume the lead on the most complex and high-profile prosecutions conducted by the PPSC, including CFPOA cases.

As the RCMP's foreign bribery investigations continue to progress, the PPSC has demonstrated its readiness and ability to provide pre-charge advice and to carry out CFPOA prosecutions. With the exception of the prosecution of Niko Resources Ltd., every prosecution under the CFPOA since the Phase 3 Evaluation of Canada in March 2011 has been or is being handled by PPSC prosecutors from various regional offices throughout Canada. Canada reiterates that the PPSC has never declined to prosecute offences under the CFPOA due to a lack of resources.

Text of recommendation 4 (d):

4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:
 - d) Take appropriate measures to encourage provincial securities commissions to sanction books and records and other securities violations associated with CFPOA misconduct, and share with the RCMP and other relevant investigative authorities expertise and information about potential CFPOA violations; [Convention, Article 8.2; 2009 Recommendation X. A. (i) and (ii)]

Actions taken as of the date of the follow-up report to implement this recommendation:

Canada emphasizes that authorities in all orders of government in Canada are committed to combating corruption, both domestically and abroad, to the extent that they can do so within their respective mandates. Canada reiterates that the investigation and prosecution of the foreign bribery offence does not fall within the mandates of the provincial securities commissions in Canada. In addition, Canadian law (including the Constitution) places significant limits on the ability of provincial securities commissions to share information with the authorities that are mandated with the investigation and prosecution of offences under the CFPOA.

Despite these significant limitations, over the past two years, investigators from the RCMP's International Anti-Corruption Unit have continued to actively establish closer working relationships with the provincial securities commissions. Information sharing practices and protocols are being established between the RCMP and a number of provincial securities commissions, including the Alberta Securities Commission, the British Columbia Securities Commission, l'Autorité des Marchés Financiers, and the Ontario Securities Commission. Cooperation between the RCMP International Anti-Corruption Unit and the provincial securities commissions over the last two years demonstrate that the securities commissions are willing to share relevant information within the parameters allowed under Canadian law.

Text of recommendation 4 (e):

4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:
- e) In consultation with the provinces in an effort to ensure consistency of standards throughout Canada: (i) prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation for purposes that would include “bribing foreign public officials or of hiding such bribery”; (ii) consider whether the requirements to submit to independent external audit are adequate, in view of the rule that permits large private companies to exempt themselves from the requirement; (iii) consider broadening the prohibitions for participating in audits in order to improve auditor independence; and (iv) consider amending the law to require external auditors to report indications of foreign bribery to the competent authorities; [Convention, Article 8] and

Actions taken as of the date of the follow-up report to implement this recommendation:

With regard to (i), Canada maintains that *Criminal Code* offences of false pretence or statement (sections 361 and 362), forgery and the use of forged documents (sections 366 and 367), possession of false documents (section 368), fraud affecting public market (section 380), falsification of books and documents (section 397), and false prospectus (section 400) continue to be relevant to Canada’s implementation of Article 8 of the Convention. Canada’s position is supported by the WGB’s request to follow-up on the maintenance of statistics relating to these offences [see Follow-Up issue 10(e), below].

To supplement these existing *Criminal Code* offences, and to provide an additional enforcement tool to Canadian authorities responsible for the investigation and prosecution of the CFPOA, section 4 of the *Fighting Foreign Corruption Act* (tabled in the Canadian Senate on February 5, 2013) creates a new books and records offence under the CFPOA of establishing off-the-books accounts, making transactions that are not recorded in books and records, recording non-existent expenditures, incorrectly entering liabilities, knowingly using false documents, or intentionally destroying books and records, for the purpose of bribing a foreign public official or for hiding that bribe.

Every person who contravenes the new books and records offence will be guilty of an indictable offence and liable to a maximum of 14 years imprisonment and unlimited fines. There is no statute of limitations for this offence.

Canada will be pleased to provide updates to the WGB on the progress of the bill to amend the CFPOA, as it progresses through Canada’s Parliament.

If no action has been taken to implement recommendation 4(e), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Canada acknowledges the WGB’s Recommendations 4(e)(ii) to (iv), and continues to consider the WGB’s recommendations with regard to external audit committees and auditor independence in its on-going review of the *Canada Business Corporations Act* (CBCA). Canada will continue to work towards ensuring that the CBCA reflects and maintains modern corporate governance principles.

Text of recommendation 4 (f):

4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:
 - f) To the extent appropriate and possible in the Canadian legal system, consider options for encouraging voluntary disclosure of CFPOA violations and for cooperating with investigations, which may thereby increase the reporting of violations of the CFPOA. [2009 Recommendation III (iv)]

Actions taken as of the date of the follow-up report to implement this recommendation:

In its significant outreach to the public (including industry representatives, companies, and law firms), the RCMP's International Anti-Corruption Unit encourages the proactive self-reporting of incidents of bribery discovered through internal controls and compliance mechanisms. This goes hand-in-hand with emphasis on the importance of establishing and implementing such mechanisms. Canada confirms that investigative leads relating to foreign bribery have been provided to the RCMP International Anti-Corruption Unit as a result of self-disclosure. For example, the guilty plea and conviction of Griffiths Energy International Inc. in January 2013 for foreign bribery under the CFPOA resulted from voluntary disclosure on the part of the company to the RCMP International Anti-Corruption Unit. The company was fined \$10.35 million CDN.

To further clarify the central role of the RCMP in Canada's voluntary disclosure system in relation to the foreign bribery offence, section 4 of the *Fighting Foreign Corruption Act* (tabled in the Canadian Senate on February 5, 2013) will provide the RCMP with the exclusive ability to lay charges for the offences under the CFPOA, as well as for offences of conspiracy, attempt, being an accessory after the fact, or counselling in relation to CFPOA offences.

Recommendations for ensuring effective prevention and detection of foreign bribery

Text of recommendation 5:

5. The Working Group recommends that Canada find an appropriate and effective means for making companies aware of the CFPOA, including the defence for 'reasonable expenses incurred in good faith' and the defence for 'facilitation payments', and increase efforts to raise awareness of the CFPOA specifically amongst: i) Industries at high risk for bribing foreign public officials, and individuals and companies operating in countries where there is a high risk of bribe solicitation; and ii) municipal and provincial law enforcement authorities, to enable them to spot suspicions of foreign bribery and thus facilitate reporting to the RCMP International Anti-Corruption Unit. [2009 Recommendation III (i), IV, VI (ii), and Annex I, paragraph A]

Actions taken as of the date of the follow-up report to implement this recommendation:

Awareness of the CFPOA has increased in Canada as a direct result of strong enforcement on the part of Canadian authorities. Media coverage of the convictions of Niko Resources Ltd. and Griffiths Energy International, as well as of the charges laid against the former employees of SNC-Lavalin, has caught the attention of Canadian businesses. In addition, there was significant media coverage following the tabling of the *Fighting Foreign Corruption Act* in the Canadian Senate on February 5, 2013.

Seizing on this momentum, Canada has made deliberate efforts to further raise the awareness of Canadians

and Canadian companies with regard to the CFPOA. In the last year, the RCMP International Anti-Corruption Unit and DFAIT have given over 60 presentations to various stakeholder groups, including business associations, associations of legal counsel, large companies (such as companies in the extractive and banking industries), conferences of practitioners, and universities. Raising awareness of the defences for reasonable expenses incurred in good faith and the defence for facilitation payments form a part of the messaging throughout these presentations. A number of these presentations were targeted specifically towards industries where there has been a high risk of bribery solicitation, such as the mining sector.

Export Development Canada (EDC) has continued to raise awareness of the CFPOA among its clients, including those who do business in industries where the risk of bribery solicitation has traditionally been high. EDC has devoted an entire page on its website to corruption and bribery, including links to the CFPOA, the Convention, and the OECD Recommendation on Bribery and Officially Supported Export Credits. EDC has also developed a brochure that is systematically distributed to its customers to inform them of the risks they face if exposed to corrupt business practices, and to encourage the development of best practices in this area. In addition, in 2012, EDC developed a number of online tools for customers to raise awareness of bribery and corruption, including an online quiz and a customer booklet entitled “Financial Crime in International Trade – A Guide for Canadian Exporters and Importers”, which contains a section devoted to combating corruption and bribery. In addition, in 2012, EDC convened a workshop, with the assistance of the RCMP International Anti-Corruption Unit, on combating corruption at the Prospectors and Developers Association of Canada (PDAC) Annual Convention for the global mining sector. A similar workshop will be taking place in March 2013. EDC also produced an anti-corruption webcast for a broader Canadian business audience interested in exporting or investing abroad.

The RCMP International Anti-Corruption Unit has continued its outreach over the past two years to provincial and municipal police authorities in Canada with regard to the foreign bribery offence. Close coordination is maintained with provincial police forces in Quebec and Ontario, and efforts continue to be made to raise the awareness of the CFPOA, and the RCMP International Anti-Corruption Unit’s role in the enforcement of the CFPOA, through pan-Canadian police force meetings.

As noted above, further clarity regarding the central role of the RCMP in the enforcement of the CFPOA has been provided through section 4 of the *Fighting Foreign Corruption Act* (tabled in the Canadian Senate on February 5, 2013), which will give the RCMP with the exclusive ability to lay charges for the offences under the CFPOA, as well as for offences of conspiracy, attempt, being an accessory after the fact, or counselling in relation to CFPOA offences.

Text of recommendation 6:

6. Further regarding the defence in the CFPOA for ‘facilitation payments’, the Working Group recommends that Canada as soon as possible implement Recommendation VI of the 2009 Recommendation by: i) periodically reviewing Canada’s policies and approach on small facilitation payments; and ii) encouraging companies, including SMEs, to prohibit or discourage the use of such payments in internal controls, ethics and compliance programmes or measures. [2009 Recommendation VI; and X. C. (i)].

Actions taken as of the date of the follow-up report to implement this recommendation:

Canada has completed a periodic review of its policies and approaches on small facilitation payments. Subsection 3(2) of the *Fighting Foreign Corruption Act* (tabled in the Canadian Senate on February 5,

2013) will repeal the facilitation payments exception in the CFPOA. To ensure that Canadian businesses have the opportunity to transition their internal controls, ethics and compliance programs towards a zero tolerance policy regarding all bribes, including facilitation payments, the repeal of the facilitation payments exception will come into force on a day to be fixed by order of the Governor in Council.

Text of recommendation 7:

7. The Working Group recommends that Canada promote compliance programmes or measures specifically targeting the prevention and detection of CFPOA violations in the private sector, including in particular the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance. [2009 Recommendation X. C. (i) and (ii)]

Actions taken as of the date of the follow-up report to implement this recommendation:

In the significant outreach and awareness raising on the CFPOA undertaken by the RCMP and DFAIT over the past two years (including over 60 presentations to various public stakeholder groups), the importance of the establishment and implementation of internal controls, ethics and compliance programs is one of the major messages. The OECD Good Practice Guidance on Internal Controls, Ethics and Compliance is featured in this outreach as a unique and useful document, as the only guidance on this issue that has been adopted by the governments of the majority of the world's major economies.

For its part, EDC sends each of its new customers a letter from EDC's President and Chief Executive Officer, which reads as follows:

“Dear EDC Customer:

Business leaders today are faced with a broad and complex trade environment. Further complicating this agenda is the issue of corrupt practices in international trade. In addition to the moral implications, corruption is an impediment to the free and efficient flow of goods and services across borders. Corruption distorts international trade processes and inhibits economic growth.

As Canada's official export credit agency, mandated to facilitate international trade for Canadian exporters and investors, Export Development Canada (EDC) strives to share relevant current information about trade-related issues on an ongoing basis. In that regard, we have prepared for our customers the enclosed brochure on anti-corruption.

Under Canadian law, it is illegal to bribe a public official, whether in Canada or abroad, to obtain or retain an advantage in the course of business. For further details on international business practices prohibited by Canadian law, please see the *Corruption of Foreign Public Officials Act*.

Businesses operating internationally are further encouraged to review the Organization for Economic Cooperation and Development (OECD), *Good Practice Guidance*, found at the following link: www.oecd.org/dataoecd/5/51/44884389.pdf. The document has been developed to help companies establish and ensure the effectiveness of internal controls, ethics and compliance programmes or measures for preventing and detecting bribery.

We encourage companies conducting business internationally to fully understand Canadian legislation in

this area, to ensure policies and procedures are in place and employees and agents are well-educated on this issue in order to avoid the risks of corruption in international business transactions. I would be grateful if you would bring this information to the attention of the relevant individuals in your company.

Yours sincerely,

Stephen Poloz
President and Chief Executive Officer”

Furthermore, in the course of its due diligence in connection with allegations of corruption, EDC has had discussions with affected or certain customers on the risks of bribery and corruption and best practices to protect themselves against such risks. In such contexts, EDC encourages its customers to put in place internal controls, ethics and compliance programs, including codes of conduct and staff training.

Text of recommendation 8 (a):

8. Regarding the tax treatment of bribes to foreign public officials, the Working Group recommends that Canada:

- a) Provide specific training for tax examiners on whether a payment comes under the defence for reasonable expenses incurred in good faith or facilitation payments, and the detection of foreign bribery by non-profit organisations; [2009 Recommendation VIII (i); 2009 Tax Recommendation II] and

Actions taken as of the date of the follow-up report to implement this recommendation:

The Canada Revenue Agency (CRA) has developed specific training for its tax auditors to address, *inter alia*, the non-deductibility of bribe payments and to provide specific guidance regarding facilitation payments. Approvals to roll out this training module are currently being sought. In addition, CRA’s Audit Manual and Criminal Investigations Manual now contain guidance on how to deal with the application of section 67.5 of the *Income Tax Act* (ITA). To note, subsection 67.5(1) of the ITA provides that outlays made or expenses incurred for the purposes of doing anything constituting an offence under section 3 of the CFPOA (the foreign bribery offence) are non-deductible. Subsection 67.5(2) of the ITA allows tax authorities to make assessments and re-assessments of tax, interest and penalties as necessary to give effect to subsection 67.5(1) for any taxation year.

The CRA’s Criminal Investigations Directorate is currently working with the OECD’s Task Force on Tax Crimes and Other Crimes on the revisions to the *Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors*. The revised Handbook, once published, will be incorporated into training for CRA’s tax auditors and into CRA’s own manuals.

Text of recommendation 8 (b):

8. Regarding the tax treatment of bribes to foreign public officials, the Working Group recommends that Canada:

- b) Complete as soon as possible the review of the prohibition against reporting non-tax criminal offences detected in the course of a tax audit, to law enforcement authorities, and identify methods to enable the tax authorities to share information about CFPOA violations, including by considering inclusion of the optional language in paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties. [2009 Recommendation VIII (i); 2009 Tax Recommendation I (ii) and (iii)]

If no action has been taken to implement recommendation 8(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Canada takes very seriously its commitment to give effect to the OECD's 2010 Recommendation of the Council to Facilitate Co-operation Between Tax and Other Law Enforcement Authorities to Combat Serious Crimes, namely, that Members "establish, in accordance with their legal systems, an effective legal and administrative framework and provide guidance to facilitate reporting by tax authorities of suspicions of serious crimes, including money laundering and terrorism financing, arising out of the performance of their duties, to the appropriate domestic law enforcement authorities". At the same time, as Canada explained throughout the Phase 3 Evaluation process, the prohibition against disclosure of taxpayer information is the cornerstone of the self-reporting mechanism of the Canadian taxation system. Changes to the current legislative framework require careful consideration to ensure consistency with, *inter alia*, Canada's robust privacy protection regime.

Canada is continuing to consider what legal and administrative measures may be taken within the context of the Canadian legal system that would allow greater disclosure of tax information to law enforcement officials where it affords evidence of serious crimes. Canada will be pleased to keep the WGB apprised of any developments regarding this initiative as they come into the public domain.

Text of recommendation 9:

9. Regarding public procurement contracting in Canada, the Working Group reiterates the Phase 2 recommendation that Canada revisit the policies of Public Works and Government Services Canada on dealing with applicants convicted of CFPOA violations. In addition, the Working Group recommends that Canada consider further strengthening CIDA procedures by undertaking due diligence concerning applicants' declarations about corruption-related convictions. [Convention, Article 3.4; Commentary 24; 2009 Recommendation XI (i)]

Actions taken as of the date of the follow-up report to implement this recommendation:

As noted above, in July 2012, the Minister of Public Works and Government Services Canada (PWGSC) added convictions for the foreign bribery under section 3 of the CFPOA to the list of offences that would

automatically result in permanent debarment from contracting with PWGSC, pursuant to PWGSC's departmental policy. In addition, prior to PWGSC awarding a contract, companies and individuals must now provide consent stating that neither they, nor those on the Board of Governors for their company, nor any of their affiliates have ever committed certain acts or offences. This list of acts / offences includes bribery of a foreign public official. The list of offences applies to PWGSC's real property transactions, such as leasing agreements, letting of space, and the acquisition and disposal of Crown-owned properties. PWGSC will also be able to terminate contracts with companies that are convicted before the end of their contract or lease.

The Canadian International Development Agency (CIDA) continues to exercise due diligence concerning declarations about corruption-related activities by funding applicants. Over the past two years, CIDA has continued to implement its policy requiring entities wishing to enter into a contract or contribution agreement with CIDA to declare previous corruption-related convictions and sanctions and to confirm that, in the three years prior to signing a contract or contribution agreement, they have not been convicted of, and are not under sanction for, any corruption-related offence. If an entity has been convicted or is under sanction, the entity will have the opportunity to make representations to CIDA to show that steps have been taken to counter the problem. CIDA, however, reserves the right to accept, to accept conditionally, or simply refuse to do business with an entity convicted of, or sanctioned for, a corruption-related offence.

In addition to the measures noted above, since April 2011, CIDA has systematically applied its Fiduciary Risk Evaluation Tool (FRET) to all aid investments of at least \$100,000 CDN. FRET comprises eight risk factors, including a specific Corruption and Fraud risk factor based on the degree to which a potential partner's anti-corruption policies and other internal control mechanisms safeguard that funds are being used appropriately and for the intended purposes. Criterion are each assigned one of four evaluative Risk Level Statements – from Very Low to Very High – based on evidence from a variety of information sources and analyses. Appropriate risk responses or targeted measures to reduce the estimated level of risk to within the risk tolerance of the program and of CIDA are incorporated into the FRET.

PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP

Text of issue for follow-up:

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

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

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

As of the date of the submission of this report, the defence of "reasonable expenses incurred in good faith" under the CFPOA has not been considered by any Canadian courts.

Text of issue for follow-up:

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

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Canada reiterates that there are no issues with regard to criminal liability of legal persons in the Canadian legal framework, most notably in its application to foreign bribery. Section 22.2 of the *Criminal Code* codified and expanded the scope of corporate criminal liability, which had already existed in common law. Canada was able to convict a corporation (Hydro-Kleen Group Inc.) of foreign bribery under the CFPOA by relying on the common law “identification theory” of corporate criminal liability. As Canada explained during the Phase 3 Evaluation process, there is no requirement in Canadian law to charge an organization or an individual jointly with the same offence. Each can be charged and prosecuted separately, and prosecuting the organization does not necessitate prosecuting the individual, and vice-versa. The convictions of Niko Resources Ltd. in June 2011 and of Griffiths Energy International Inc. in January 2013 for offences under the CFPOA clearly demonstrate that corporations can successfully be prosecuted in Canada in the absence of prosecutions against natural persons.

Similarly, section 22.2 of the *Criminal Code* does not limit corporate criminal liability to those legal persons created with an expectation of profit. The words “for profit” in the definition of “business” in section 2 of the CFPOA do not, in any way, alter the scope of section 22.2 of the *Criminal Code*.

In any event, as noted above, Canada maintains that the definition of “business” in section 2 of the CFPOA does not unduly narrow the foreign bribery offence, given its robust application by Canadian authorities. In addition, to provide greater clarity and to reflect the broad approach already being taken by authorities, subsection 2(1) of the *Fighting Foreign Corruption Act* (tabled in the Canadian Senate on February 5, 2013) will replace the definition of “business” in section 2 of the CFPOA with the following:

“business” means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere.

Text of issue for follow-up:

10. The Working Group will follow-up the issues below as CFPOA case law and practice develop:
- c) Sanctions imposed on natural and legal persons in CFPOA cases, including confiscation of bribes and the proceeds of bribing foreign public officials; (Convention, Articles 3.1 and 3.2)

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Since the adoption by the WGB of the Phase 3 Evaluation report on Canada's implementation of the Convention, the following two cases were concluded before Canadian courts (as of the date of the submission of this report):

Niko Resources Ltd. – Niko Resources Ltd. (“Niko”) is a publicly traded company based in Calgary, Alberta. On June 24, 2011, the company entered a guilty plea for one count of bribery. The company admitted that, through its subsidiary Niko Bangladesh, it provided the use of a vehicle (worth approximately \$190,000 CDN) in May 2005 to then-Bangladeshi State Minister for Energy and Mineral Resources, in order to influence the Minister in his dealings with the company. In June 2005, Niko paid travel and accommodation expenses for the same Minister to travel from Bangladesh to Calgary, Alberta to attend an oil and gas exposition, and improperly paid \$5,000 CDN for the Minister to travel to New York and Chicago to visit his family. As a result of the conviction, Niko was fined \$9.5 million CDN and placed under a three-year Probation Order by the Alberta Court of Queen's Bench. The Probation Order places the company under the Court's supervision to ensure that audits are completed to examine the company's compliance with the CFPOA.

Griffiths Energy International Inc. – Griffiths Energy International Inc. (“Griffiths”), a company based in Calgary, Alberta, pleaded guilty on January 22, 2013 to a charge of foreign bribery under the CFPOA to secure an oil and gas contract in Chad. Griffiths acknowledged committing to provide \$2 million CDN in cash and shares in exchange for exclusive resources in two regions. After providing the Government of Chad with a \$40 million CDN signing bonus, Griffiths was awarded the resource rights. After a voluntary disclosure by the company, full cooperation with the RCMP International Anti-Corruption Unit's investigation, and a guilty plea, Griffiths was sentenced by the Alberta Court of Queen's Bench to a fine of \$10.35 million CDN. In addition, the PPSC prosecutor has initiated forfeiture proceedings in relation to the shares purchased by three of the bribe recipients.

Text of issue for follow-up:

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

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

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The Government of Canada's system of coordination in the foreign bribery space was established and implemented prior to the Phase 3 Evaluation of Canada, and it continues to function effectively today. The

individual in the role of the RCMP Investigator in Ottawa, who provides support to the RCMP International Anti-Corruption Unit, continues to work closely with the PPSC subject-matter expert on the CFPOA, foreign bribery experts from DFAIT, and with Justice Canada lawyers from the Criminal Law Policy Section and from the RCMP's Legal Services Unit. A number of other federal departments, agencies and Crown corporations, including EDC, CIDA, CRA, the Canadian Commercial Corporation (CCC), and PWGSC, also work in close cooperation with the RCMP, DFAIT, PPSC and Justice Canada to support Canada's whole-of-government approach to prevention and enforcement of the foreign bribery offence.

In addition, Justice Canada's International Assistance Group (Canada's central authority for extradition and mutual legal assistance in criminal matters) continues to maintain a single point of contact for all corruption-related mutual legal assistance requests. The contact point works closely with federal prosecutors from the PPSC, and with investigators from the RCMP's International Anti-Corruption Unit to process incoming and outgoing mutual legal assistance requests relating to corruption.

As Canada reported during the Phase 3 Evaluation process, the Integrated Market Enforcement Teams (IMETs) are dedicated to the investigation and prosecution of serious capital market fraud offences in the *Criminal Code* that are of national significance and involve actions by publicly-traded companies that pose a threat to investor confidence in Canada's capital markets. IMETs are comprised of RCMP investigators, PPSC prosecutors, provincial securities regulators, representatives of other federal law enforcement agencies, law enforcement agencies of local jurisdictions, forensic accountants, and other support staff. There are IMETs currently working out of Ottawa, Toronto, Vancouver, Montreal and Calgary. From time to time and as necessary, the RCMP International Anti-Corruption Unit receives assistance, in the form of additional temporary resources and expertise to support large and complex foreign bribery investigations, from these IMETs. In addition, as Canada explained in the Phase 3 Evaluation process, provincial securities commissions share information with other law enforcement authorities in the serious fraud context through their participation in the IMETs. While this continues to be a valuable channel for cooperation (subject to limits established under Canadian law), as noted above, closer working relationships in the foreign bribery context have been and are now being developed between the RCMP International Anti-Corruption Unit and provincial securities commissions.

Text of issue for follow-up:

10. The Working Group will follow-up the issues below as CFPOA case law and practice develop:
 - e) Statistics compiled on convictions under the CFPOA, and related omissions and falsifications of book, records and accounts of companies; (Convention, Article 3)

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Canada reiterates that it can and does collect information on the sanctions imposed for CFPOA violations (which will include the new books and records offence, following the coming into force of the *Fighting Foreign Corruption Act*) in a way that differentiates between sanctions for legal persons and those for natural persons. However, Canada cannot obtain statistics that makes the same differentiation in respect of offences under the *Criminal Code* concerning related omissions and falsification of the books, records and accounts of companies, such as false pretence (section 361), false pretence or false statement (section 362), forgery (section 366), uttering forged documents (section 368), fraud (section 380), books and documents (section 397) and false prospectus (section 400). The Adult Criminal Court Survey administered by

Statistics Canada is the vehicle through which information on Adult Criminal trials (i.e. for *Criminal Code* offences) is collected and reported on nationally in Canada. At this time, this information is not uniformly collected or reported upon; thus, it is not possible for Canada to provide this information.

In Canada, information on plea bargaining is not made public during court proceedings. For the reasons mentioned above, Canada cannot provide information on whether sanctions for books and records offences under the *Criminal Code* were the result of an agreed upon plea bargaining process or ordinary trial proceedings.

To note, Canada is obliged to report to its Parliament annually on enforcement of the CFPOA; thus, cases under the CFPOA are also tracked closely for this purpose. Canada can identify whether CFPOA sanctions were obtained through plea bargaining and, to the extent that the information is publicly available, Canada can provide this information to the WGB.

As described above, there have (as of the date of the submission of this report) been two convictions under the CFPOA since the adoption by the WGB of the Phase 3 Evaluation report on Canada's implementation of the Convention. In addition, charges have been laid in the following cases, which have yet to be concluded:

- On May 28, 2010, the RCMP laid charges against Mr. Nazir Karigar under the CFPOA for allegedly making a payment to an Indian government official to facilitate the execution of a multi-million dollar contract for the supply of a security system by Cryptometrics, a Canadian high-tech firm. The trial before Ontario Superior Court of Justice is expected to conclude in the spring of 2013.
- On April 11, 2012, the RCMP laid charges under the CFPOA against two former employees of SNC Lavalin (Mr. Ramesh Shah and Mr. Mohammad Ismail) in relation to the awarding of a contract for the supervision and consultancy services for the construction of the PADMA Multipurpose Bridge in Bangladesh. The investigation is on-going and the matter is currently before a Canadian court.

Canada is pleased to provide an updated summary of statistical information on completed cases and guilty counts for offences relating to books and records under the *Criminal Code*, in Annex B to this report.

Text of issue for follow-up:

10. The Working Group will follow-up the issues below as CFPOA case law and practice develop:
 - f) Application of the money laundering offence where violations of the CFPOA form the predicate offence; (Convention, Article 7)

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Canada reiterates that the offences under the CFPOA can constitute predicate offences for the purposes of the money laundering offence. To date, there have been no cases with this fact pattern.

Text of issue for follow-up:

10. The Working Group will follow-up the issues below as CFPOA case law and practice develop:
- g) The efficiency of mechanisms for incoming and outgoing mutual legal assistance regarding cases of bribing foreign public officials; (Convention, Article 9.1; 2009 Recommendation XIII) and

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Canada continues to take appropriate measures to provide MLA in corruption-related matters. In this regard, Canada has received and acted on 11 requests regarding bribery of foreign public officials, and sent out an equal number of MLA requests for such matters. Where an MLA request is deficient, Canada will, as a matter of practice, respond to the requesting country to clarify what information is required and provide a description of Canada's MLA requirements. To ensure the management and development of best practices, Justice Canada's International Assistance Group (Canada's central authority for MLA in criminal matters) has dedicated one legal expert to handle all incoming and outgoing corruption-related MLA requests. In addition, Canada has prepared a guide on MLA in criminal matters.

Canada notes that the time required to process and execute an MLA request varies from case to case, depending upon the complexity of the request and the assistance required.

Text of issue for follow-up:

10. The Working Group will follow-up the issues below as CFPOA case law and practice develop:
- h) The operation of the relatively new Criminal Code offence of retaliation against employees. [2009 Recommendation IX (iii)]

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

There have been no cases to date under section 425.1 of the *Criminal Code*.