SUBMISSION TO THE ORGANIZATION OF AMERICAN STATES "EXPERT GROUP" (THE MESICIC) ON CERTAIN PROVISIONS OF THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION

REPORT PREPARED BY TRANSPARENCY - INTERNATIONAL CANADA
SUBMITTED ON BEHALF OF CIVIL SOCIETY
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Background

The Canadian Chapter of Transparency International is pleased to respond to the opportunity provided under the follow-up mechanism of the Inter-American Convention against Corruption (the IACAC) of the Organization of American States (OAS) and submits its comments on behalf of civil society on topics selected by the IACAC expert group (the MESICIC) as "topics of collective interest". These topics include systems of **government hiring, public procurement of goods and services and systems for protecting public servants** and private citizens who, in good faith, report acts of corruption ("whistleblowers"). The topics of common interest selected by the expert group have significant connections and impact on good governance. Obviously, hiring good people will ensure that government contracting and procurement is done in the public interest. As well, feedback from "whistleblowers" and complaints from private citizens will alert government – and often the media – to abuse and wrongdoing. Actions by Canada to criminalize Acts of Corruption are also reported at the end of this report.

It is noted that the scope of the requested OAS survey/report mainly covers the work of Canada's National Government and not that of its sub-national jurisdictions – i.e. the 10 Provincial and 3 Territorial Governments.

This is the second round in this IACAC MESICIC follow-up process and the second report by TI – Canada. TI-Canada was pleased to be able to meet with the members of the OAS MESICIC "Expert Group" in Washington D.C. to respond to questions and issues from members arising out of the first report from Canada.. Of special interest at that time was the problem of assessing measures to counter-act corruption by government in "presidential" legislative systems as contrasted with "parliamentary" political systems – the minority case in the Americas. Also, a dominant theme at that meeting was the general problem of excessive government secrecy. In this regard we report that the government of Canada still fares poorly in providing access to public information. TI-Canada along with other civil society groups and member states representatives also pointed to the need to continue the focus on government anti-corruption activity – at all levels – and especially in the three areas covered by this current questionnaire and report. i.e. government hiring, procurement and the subject of "whistleblowers". In response to pressure from financial institutions and multi-lateral bodies the financing of political parties was

proposed as a subject worthy of examination and the need to have more **enforcement** of existing laws and rules.

A new government adminstration has placed a high priority upon measures and new institutions to strengthen government accountability. Numerous laws and new bodies have been introduced and significant changes have been made to Canada's national laws, rules and machinery of government related to integrity, accountability and oversight. Implementation of these changes continues.

1. Government hiring systems

Introduction

It is important to mention that government hiring, appointments and advancement in public service have been, and still are, one of the main political prizes of all nation states. Political patronage i.e. hiring of members of a political party (often defeated candidates) as well as the appointment of colleagues, friends - the "old boy" net, and relatives – nepotism - continues in Canada albeit in a restricted way. In Canada, the scope of such restrictions has varied over time as to the parts of the public service that are controlled by formal institutions which are charged with the responsibility of hiring public servants and those which are not. The main actors in the formal process are:

The Privy Council Office, (PCO) which is responsible for the selection, management and development of the most senior leaders in the Public Service, and which supports the Clerk as Head of the Public Service; and the Secretariat of the "Cabinet" and its committees. The Cabinet and Prime Minister continue to select and appoint all senior officials by "Order-in-Council". An attempt to establish a new senior appointments commission was recently made but has been postponed. The work of the Prime Minister's Office (the PMO) is closely linked to that ofthe PCO.

The Public Service Human Resources Management Agency of Canada, which was created in 2003 and is responsible for leadership and service in human resources planning, accountability, modernization, employment equity, values and ethics, and official languages, as well as policies and compensation for executives, learning policy and management of development programs; (The role of this agency is in transition)

The Treasury Board Secretariat, which, among its many other responsibilities, man ages pensions, health care, dental care, labour relations, compensation and setting of terms and conditions of employment and acts as the "employer" of the public service for purposes of approving the organization and staffing complements of Departments and most agencies, setting conditions of service, wages and negotiating collective agreements. (The role of this institution in the mix of personnel authorities is under review.)

The Canada School of Public Service, which is responsible for training and professional development, including leadership development and language training, for all levels of the Public Service;

The Public Service Commission, traditionally the main personnel recruitment and hiring agency and whose most critical role has been to protect and support the integrity of the merit-based staffing system. (In the last few years the influence and role of the PSC has changed dramatically.)

Since 1917 the federal government of Canada has staffed its deparments and administrative machinery using competive selection and promotion systems based upon application of the **"merit principle**". The merit system has been the foundation of a competent, professional, non-partisan national public service for almost a century. It plays an essential role, not only by protecting against political patronage, but also by ensuring that employees are hired and can advance based on their ability to do the work rather than on personal favouritism. The merit system reflects a commitment to fundamental public service values and is comprised of more than just the merit principle alone. Ensuring that staffing decisions are based on just and equitable treatment of all applicants; this principle recognizes that the staffing requirements and needs are not constant throughout the public service and that there will be a variety of staffing approaches in practices throughout government. Deputy Ministers are responsible for ensuring appointments are based on merit, and can delegate accountability and responsibility within their ministries through the Delegation of Authorities matrix. Delegates have the responsibility to ensure that they can prove the test of merit.

The factors to consider have included:

Education
Experience
Knowledge
Skills and abilities
Past work performance
Years of "continuous service" in the Public Service

Over time the application of the merit principle and the development of tests, interviews and other effective methods to assess these factors has led to some very cumbersome selection and testing processes and the routine recruitment and appointment of staff to do their jobs has been severely delayed by **numerous appeals** from the disappointed job candidates To date the main change in this process has been to give departmental managers greater freedom in hiring by expanding and increasing the delegation: of powers of the central recruitment agency – the Public Service Commission – to departmental management.

Further efforts to modernise the hiring process has involved major changes in Canada's laws. This includes a revised *Public Service Employment Act* (PSEA) enacted as part of the *Public Service Modernization Act* (PSMA). The PSMA, which received Royal Assent on November 7, 2003, has been implemented in stages,.

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The intent of the revised PSEA is to modernizes staffing in the public service by clarifying responsibilities and eliminating inefficiencies in the system, while retaining the core values of merit, non-partisanship, excellence, representativeness, and the ability to serve the public with integrity and in their official language of choice.

As the central agency – the Public Service Commission (PSC) is now more removed from actual "hands-on" selection it must, of necessity, strengthen its audit, monitoring and oversight capacity. To this end adequate records are needed and investigative staff complement need to be increased.

In the same vein the Commission has been assigned by the Governor in Council (Cabinet) the function of investigating individual complaints of harassment in the workplace. And the PSC Investigations Branch may now accept complaints concerning such matters as:

open competitions;
administration of eligibility lists;
surplus status of individuals and administration of their priority re-employment;
reverse order of merit;
any other issue under the jurisdiction of the Public Service Commission;

(It is of interest to note that in the **US federal government; all major Departments** have an Inspector-General Office well staffed with trained **investigators** who are responsible for investigating wrong-doing and allegations of corruption in their Department and usually reporting on the results to Congress... Canada has a few "Inspector-General Offices but these are mainly used as Departmental or agency "ombudsmen".). Investigations are mostly triggered by a complaint or appeal. Below are examples of the number and frquency of such complaints. (See PSC Annual report 2005-2006)

Investigations **Number of complaints received, cases opened (with basis for complaints) and cases closed (with outcomes)**			
		Opened Cases	**Closed Cases**

Period	Complaints Rec'd	**Total**	**Reverse Order of Merit**	**Harass-ment**	**PSEA/ Other**	**Total**	**Founded**	**Un-founded**	**Resolved**	**Other**
1996-97	1 178	472	221	146	157	431	116	131	61	123
1997-98	973	572	29	211	380	497	191	122	73	107
1998-99	710	321	8	181	313	441	97	162	79	103
1999-00	689	278	2	119	157	445	57	159	97	132

Of the complaints received, 45% were accepted for investigation in 1998-99 compared to 59% in 1997-98. As well, in 1998-99, 22% of completed cases were declared founded compared to 38% in 1997-98; 41% were either resolved or withdrawn compared to 36% in 1997-98.

Table 14(a): Appeals

Number of selection processes appealed and closed, with number and percentage of those allowed

Period	**Appealed**	**Closed**	**Allowed**	
			Number	**%**
1996-1997	1 252	1 246	129	10.4
1997-1998	1 853	1 623	139	8.6
1998-1999	1 729	1 202	179	14.9
1999-2000	1,499	1,117	126	11.3

Table 14(b): Appeals

Number of decisions rendered, average disposal time, with number and percentage of those disposed within standard

Period	**Number of Decisions**	**Average Disposal Time**	**Within Standard**	
			Number	**%**
1996-1997	456	7.8	373	81.2
1997-1998	575	9.4	426	74.1
1998-1999	783	13.3	518	66.1
1999-2000	550	13.8	407	74

In 1998-99, approximately 15% of completed appeals against selection processes were allowed (Table 14(a).

In 1998-99, 66% of decisions were rendered within the service standard of 10 working days (Table 14(b).

In 1998-99, 27% more decisions were rendered than in 1997-98 and 42% more than in 1996-97 (Table 14(b).

Table 14(c): Appeals

Number of appeals lodged and disposed of (with outcomes)

Period	Appeals Lodged (Opened)	Appeals Disposed (Closed)	Allowed	Dismissed	Withdrawn		No Right of Appeal
					Number	%	
1996-1997	3 451	2 965	602	481	1 398	47.2	484
1997-1998	5 430	4 829	337	1 154	2 951	61.1	387
1998-1999	4 900	3 761	511	633	2 099	55.8	518
1999-2000	3,979	2,563	239	422	1,517	59.2	385

In 1998-99, 14% of disposed appeals were allowed, 17% were dismissed, 14% had no right of appeal and approximately 56% were withdrawn.

Table 15: Deployments

Number of complaints, number of deployments complained against and number of cases closed (with outcomes)

Period	Complaints	DeploymentsComplained Against	Closed	Founded	Un-founded	No Juris-diction	Withdrawn	Decisions
1996-1997	122	61	55	8	30	7	10	45
1997-1998	101	63	52	5	14	7	15	26
1998-1999	74	46	44	8	13	14	9	27
1999-2000	31	30	18	2	6	6	4	11

Further, in the recent 1992 amendments to the Act, the recourse functions of the Commission were enhanced by Parliament with authority given to the Commission to take or order a deputy head to take appropriate corrective action, as determined by the Commission, following an investigation conducted and report prepared pursuant to section 7.3(1). Additionally, in 1992 the Commission was given the authority to review qualifications established by departments for appointments and to ensure that the qualifications afford a basis for selection according to merit. The Act now recognizes,

for complaints concerning deployment, a modern version of recourse which makes every effort to leave the decision-making authority with the deputy head. Notwithstanding the current momentum to make deputy heads not only responsible for staffing within the Public Service, but accountable for decisions taken in the exercise of that delegated authority, the Act perpetuates the historical model of recourse.

The Commission and stakeholders in the recourse avenues available under the Act are left to devise alternative dispute resolution mechanisms which do not violate an individual's right of appeal or an individual's right to request an investigation, nor violate the Commission's statutory mandate.

Under the current statutory scheme the Commission cannot delegate or otherwise extricate itself from recourse, and for good reason. Only with the leverage of final decision-making authority and the ability to direct deputy heads to take corrective action, where necessary, can the Commission fulfill its statutory mandate. Following this devolution of central authority special measures have been applied in recruitment selection and promotion to provide greater representation to women, visible minorities and candidates able to work effectively in both of Canada's official languages. This has led to some improvement in Canada's merit-"representational bureaucracy" which reflects the diversity of Canada's multicultural society.

Exceptions

Some exceptions to this process are worth noting. First, particularly in the 1950's special preference in hiring was given to military veterans of WWII. Similarly, special efforts have been made to accommodate indigenous peoples. Language training is provided routinely for all senior level officers. A major loophole in the staffing process has been that of using "temporary" employees thereby avoiding strict hiring conditions. Numerous cases of "long-term" temporaries exist. For a short time Ministerial staff were given preference in appointment for one year after leaving the employ of that Minister. This has now ceased but not before over 100 political staff had availed of this "open door" opportunity. The PSC 2005-2006 Annual report reveals that two individuals working in ministers' offices had been appointed to "phantom" positions within the public service. These appointments were inconsistent with the public service value of non-partisanship, and an inappropriate use of delegated authority. .Based on parliamentary interest in this issue, the PSC has made it a priority to determine whether these cases were isolated incidents or symptomatic of a broader pattern. Investigations conducted by the PSC in 2005-2006 revealed that two individuals working in ministers' offices, and on leave from the public service, had been appointed to "phantom" positions. Instead of performing the duties of these positions, they had immediately left on a leave of absence to assume their duties within the ministers' staff. The PSC concluded that the appointments to these "phantom" positions was an inappropriate use of delegated authorities. **The appointments were revoked**. Over the last 10 years about 100 public servants have worked in ministers' offices without a break in service. This movement is not controlled or monitored – a gap that needs to be addressed.

An ancient proverb states that "when one opens the windows to let in some fresh air – beware, as the flies may also come in"!!

2. Government systems for procurement of goods and services

Procurement of goods and services in the Federal Government of Canada has traditionally followed a simple standard process of competitive bidding by suppliers on "tenders" or requirements for goods and services advertised by departments or the central purchasing body, the Department of Public and Government Services. A schedule of "threshold" amounts is specified as to what body or person may authorize or approve contracts or expenditures on goods and services at different levels of expenditure.

Purchase of military equipment and munitions and goods and services provided for "emergencies" are generally excluded from the standard government procurement practices.

The Financial Administration Act which focuses on the financial aspects of government, including payment for goods and services. The recent Federal Accountability Act increases the accountability of federal public servants and reduces the chances for improper actions. The Federal Accountability Act also has provision for the creation of a new office – Procurement Auditor/ombudsman – to investigate complaints on federal procurements. There is also the Competition Act to ensure that collusion between firms can be prevented.

With relation to public tender, the trend for all levels of government – federal, provincial, city, municipal - has been and continues to be a movement to an electronic bidding system. This eliminates the source lists that used to be established for bidding purposes and reduces the likelihood of preferential treatment. These bidding opportunities are posted on electronic procurement boards. The emphasis is on firms to monitor the procurement opportunities and decide for themselves if they are qualified to bid.

The procurement opportunities that are not open for public tender generally fall into a few categories. The categories are generally the same for all levels of government.

The first category is considered low dollar value where the cost of a competitive process would out-way the results. These small dollar values are negotiated directly with suppliers. In the case of the federal government, low dollar value procurements over $10,000 must still be published to ensure that transparency takes place.

The next category would be considered proprietary goods or services where there is only one existing supplier. Unless the requirement is small dollar value, the trend is to publish a notice of this sole sourcing on the electronic bulletin board system for the purposes of transparency.

The third category would be considered urgent requirements. A flood or power failure would be an example. In these cases, procurement needs can not wait for normal competitive tendering to take place. However, these sole source contracts are still public information.

The fourth category is sensitive procurements. These are not published the electronic bulletin board system and there is no public record of these procurements. While there are no statistics to determine how common these are, it is not believed that these are significant.

Regardless of the level of government, public procurement has checks and balances built into the system. While each level and area of government has different procedures, generally similar mechanisms are in place. Lower dollar value procurement is approved directly by the procurement authority. As the value of the procurement increases, the procurement has to be referred to higher levels. For high dollar values, there is generally a review body that will review the complete procurement to ensure that it has met the standards. Finally, for the highest dollar value requirements, approval at political levels such as municipal or city councils or Ministers if provincial or federal take place. All this to say that the systems are built with checks and balances to ensure proper controls in public spending.

As all levels move to electronic bulletin boards, the traditional register of pre-approved contractors has diminished or been eliminated. On some electronic systems, contractors can register themselves and their ability to provide goods or services.

In services, there is a somewhat disturbing trend for governments to advertise their general needs and create a list of suppliers who could fulfill these needs later. In these cases, further bidding is restricted to those who are already approved, regardless of the size of the requirement. This tends to favour existing large firms over small firms who could fulfill the requirements at lower cost.

In goods procurement, this is not a factor as price tends to be the deciding factor once the specifications have been met.

As stated above, the move by all levels of government is to electronic bulletin (or bidding) boards where requirements are posted. In addition to this, normally, through these boards or other means, knowledge winning bid becomes public information.

Due to the changed nature of the bidding process with open bidding becoming the norm, the various procurement organizations have needed to more closely define the selection criteria. Also, it is not unusual, during the bidding period, to see questions asked regarding perceived bias in assessment. The electronic bidding enables firms to review the requirement, point out errors in the procurement and/or the use of proprietary terms where only generic evaluation requirements are needed.

There have been a number of different ways to blend the evaluation of price, quality and expertise. These different ways all have one common element – they can be customized to address the relative importance of each of the elements for a specific procurement.

Ways to challenge a selection.

There are many ways that a bid and selection can be challenged in public buying.

During the bidding period, the evaluation and selection criteria can be challenged through questions. The answers become public knowledge and can be used later on as "evidence" if necessary.

Once the selection has been made, the winning bid can be challenged if impropriety is suspected.

First the direct manager/boss of the employee who was responsible for the bid process can be asked to investigate. In addition or subsequently, the senior bureaucrat of the procurement department can also be asked to investigate.

In the federal case, there is the CITT (Canadian International Trade Tribunal) that complaints can be made to. The CITT will investigate and render opinions. In the Federal Accountability Act, there is also a procurement auditor with the duty to investigate – although this position still has not been staffed. The auditors can also play a major role in such reviews.

In provincial, municipal and city procurement, there is an ombudsman or auditor that can be requested to investigate.

The above are the bureaucratic levels of challenge. There are also the political levels. The political official, normally the Minister responsible for the process can be asked to investigate. Following that, there is the member of government where the business resides in (and the appropriate level of government) who can be asked to represent their constituent.

Where party politics are in place, the information can be given to the opposition party or parties so that they may raise questions publicly.

On top of these, there are also trade associations who can represent their members to all these.

There is also the media. Injured parties can take their complaints directly to the media to ensure that the perceived wrongdoing is known. Politicians are sensitive to media and this may help a case.

On 17 September 2007 a Procurement Ombudsman was designated by government and a new Code of Conduct for Procurement was announced. Issues of Ministerial accountability under this new system have been raised and are under review.

New Code of Conduct for Procurement

In February/ March 2007. the new *Code of Conduct for Procurement* was put in place, Government claims that "The *Code* is an important measure in fostering a stronger

relationship between the government and the private sector, while ensuring this relationship is built on transparency, accountability and the highest ethical conduct," .

3. PROTECTING PUBLIC SERVANTS AND PRIVATE CITIZENS WHO REPORT ACTS OF CORRUPTION (ARTICLE III (8) OF THE CONVENTION)

In Canada, the new Federal Accountability Act which has just become law continues a slow evolution in protection for whistleblowers. However, under this Act, only federal public servants are offered protection. A new Integrity Commissioner's Office is established to oversee these activities but is still being set up. There is no evidence, as yet, that this new Act will produce positive results. Nonetheless, the existence of the Act, by itself, is an indication that change is taking place.

In Canada, there are few formal mechanisms for reporting wrongdoing other than normal channels. Thus, in most cases, it is impossible to protect the identity of the whistleblower. The majority of whistleblowers especially where they have already tried to correct the problem through normal channels and, therefore, are easily identifiable. The burden of proof for threats or reprisals still rests with the whistleblower and the whistleblower does not usually have access to files or information that could offer protection or show threats or reprisals existed. Without this, the whistleblower is left in an isolated and exposed position. (See new legislation below.) .

***Public Servants Disclosure Protection Act* (PSDPA)**

Currently new legislation has been put in place to provide protection to "whistleblowers". The purpose of the *Public Servants Disclosure Protection Act* (PSDPA) is to encourage employees in the public sector to come forward if they have reason to believe that serious wrongdoing has taken place and to provide protection to them against reprisal when they do so. It also provides a fair and objective process for those against whom allegations are made.

The PSDPA was amended by the *Federal Accountability Act*, which received Royal Assent on December 12, 2006. The PSDPA came into force, April 15, 2007. The Canada Public Service Agency (CPSA) is responsible for leadership and support to organizations in the implementation of the PSDPA.

The PSDPA applies to all employees in departments, agencies, boards, tribunals, separate employer agencies, parent Crown corporations, court administrations as well as their chief executives (heads of department or agency), and members of the Royal Canadian Mounted Police (RCMP). The Act **excludes** Ministers, members of Minister's staffs, members of boards of directors of Crown corporations, Parliament and its institutions,

federally appointed judges, Canadian Security Intelligence Service (CSIS), Communications Security Establishment (CSE) and the Canadian Forces. However, CSIS, CSE and the Canadian Forces are required to create comparable disclosure protection regimes.

Definition of Wrongdoing:

The Act describes wrongdoing as: the contravention of an Act of Parliament or of the legislature of a province, or of any regulations made under any such Act; the misuse of public funds or assets; gross mismanagement in the federal public sector; a serious breach of a code of conduct; an act or omission that creates a substantial and specific danger to the life, health and safety of Canadians or the environment; and knowingly directing or counseling a person to commit a wrongdoing.

Definition of Reprisal:

Reprisal is defined to mean any of the following measures taken against a person who has made a protected disclosure or has cooperated in an investigation, including any disciplinary measure: the demotion of the person, termination of employment, the taking of any measure that adversely affect the employment or working conditions of a person or a threat to do any of those things or to direct a person to do them.

Confidentiality:

Chief executives must, subject to any other Act of Parliament and to the principles of procedural fairness and natural justice, protect the identity of persons involved in the disclosure process, and establish procedures to ensure the confidentiality of information collected in relation to disclosures under this Act. The Public Sector Integrity Commissioner (PSIC), appointed under this Act, is responsible for ensuring that the right to procedural fairness and natural justice of all persons involved in investigations is respected. (See below) The PSIC is required to protect, to the extent possible, the identity of all persons involved in the disclosure process. The PSIC must also establish procedures to ensure the confidentiality of information collected in relation to disclosures or investigations.

Disclosure Process

A public servant may make a disclosure to the PSIC or internally to his or her supervisor or to the senior officer designated for this purpose under the Act. The PSIC has investigatory powers under Part II of the *Inquiries Act.*

1. Each chief executive in the federal public sector must designate a senior officer and establish an internal disclosure mechanism unless it is not practical given the size of the organization.
2. When a public servant makes a disclosure to the PSIC, he or she will investigate the alleged wrongdoing, report his or her findings and make recommendations on corrective measures to the chief executive concerned.
3. A public servant may make a public disclosure only if there is not sufficient time to make the disclosure using the internal or independent PSIC processes and the public servant believes on reasonable grounds that there is a serious breach of federal or provincial laws, or an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.
4. Any person can provide information about a wrongdoing in or relating to the public sector to the PSIC who can investigate the allegation.

Reprisal Protection Process

1. The PSIC will receive all reprisal complaints from public servants.
2. If the PSIC decides to deal with the complaint, he or she will designate a person as an investigator. At any time during the course of the investigation, the investigator may recommend to the PSIC that a conciliator be appointed to attempt to bring about a settlement.
3. After receiving the investigation report, if the PSIC is of the opinion that it is warranted, he or she may apply to the Public Servants Disclosure Protection Tribunal for a determination of whether or not a reprisal was taken against the complainant.
4. On application by the PSIC, if the Tribunal, composed of Federal Court or provincial superior court judges, determines that a reprisal occurred, it can order remedial action, including:
   - Permit the complainant to return to his or her duties;
   - Reinstate the complainant or pay compensation in lieu of reinstatement if the relationship of trust between the parties cannot be restored;
   - Pay to the complainant compensation in an amount not greater than the amount that is equivalent to any financial or other penalty imposed on the complainant;
   - Rescind any disciplinary action;
   - Pay the complainant an amount equal to any expenses or other financial losses incurred as a direct result of the reprisal;
   - Compensate the complainant by an amount of not more than $10,000, for any pain and suffering experienced as a result of the reprisal.
5. The Tribunal can also order disciplinary action against persons determined to have taken a reprisal.
6. Public servants may still choose to deal with the matter through grievance, if applicable, but can only use one mechanism. In fact, the Commissioner may not deal with a complaint if a person or body acting under another Act of Parliament or a collective agreement is dealing with the subject-matter of the complaint.

Protection from Reprisal for Non-Public Servants

Protection for all Employees

Reprisal protection is provided for all employees (not just public servants) who provide information concerning an alleged wrongdoing in the public sector.

Employers are prohibited from retaliating against an employee who provided information about federal public sector wrongdoing to the Commissioner.

Protection for Contractors

Public servants are prohibited from retaliating against contractors, including recipients of grants and contributions, because they reported government wrongdoing to the Commissioner. The PSIC, or the Senior Officer, will report the findings of investigations and recommend corrective action when required to the chief executive concerned.

The PSIC may make special reports to Parliament and must prepare an annual report to Parliament.

The PSIC must report to Parliament within 60 days of finding a wrongdoing.

Chief Executives must report publicly on findings of wrongdoing.

CPSA must make an annual report to Parliament on disclosure activity across the public sector.

Legal Advice

The PSIC may provide legal advice to any person involved in proceedings under the PSDPA up to an amount of $1,500 ($3,000 if the PSIC is of the opinion that there are exceptional circumstances) for those who do not otherwise have access to legal advice, at no cost to him or her.

Role of Bargaining Agents / Unions

Right to Representation

During the disclosure process, public servants have a right to be represented by any person in order to answer any allegations that may result in the Commissioner making a report or recommendation that adversely affects them, or if they are subpoenaed by the Commissioner to provide information.

Public servants have a right to be represented by any person throughout the reprisal complaint process.

Public servants may consult their bargaining agent at any time during PSDPA proceedings.

The Public Sector Integrity Commissioner (Public Sector Integrity Canada)

The mandate of the new Public Sector Integrity Commissioner is set out in the *Public Servants Disclosure Protection Act*, which entered into force on April 15, 2007.

The Commissioner and his office provides for a means and mechanism for public servants to make disclosures concerning potential wrongdoing in their workplace, and to be protected from reprisal for making such disclosures. This mandate has five main responsibility areas:

> to accept disclosures of wrongdoing in or relating to the public sector made by public servants and other Canadians;
> to investigate these disclosures and report findings to the concerned chief executive, which may also include recommendations for the chief executive on corrective measures to be taken;
> to enforce the prohibition against reprisal by receiving all reprisal complaints from public servants;
> to investigate complaints of reprisal, which may include conciliation attempts to remedy a complaint or, if unresolved, application to the Public Servants Disclosure Protection Tribunal to determine whether reprisal took place and to order appropriate remedial action; and,
> To report to Parliament.

The Commissioner also has authority to provide public servants and any Canadian who may be considering making a disclosure of wrongdoing access to legal advice valued up to $1,500. Access to legal advice may be extended to public servants who are considering making a complaint of reprisal to the Commissioner, and any person who is involved in an investigation or proceeding under the *Public Servants Disclosure Protection Act*.

The Commissioner is appointed as an Agent of Parliament by an Order in Council and approved by resolution of both Houses of Parliament. The Commissioner reports directly to Parliament, has the rank, and all powers and accountabilities, of a deputy head of a department.

The work of the Commissioner is supported by a Deputy Commissioner who can be delegated any or all of the responsibilities of the Commissioner, except the power to make reports to chief executives and to Parliament. The office of the Commissioner, Public Sector Integrity Canada, provides administrative, investigative and legal support to the work of the

4. Criminalization of Acts of Corruption

Canada has in place a wide array of measures Commissioner and Deputy Commissioner.

Which are designed to ensure integrity in public life. In addition, the Canadian government is actively supporting international efforts to combat corruption.

The federal government of Canada regulates potential corruption by a combination of federal statutes, parliamentary rules and administrative provisions. The nature of the governing authority generally depends on the kind of public office held by an individual and this governing authority may involve a mixture of statutes, regulations and administrative provisions. In addition, the Auditor General of Canada, an independent body, reports annually to the House of Commons.

The *Criminal Code of Canada* includes offences which prohibit bribery (ss. 119, 120), frauds on the government (s. 121), fraud or a breach of trust in connection with the duties of office (s.122), municipal corruption (s. 123), selling or purchasing office (s. 124), influencing or negotiating appointments or dealing in offices (s. 125), possession of property or proceeds obtained by crime (s. 354), fraud (s. 380), secret commissions (s. 426), and laundering proceeds of crime (s. 462.31).

Members of the Canadian Forces are subject to the same provisions of the *Criminal Code of Canada* as civilians. In addition, The *National Defence Act* also includes offences such as improper sale of military property (section 116) and receiving a benefit for favouring a person doing business with the Canadian Forces (section 117). Members of the Canadian Forces may be tried before civilian courts for *Criminal Code* offences and before military tribunals for both *Criminal Code* and *National Defence Act* offences

Further, a person is precluded from holding any public office or other public employment, or from being elected or sitting or voting as a member of Parliament or of a provincial legislature, or from exercising any right of suffrage, if that person has been convicted of an indictable offence for which that person has been sentenced to a term of imprisonment for two years or more until that person has served that term or the punishment has been substituted by a competent authority or the person has been given a pardon. No person convicted of frauds against the government, of selling or purchasing office, or of selling defective stores to the government has, after that conviction, the capacity to contract with the government or to receive any benefit under a contract between the government and any other person or to hold government office (s. 750).

Any person who, while in Canada, conspires to commit an indictable offence in a place outside Canada that is against the law in that place shall be deemed to have committed the conspiracy in Canada (s. 465(3)). Further, any person who, while outside Canada, conspires to commit an indictable offence in Canada shall be deemed to have committed the offence of conspiracy in Canada (s. 465(4)).

The *Corruption of Foreign Public Officials Act* entered into force in Canada on February 14, 1999. It features the offence of bribing a foreign public official. Not only would the offence of bribing a foreign official be subject to prosecution, but it would also be possible to prosecute, for example, a conspiracy or an attempt to commit this offence. It would also be possible to prosecute for aiding and abetting in committing the offence, an intention in common to commit the offence, and the counseling of this offence.

The *Act* also criminalizes the laundering of profits obtained from bribing a foreign public official, and specifically covers proceeds found in Canada as a result of an act or omission outside Canada that, if it had occurred in Canada, would have constituted the offence of bribing a foreign public official. In addition, the possession in Canada of property or proceeds obtained or derived from both Canadian and offshore bribery of foreign public officials or laundering is criminalized. These proceeds of crime could be **seized, restrained or forfeited**.

Section 132 of the *National Defence Act* also provides for laying charges for offences contrary to the law of the country where an act or omission occurred.

By adding the *Corruption of Foreign Public Officials Act* offences to the list of offences under section 183 of the *Criminal Code*, it will be possible for police, through the lawful use of a wiretap and other electronic surveillance, to gather evidence in the bribery of foreign public officials cases, and in the possession and laundering of proceeds from these cases. This will assist in the investigation of these new offences.

Effective April 1, 1997, the national Integrated Proceeds of Crime (IPOC) enforcement initiative established ten new IPOC units across Canada and continued the three existing IPOC units. This initiative is aimed at intensifying the investigation and prosecution of major organized criminals and crime groups operating in Canada. These units will target profiteering from a whole range of enterprise crimes, including corruption crimes, in which organized criminals engage. Each IPOC unit brings together representation from the federal Department of Justice, the Royal Canadian Mounted Police, Canada Customs, provincial and municipal police, and forensic accountants.

As the offences in the *Act* are criminal offences, they permit effective mutual legal assistance pursuant to the *Mutual Legal Assistance in Criminal Matters Act*. The penalty for each of these offences is sufficient to enable extradition.

The offence of bribing a foreign public official has also been added to the list of offences found in section 67.5 of the *Income Tax Act* to deny claiming bribe payments as a deduction.

Witness protection is one of the most useful and effective law enforcement tools we have in the fight against crime. The *Witness Protection Program* Act in Canada serves the needs of police services and of potential witnesses and sources who need protection.

The *Financial Administration Act* provides for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations. It also creates specific offences to address corruption and fraud. The *Income Tax Act* contains provisions prohibiting the tax deductibility of bribes.

As well, other federal statutes contain specific provisions relating to the conduct of public officials who administer the statutes. For example, the Immigration Act prohibits bribery of immigration officers and adjudicators. The *Statistics Act* contains specific provisions dealing with the misuse of such information for gain.

Canada had in place a non-statutory conflict of interest and post employment code for federal public office holders and a code for federal public servants and military personnel. These codes are designed to guide the conduct of federal public office holders and federal public servants and to maintain and enhance public confidence. For the purposes of the *Conflict of Interest and Post- Employment Code for Public Office Holders*, "public office holders" include Ministers, Parliamentary Secretaries and full-time Governor in Council appointees, as well as members of ministerial staff who are not public servants. The Federal Accountability Act (Dec 11 2006) further expands and applies conflict of interest and ethics requirements.

The *Parliament of Canada Act* contains several conflict of interest prohibitions pertaining to Senators and Members of Parliament. The Standing Orders of the House of Commons and the Rules of the Senate of Canada also address conflict of interest matters. For example, section 16 of the *Parliament of Canada Act*, among other things, prohibits any Senator from receiving any compensation for services rendered in relation to any matter before the Senate or the House of Commons or for the purpose of influencing or attempting to influence any Member of either House. Standing Order 21 of the House of Commons, for example, prohibits any Member from voting on questions in which that Member has a direct pecuniary interest.

As well, to reinforce the importance of personal integrity within the federal public service, all federal civil servants on appointment from outside the federal public service are required to take and subscribe to the oath or solemn affirmation of allegiance and the oath or solemn affirmation of office and secrecy.

In the ten provinces and the four territories of Canada, generally similar rules of conduct in the form of legislation or guidelines exist for public officials, elected and appointed.

Several departments have in place internal, but independent and impartial, investigative bodies, which report incidents to the RCMP, military police or the proper police authority.

The *Lobbyists' Code of Conduct* came into effect on March 1, 1997. The *Code* establishes standards of conduct for all lobbyists who communicate with federal public office holders and forms a counterpart to the obligations that federal officials must observe when they interact with the public and with lobbyists. As well, the *Lobbyists Registration Act* was amended in 1996 to increase the amount of information available to the public on lobbying efforts directed at federal institutions.

Few institutions are more important to a healthy democracy than the courts. Their importance comes from the power they hold: the power to determine rights between individuals and between individuals and the government and the power to uphold the rule of law. They are entrusted to determine a multitude of issues and are responsible for making decisions over rights, obligations, freedoms and property of individuals. That is why it is so crucial to have an independent judiciary.

The objective of an independent judiciary is to ensure that everyone has access to an impartial judge, who is in control of the judicial proceedings, so that the rights of the person appearing before the bench will be determined solely on the basis of the facts and the law.

In Canada, the independence of the judiciary is a constitutional and legal principle of foremost importance. This principle has received recognition in Canada's constitution and has continued to be developed and strengthened in Canada's statutes. The basic constitutional provisions with respect to the independence of the judiciary are those set out in sections 96 to 101 of the *Constitution Act, 1867*. They specifically acknowledge the concept of judicial independence through the judicature provisions respecting tenure and removal and the fixing and payment of salaries, annuities and allowances,

The effect of the other constitutional provisions is to give judges and military judges very substantial guarantees against arbitrary interference or removal by the executive level of government. The fundamental status of the judges, as well as the provision of their salaries, allowances and pensions, is constitutionally guaranteed.

Certain of the rights established in the *Canadian Charter of Rights and Freedoms* by implication guarantee the independence of the judiciary and military tribunals by setting out minimum standards for the courts and tribunals which hear cases relating to criminal offences and specific fundamental rights.

The concept of an independent judiciary is truly recognized in Canada and the separation between the judiciary and the executive at the federal level clearly exists. In Canada, the independence and impartiality of the judiciary is a constitutional and legal principle of paramount importance. One change proposed by the current government is to establish a new office of "Director of Public Prosecutions" responsible for the conduct of all prosecutions under federal law. (Currently, the Attorney General and Department of Justice of Canada and provincial prosecutors decide on how to proceed in such cases.)

The *Canadian Charter of Rights and Freedoms* also provides that everyone has the freedom of conscience and religion; the freedom of thought, belief, opinion and expression, including the freedom of the press and other media of communication; the freedom of peaceful assembly; and the freedom of association. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Making government information accessible to Canadians is an important element of open government in Canada. The *Access to Information Act* includes an enforceable right of public access to most government information and records.

In the Development Assistance Committee of the Organization for Economic Cooperation, CIDA has supported efforts to curb corrupt procurement practices and CIDA has revised its contract language to ensure that the responsibilities of Canadian firms are clear and that contractors sign a "non-bribery" pledge.

Canada has also actively participated in discussions, and negotiations, in various international fora, including the United Nations, the Organization of American States, the Organization for Economic Co-operation and Development, the Council of Europe, the Commonwealth and the G-8 about ways to combat corruption. As well, Canada is the United Nations Convention on Transnational Crime and the United Nations Convention Against Corruption (2 October, 2007) *Updated submission to the International Conference on Fighting Corruption and Safeguarding Integrity and Security Among Justice and Security Officials. Washington, D.C. February 24-26, 1999*_____

Conclusions and recommendations

It should be noted that, while the Canadian Chapter of Transparency International has a very high quality and representative Board of Directors who serve on a voluntary basis, it is greatly challenged in its work by the fact that it has very limited financial resources and, in fact, relies only on the services of one **part-time staff member**! In this regard monitoring Canada's compliance with the IACAC in the swiftly changing environment of Canada's national government is virtually impossible. Furthermore, a full picture of the Canadian scene is not feasible without coverage of the provincial and territorial jurisdiction and major cities. In future to prepare a comprehensive MESICIC OAS

follow-up report for Canadian civil society, a national survey of "integrity" systems is warranted.

A basic issue in the philosophy of ethics is whether to rely on individual values and personal ethics or to enforce rules to obtain compliance. At this time, the government of Canada is clearly relying on the latter. Also, whereas in the recent past, staff who reported wrongdoing ("whistleblowers") were not encouraged. Recently, "whistleblower" protection rules have been established.

An emphasis on effective enforcement requires the support of a large cadre of trained and experienced investigators and "in-house" units in each major department. Widespread staff training in ethics, values and conduct is still needed especially on induction to the public service and at all levels.

TI-Canada recommends that the MESICIC "Action Plan" framework be applied to all Canadian jurisdictions and is willing to partner with other NGOs and academic bodies to complete such a Plan. ***National Plans of Actions***

During the First Round meetings of the MESICIC Committee of Experts, countries expressed the importance of receiving support to fully develop and implement the selected provisions of the Convention and, in particular, the recommendations contained in the country reports adopted by the Committee.

To that end, the OAS General Secretariat, with the financial support of the Canadian International Development Agency (CIDA), carried out a pilot project to create national Plans of Action to implement the Committee's recommendations. During the pilot project the OAS General Secretariat worked with the first four countries reviewed by the Committee in the First Round of review (Argentina, Colombia, Nicaragua and Paraguay).

In September of 2006, with a contribution from the United States, the General Secretariat set up the Anti-Corruption Fund to extend this initiative to other countries participating in MESICIC.

Plan of Action

Each national Plan of Action addresses the following aspects:

- Specific actions necessary to implement the recommendations of the MESICIC Committee of Experts
- Institution, entity or government agency responsible for implementation
- Estimated costs and resources needed
- Time frame for execution
- Indicators that measure the expected results and means of verification

Canada's new government has placed high priority on implementing transparency and accountability in the national government administration and has introduced major new

legislation and institutional measures to implement this priority (The Federal Accountability Act). However, implementation of such changes is difficult and a number of loopholes exist in the new legislation and gaps have been noted in the accountability framework. Not the least is the need:

1. to establish a national "Senior Appointments Commission".
2. to ensure transparency through open government and ready access to government information, including cabinet documents and adequate "paper trails" in Departments for government decisions.
3. to strengthen accountability by the increased use of internal auditors and special investigative or oversight units.
4. to provide substantial rewards to persons who report wrongdoing especially where savings are made.
5. to provide full legal support to "whistle-blowers" to prepare their case and protect them from retribution.
6. to bring military armaments and munitions procurement and sales under stricter oversight and control.
7. to bring "emergency" procurement under standard controls by pre-purchasing and arranging advance contracts and regional and international stockpiles of emergency goods and services.
8. to establish a central monitoring unit to follow-up international treaties and conventions such as the new United Nations Convention against Corruption.

The official to be consulted regarding this response to the OAS, IACAC MESICIC questionnaire is:

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