# CANADA

## REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

## A. IMPLEMENTATION OF THE CONVENTION

### Formal Issues

Canada signed the Convention on December 17, 1997, and deposited the instrument of ratification with the OECD on December 17, 1998. On December 7, 1998, it adopted implementing legislation in the form of the *Corruption of Foreign Public Officials Act*,[1] and this received Royal Assent on December 10, 1998. The law came into force on February 14, 1999.

### Convention as a Whole

The *Corruption of Foreign Public Officials Act* (the Act) seeks to address issues relating to the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention). It is intended to give tangible expression to commitments made in the OECD and to represent Canada's legislative contribution to the international effort to fight corruption of foreign public officials.

The Act reflects the following approach: (1) the legislation is designed to meet the obligations set out in the Convention and to be in compliance with the Convention; (2) the main offence of bribery of foreign public officials represents an effort to marry the Convention wording and requirements with wording that was found already in paragraph 121(1)(a) of Canada's *Criminal Code*, R.S.C. 1985, c. C-46 as amended; and (3) the exception and the defences are based, in large part, on policy concerns reflected in other legislation, such as the U.S. *Foreign Corrupt Practices Act*.

Having a new Act of Parliament serves to give greater prominence to the principal offence. As well, by using the term "Corruption" in the Act's title, there is room for the Act to grow to accommodate new legislative provisions falling under this heading should Canada, in the future, undertake to sign and ratify additional international conventions dealing with such matters.

It is notable that the long title of the Act indicates to judges, and to others, that the Act seeks to address legislatively issues relating to the implementation of the Convention.

## 1. ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

Section 3(1) of the *Corruption of Foreign Public Officials Act* sets out, as follows, the offence of bribery of a foreign public official:

*Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official*

[1] S.C. 1998, c. 34. Long title of Act is: An Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts.

*(a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or*

*(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions.*

## 1.1 The Elements of the Offence

### 1.1.1 any person

Section 3(1) applies to "every person", and pursuant to section 2 of the Act, "person" is defined in section 15(2) of the *Criminal Code* as follows:

"every one", "person", "owner" and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.

The offence is intended to apply to every person, whether Canadian or not, including persons who are not "inhabitants" of Canada, and within the full meaning of person as defined in section 2 of the *Criminal Code.*

Canada states that this definition means that for the purposes of offences under the *Corruption of Foreign Public Officials Act*, corporations as well as natural persons fall within the scope of the offences.

An exemption from criminal liability under the offences set out in sections 4 (possession of property) and 5 (laundering proceeds of the offence) of the Act is provided in section 6 of the Act for a peace officer or a person acting under the direction of a peace officer. This exemption, however, is limited to conduct undertaken for the purposes of an investigation or the performance of other duties by peace officers. No exemption exists with respect to the section 3 offence.

### 1.1.2 intentionally

Section 3(1) is silent with respect to intent. However, *Criminal Code* offences are presumed to import *mens rea* unless there is a clear indication to the contrary. Given the nature of the offence, and given how section 121(1) of the *Criminal Code* has been interpreted, it is expected that the courts would read in a *mens rea* of intention and knowledge for this offence (see, for example, R. v.Cogger (1997), 116 C.C.C. (3d) 322 (S.C.C.) and R. v. Cooper (1977), [1978] 1 S.C.R. 860). The *mens rea* of intention and knowledge would include wilful blindness. It would not include the "should have known" standard, which is not to be equated with intention. The "should have known" standard amounts to negligence or lack of due diligence. The words "in order to" imply that there is a purpose underlying the giving etc. of the benefit.

### 1.1.3 to offer promise or give

Section 3(1) uses the terms "gives, offers or agrees to give or offer", which mirror the domestic bribery provisions and are intended to address the same conduct as that in the Convention.

### 1.1.4 any undue pecuniary or other advantage

Section 3(1) refers to a "loan, reward, advantage or benefit of any kind". Canada explains that it does not use the word "undue" because it is the giving of the loan, etc., in the context of the offence, including the available defences under section 3(3) and (4) of the Act, that renders the loan, etc., "undue".

Section 3(3)(a) excludes from the purview of the offence a "loan, reward, advantage or benefit" that is "permitted or required under the laws of the relevant foreign state or public international organisation". Commentary 8 on the Convention refers to the "written laws and regulations" of a foreign state and does not include any mention of the laws of a public international organisation.

Canada explains that the word "laws" used in paragraph 3(3)(a) of the Act is intended to encompass all laws, regardless if they are written, as well as regulations. It was Canada's understanding of the Convention and the Commentaries that this defence was to be applicable to all foreign public officials under the Convention, including foreign public officials working for a public international organisation. This would be a principled approach. The failure to include specific mention of the laws of a public international organisation in the Commentaries was regarded by Canada as an oversight. As a result, Canada has adopted the wording of paragraph 3(3)(a) of the Act. It is intended that it would be the laws of the public international organisation itself rather than the laws of the country within which the organisation is situated that would be relevant to the exception.

Section 3(3)(b), which is not required by the Convention, further excludes from the purview of the offence a "loan, reward, advantage or benefit" that was made "to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to":

*(i) the promotion, demonstration or explanation of the person's products and services, or*

*(ii) the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.*

Canada provides that subsection 3(3)(b) of the Act reflects a policy concern that is also reflected in a similar provision in the U.S. *Foreign Corrupt Practices Act*. To use this possible defence, the accused must show that the loan, reward, advantage or benefit was a reasonable expense, incurred in good faith, made by or on behalf of the foreign public official and was directly related to the promotion, demonstration or explanation of the person's products or services or to the execution or performance of a contract between the person and the foreign state for which the individual performs duties or functions. Cases involving the bribing of a foreign public official will be subject to prosecution and it is expected that courts will effectively limit any attempts on the part of accused persons to misuse this possible defence. In addition, this defence must be raised and argued by the defendant.

Canada further provides that there have been no prosecutions as yet under the *Corruption of Foreign Public Officials Act*. In interpreting the defence set out in paragraph 3(3)(b) of the Act, Canadian courts could well examine U.S. texts, commentaries and case law on the U.S. defence, although Canadian courts may choose not to follow the U.S. approach. What expenses were "reasonable" and whether such expenses were incurred in good faith would ultimately be determined by the court in light of all the facts, including the possible testimony of the accused.

### 1.1.5 whether directly or through intermediaries

Section 3(1) does not make specific reference to the application of the offence to bribes given through intermediaries. However, Canada explains that the words "directly or indirectly" cover bribes given

directly or indirectly, including through intermediaries. Canada adds that the words "directly or indirectly" are commonly understood to have this meaning in Canadian law. Furthermore, intermediaries themselves could also be prosecuted as parties to the offence in appropriate circumstances.

Canada provides that it is expected that the *mens rea* required for the offence would be intention and knowledge. Knowledge, in Canadian law, includes wilful blindness. The involvement of an intermediary does not alter the *mens rea* involvement.

**1.1.6 to a foreign public official**

The term "foreign public official" is defined in section 2 of the Act as:

*(a) a person who holds a legislative, administrative or judicial position of a foreign state;*

*(b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and*

*(c) an official or agent of a public international organisation that is formed by two or more states or governments, or by two or more such public international organisations.*

Paragraph (a) of the definition does not explicitly state that it applies to the persons therein whether they have been appointed or elected, as is required by the Convention. But Canada explains that paragraph (a) of the definition of "foreign public official" in the Act covers a "person who holds a legislative, administrative or judicial position of a foreign state". In Canada's view, it was not necessary to use the words "whether elected or appointed".

Paragraph (b) defines a foreign public official to include a person exercising a public function for a "public agency " through the definition of "foreign state" (see below), which includes "an agency of that country or of a political subdivision of that country". With respect to public enterprises, the latter part of the paragraph lists a wide variety of entities that are included in the definition.

Paragraph (c) follows closely the definition of public foreign officials in relation to public international organisations.

In section 2, "foreign state" is defined as "a country other than Canada" including:

*(a) any political subdivision of that country;*

*(b) the government, and any department or branch, of that country or of a political subdivision of that country; and*

*(c) any agency of that country or of a political subdivision of that country.*

Unlike the Convention, it does not speak directly to the levels and subdivisions of government, "from national to local", but Canada explains that this is, in fact, the intent. By including "a political subdivision of that country" in the definition of "foreign state" in section 2(b) of the Act, Canada states that it ensures the Act covers foreign public officials from the national to local levels of government within the foreign state.

### 1.1.7 for that official or for a third party

Canada states that the offence would cover the situation where the benefit was for the benefit of a foreign public official or for a third party. The application of the offence to situations where the benefit was for a third party is not, however, evident from the wording of the offence itself, which would appear to apply to two situations: one where the benefit is given "to a foreign public official" and the second where it is given to a third party "for the benefit of a foreign public official".

Canada explains that the wording "to a foreign public official or to any person for the benefit of the foreign public official" is derived from s. 121(1)(a)(i) of the *Criminal Code*. It is designed to cover the situation where a foreign public official might not receive the bribe himself or herself, but instead direct that the benefit be given to another person. The advantage or benefit need not be given to the foreign public official, but can be given to any one else for the benefit of that official. It is expected that there would be some benefit or advantage to the foreign public official to be able to direct or confer such a benefit upon a third party. This formulation covers this aspect of the Convention without requiring the advantage etc. to be given to the foreign public official.

Canada adds that it is expected that intangible benefits (e.g. favourable publicity and indirect pecuniary benefits such as reduced tuition expenses arising from scholarships paid directly to a school or an adult child) would be covered where it is a third party who receives the benefit. It states that the words "benefits of any kind" cover diverse forms of benefits (R. v. Hinchey, [1996] 3 S.C.R. 1128).

### 1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

Section 3(1)(a) of the offence criminalizes the giving of an advantage, etc., as consideration "for an act or omission by the official in connection with the performance of the official's duties or functions". This is meant to conform with the wording of Article 1.1 of the Convention, which requires that the offence apply to the giving of an advantage "in order that the official act or refrain from acting in relation to the performance of official duties".

There is a further requirement in Article 1.4.c. of the Convention that an act or omission by a foreign public official in relation to the performance of official duties include "any use of the public official's position, *whether or not within the official's authorised competence"*. As a matter of drafting, Canada decided not to follow this wording, and created, instead, section 3(1)(b), which prohibits the giving of advantages to "induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions".

Although the Act does not specify whether the offence applies to acts or omissions whether or not they are within the official's authorised competence, Canada explains that paragraphs 3(1)(a) and (b) of the Act were created to encompass this requirement. The latter paragraph is meant and designed to cover the situation where the bribe is given, not for the purpose of having the foreign public official act or omit to act in areas over which the official is authorised to act, but to influence others within the foreign state or public international organisation.

### 1.1.9 in order to obtain or retain business or other improper advantage

Section 3(1) applies to advantages, etc., given to a foreign public official in order to "obtain or retain an advantage in the course of business". The provision is not limited to the obtaining or retaining of "business or other improper advantage", as in Article 1 of the Convention, but Canada asserts that, by using the broad words, "in order to obtain or retain an advantage in the course of business" in subsection 3(1), the offence seeks to capture this notion. Improper advantages are prohibited because

securing an improper advantage would not be part of a foreign public official's duties or functions. This language would cover efforts to secure improper advantages in the course of business as well as other advantages which would otherwise be proper but for the bribery. For example, it would be an offence within the meaning of subsection 3(1) to bribe in order to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

Subsection 3(4) exempts from the ambit of the offence payments, etc. that are made "to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including":

*(a) the issuance of a permit, licence or other document to qualify a person to do business;*

*(b) the processing of official documents, such as visas and work permits;*

*(c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and*

*(d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.*

Subsection 3(5) clarifies that an act of a routine nature does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision. This defence must be raised and argued by the defendant.

Canada remarks that the Commentaries do not define "facilitation payment", let alone the meaning of "small" facilitation payment. While the Act could have been silent on this on the assumption that such payments do not fall within the meaning of Article 1 paragraph 1 of the Convention (and other States seemed to have adopted that approach), for the purpose of legal clarity, Canada chose to address this issue explicitly in its legislation.

The long title of the Act is *"An Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts"*. The long title is meant to signal to judges that they can look to the Convention and to the Commentaries to assist them in interpreting the legislation.

### 1.1.10 in the conduct of international business

The Convention addresses the bribery of foreign public officials in the conduct of international business transactions. The Act addresses the bribery of a foreign public official in the course of business. It was believed that the word "international" might lead to some confusion and create difficulties in defining what is actually meant by "international business".

Canada states that "the Act targets the bribery by any person of a foreign public official when the transaction is for profit".[2] The courts have not yet interpreted this requirement, but Canada explains

2 . Page 3 of *The Corruption of Foreign Public Officials Act: A Guide* (Department of Justice, Canada, May 1999).

that non-profit companies would not be exempted from the purview of the offence, as they are captured by the definition of "person" under subsection 15(2) of the *Criminal Code* (see discussion under 1.1.1 on "any person"). Canada believes that this formulation effectively implements the Convention.

### 1.2 Complicity

Article 1(2) of the Convention requires Parties to establish as a criminal offence the "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official".

Subsection 34(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21 provides that all of the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the *Criminal Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides. The provisions relating to aiding and abetting, intention in common, and counselling can be found in the *Criminal Code* (ss. 21, 22), but they can be applied to the offences in the Act.

By section 21 of the *Criminal Code*, every one is a party to an offence who actually commits it, does or omits to do something for the purpose of aiding any person to commit it, or abets any person in committing it, or where there is an intention in common. As well, where a person counsels another person to be a party to the offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled. Subsection 22(3) indicates that "counsel" includes procure, solicit or incite. In Canada's view, the incitement and authorisation of bribes are adequately covered.

### 1.3 Attempt and Conspiracy

Article 1(2) of the Convention requires Parties to criminalise the attempt and conspiracy to bribe a foreign public official to the same extent as these acts are criminalised with respect to their own domestic officials.

*Attempt*

Section 24(1) of the *Criminal Code* creates liability for attempting to commit an offence regardless of whether it was, in fact, possible to commit the offence. It is a question of law whether an act or omission by a person who has the intent to commit an offence is mere preparation or an attempt to commit the offence. To illustrate how the courts normally draw the line between mere preparation and attempt, Canada presents the following two cases:

1. In R. v. Deutsch, [1986] 2 S.C.R. 2, the Supreme Court of Canada concluded that no satisfactory general criterion can be devised to articulate a clear line between preparation and attempt. The Court held the view that this issue would need to be decided by the courts on a case-by-case basis, using common sense judgement, having regard to the relationship between the nature and quality of the act in question and the nature of the complete offence, as well as the relative proximity of the act in question to what would have been the completed offence.

2. In R. v. Sorrell and Bondett (1978), 41 C.C.C. (2d) 9, the Ontario Court of Appeal determined that where an accused's intention is otherwise proven, acts which are on their face equivocal in nature may nevertheless be sufficiently proximate as to constitute an attempt.

*Conspiracy*

Section 465 of the *Criminal Code* contains the relevant provisions on conspiracy. Section 465(1)(c) states that every one who conspires with any one to commit an indictable offence is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of the offence would, on conviction, be liable. Section 465(3) makes it an offence to conspire in Canada to do anything abroad referred to in section 465(1), if it is an offence under the laws of that place. Additionally, it is an offence under section 465(4) to conspire outside Canada to do anything in Canada referred to in 465(1). Canada explains that it is not a defence to a charge of conspiracy that an accused, having agreed to carry out the unlawful act with the intention to carry out the common design, later withdraws from the conspiracy, as the offence is complete upon the making of the agreement. Further to subsection 34(2) of the *Interpretation Act*, section 465 of the *Criminal Code* (conspiracy) would apply to the offences in the Act.

## 2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to "take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official".

### 2.1.1 Legal Entities

Section 2 of the *Corruption of Foreign Public Officials Act* extends criminal liability to persons other than natural persons. It states that, among other things, "person" means a person as defined by section 2 of the *Criminal Code*, and the definition of "person" in the *Criminal Code* includes Her Majesty and public bodies, bodies corporate, societies, and companies. Canada explains that this means that the foreign bribery offence under section 3(1) is not limited in its application to natural persons, but that corporations also fall within its scope. Canada adds that the definition of "person" in section 2 of the *Criminal Code* includes state-owned or state-controlled companies.

By using the same definition for "person" in this Act as is used in the *Criminal Code*, the same principles of corporate criminal liability apply to the offence of bribing a foreign public official, in accordance with the requirements under the Convention.

### 2.1.2 Standard of Liability

In Canada, corporate criminal liability depends upon a common law principle called "the identification theory of liability". This theory establishes that a corporation is liable for the guilty act of a natural person if the person is the directing mind of the corporation. A directing mind includes the board of directors, the superintendent, the manager, or anyone else to whom the board of directors has delegated the governing executive authority of the corporation. For example, a corporation can be liable, if the actions of the directing mind are performed by the manager within the sector of operation assigned to him by the corporation. The sector may be functional or geographic or may embrace the entire undertaking of the corporation.

According to the decision of Canadian Dredge & Dock Co. v. The Queen, [1985]1 S.C.R. 662, 19 C.C.C. (3d) 1 (S.C.C.) corporate liability only applies where the action by the directing mind was within the field of operation assigned to him or her, was not totally in fraud of the corporation, and was by design or result partly for the benefit of the company. Pursuant to this decision it is not necessary for the "directing mind" of the corporation to be found guilty of the offence of bribing a foreign public official in order for the corporation to be prosecuted. Canada adds that, however, if the theory of the

case against the corporation is based solely on proving the intent of a particular directing mind, and that is not achieved, then it is likely that that will result in estoppel of a prosecution against the corporation.

Canada explains that pursuant to its common law, the "directing mind" is not limited to senior management or the board of directors, but that this concept includes any officer or employee acting in the field assigned to him/her by the legal person. Moreover, the judicial interpretation of this concept has given it broad applicability.

The same principles apply with respect to corporate criminal liability under section 3 of the *Corruption of Foreign Public Officials Act*.

## ARTICLE 3. SANCTIONS

The Convention requires Parties to institute "effective, proportionate and dissuasive criminal penalties" comparable to those applicable to bribery of the Party's own domestic officials. Where a Party's domestic law does not subject legal persons (e.g. corporations) to criminal responsibility, the Convention requires the Party to ensure that they are "subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions." The Convention also mandates that for a natural person, criminal penalties include the "deprivation of liberty" sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of "comparable effect" are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

### 3.1/
### 3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official

*Penalties*

The criminal penalties with respect to the bribery of domestic[3] and foreign officials[4] are practically identical. The maximum penalty in both cases with respect to a natural person is 5 years imprisonment.

Pursuant to section 734 of the *Criminal Code*, natural persons can also receive fines for domestic and foreign bribery. A court may impose a fine on a natural person if it is satisfied that he/she is able to pay the fine, or discharge it under section 736 of the *Criminal Code* (fine option program). There is no upper limit on the fine that may be imposed on a natural person. An individual may be sentenced to both imprisonment and a fine, except where the offence is punishable by a minimum term of imprisonment, which is not the case for the offences in the *Corruption of Foreign Public Officials Act.*

Pursuant to section 735 of *Criminal Code*, the maximum penalty that may be imposed on a corporation for both domestic and foreign bribery is a fine with no upper limit.

The amount of the fine in respect of natural and legal persons is within the discretion of the court, taking into account different considerations. However, information is not available at this time about the size of fines normally imposed in these cases.

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[3] see s. 121 of *Criminal Code*.

[4] see s. 3(2) of *Corruption of Foreign Public Officials Act.*

The penalty for attempt in respect of sections 121 and 123 of the *Criminal Code* and section 3 of the Act is imprisonment for a term that is one-half of the longest term to which a person who is guilty of the offence is liable. (2.5 years in the case of the bribery of a foreign public official.)

Pursuant to the *Criminal Code*, a person who aids and abets[5] or conspires[6] to commit the offence of bribing a foreign public official would be guilty of an indictable offence and liable to the same punishment as for the normal offence.

*Sentencing Principles*

Section 718.1 of the *Criminal Code* states that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". In addition, section 718.2 lists the following principles, which must be considered by a court in imposing a sentence:

*(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,*
*(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,*
*(ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,*
*(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or*
*(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organisation*
*shall be deemed to be aggravating circumstances;*
*(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;*
*(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;*
*(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and*
*(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.*

As a general rule, there are no sentencing guidelines *per se*, other than case precedents.

### 3.3 Penalties and Mutual Legal Assistance

Canada states that because bribery of foreign public officials is a criminal offence, it permits effective mutual legal assistance. It states further that the Mutual Legal Assistance in Criminal Matters Act (MLACMA), R.S.C. 1985, c. 30 (4th Supp.) does not make the provision of mutual legal assistance dependent on the existence of some period of imprisonment in relation to the offence in question. Instead the MLCMA defines "offence" as "an offence within the meaning of the relevant treaty". Accordingly, one must look to the relevant treaty for the meaning.

5 . s. 21 of *Criminal Code*

6 . s. 465 of *Criminal Code*

### 3.4 Penalties and Extradition

Canada states that the penalties under section 3(2) of the *Corruption of Foreign Public Officials Act* are sufficient to enable extradition because it provides that persons who contravene section 3(2) are guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. Pursuant to section 3(1)(a) of the new Extradition Act (Bill C-40), which is expected to come into force sometime in 1999, the offence in question must be punishable in the requesting country by a deprivation of liberty for a maximum term of 2 years or more, or by a more serve punishment; and pursuant to section 3(1)(b) in Canada,

*(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of 5 years or more, or by a more severe punishment, and*
*(ii) in any other case, by imprisonment for a maximum term of 2 years or more, or by a more severe punishment, subject to the relevant extradition agreement.*

### 3.6 Seizure and Confiscation of the Bribe and its Proceeds

Article 3.3 of the Convention requires each Party to take necessary measures to provide that "the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable".

Section 7 of the *Corruption of Foreign Public Officials Act* applies sections 462.3 and 462.32 to 462.5 of the *Criminal Code* on the search, seizure and detention of proceeds of crime to proceedings for offences under sections 3 to 5 of the Act (s. 3 on bribing a foreign public official; s. 4 on possession of property obtained by bribing a foreign public official or laundering the proceeds thereof; and s. 5 on laundering the proceeds of foreign bribery).

In addition, section 462.3 of the *Criminal Code* was amended to add a reference to sections 3, 4 and 5 of the *Corruption of Foreign Public Officials Act*. This means that those sections are considered "enterprise crime offences", and thus the other provisions in Part XII.2 of the *Criminal Code* (e.g. ss. 462.32, 462.33, 462.37 and 462.38) apply. Since these are given that particular status, the other provisions in Part XII. 2 apply.

Sections 462.32 and 462.33 are available for the pre-charge seizure or restraint of "property" that "may be forfeited pursuant to sections 462.37 and 462.38. (Note that Canada "seizes" moveable property [e.g. a car], but it "restrains" immovable property [e.g. a bank account or land]). The key question to be determined in every application is whether the targeted property may be forfeited under the provisions in this part.

Section 462.37 provides for forfeiture application after a criminal conviction for an "enterprise crime offence". Section 462.38 provides for an exceptional *in rem* application for forfeiture. Section 462.3 defines sections 3, 4 and 5 of the *Corruption of Foreign Public Officials Act* as such offences. The forfeiture in sections 462.37 and 462.38 applies where the Attorney-General is satisfied on a balance of probabilities that "any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property…" Section 462.3 defines "proceeds of crime" in broad terms that include every aspect of a bribe, from the perspective of the bribe giver and recipient (i.e. the money paid, the benefits that accrue to the recipient from the bribe and the benefits received by the payor as a result of the bribe).

### 3.8 Civil Penalties and Administrative Sanctions

Article 3.4 of the Convention requires each Party to "consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official".

There are no specific recourses available to a person who has been a victim of corruption, but recently Canadian courts have had to consider the tort of unlawful interference with an economic interest. With regard to already existing contracts, there is some case law supporting the proposition that a party, such as a business competitor, who induces a breach of a rival's contract by convincing a third party to do an unlawful act, will be liable for the loss or damage which the rival sustains. Tort liability could also arise if there were interference short of a breach. With regard to new contracts, the law is less clear.

The tort of unlawful interference is discussed in Future Health Inc. v. Cividino, (1999) 41 O.R. (3d) 275, where the Ontario Court (General Division) dismissed a motion to strike a statement of claim for failure to disclose a reasonable cause of action.

In Quebec, there are no cases where corruption has been recognised as a fault giving rights to damages. However, the new Civil Code contains provisions that could be invoked to claim damages.

In conclusion, in both the common law provinces and in Quebec, possible remedies exist for those "whose rights and interests are affected by corruption".

## 4. ARTICLE 4. JURISDICTION

### 4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory". Commentary 25 on the Convention explains that "an extensive physical connection to the bribery act" is not required.

Canada establishes jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory. The leading Supreme Court of Canada decision on jurisdiction is R. v. Libman [1985] 2 S.C.R. 178 in which the court stated:

*…all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well known in public and private international law.*

In addition, the court in R. v. Libman stated that Canada "should not be indifferent to the protection of the public in other countries".

Canada explains that the determination of what is a "significant portion" or a "real and substantial link" will depend on the particular fact situation, but does not rely on an extensive physical connection between the offence and Canada. It offers the following three decisions to illustrate how particular fact situations are applied:

1. In Canada (Human Rights Commission) v. Canadian Liberty Net [1998] 1 S.C.R. 626, a lower court had issued an injunction ordering Canadian Liberty Net, a private organisation, to cease making racist messages available on their answering service. The organisation then changed their message to refer callers to a phone number in the United States. Callers to this second number could then hear

racist messages. The Court referred to Libman and held that "as long as at least part of an offence has taken place in Canada, Canadian courts are competent to exert jurisdiction." In this case, the Court found that the facts of the case "did not even test the outer limits of the principle" as the advertisement for the racist messages was made in Canada on the same phone line where the original messages had been available.

2. In United States of America v. Lépine [1994] 1 S.C.R. 286, the Supreme Court deliberated whether to extradite the accused to face charges of conspiracy to distribute cocaine in the United States. A group of co-conspirators in Canada agreed to purchase cocaine and fly it from Columbia to Canada with stops in the United States. The cocaine did not enter Canada because all the co-conspirators but one were arrested and the cocaine seized at a United States airport. The United States sought extradition of one conspirator who had never left Canada. The issue considered by the Court was who, the Canadian executive or the judge at the extradition hearing, has authority to determine whether the state requesting the surrender of a fugitive has jurisdiction to prosecute the fugitive. In answering this question, the Court held that the facts of this case amply fulfil the "real and substantial link" requirement articulated in Libman.

3. In R. v. Hammerbeck (1993), R.F.L. (3d) 265, 26 B.C.A.C. 1, the accused took his daughter to the United States and kept her there for three weeks in violation of a child custody order. He was charged with abduction in contravention of a custody order contrary to section 282 of the *Criminal Code*. The British Columbia Court of Appeal did not accept the argument that the offence had taken place outside of Canada. Instead they held that Canadian courts had jurisdiction because the abduction started in Canada and the deprivation of the mother continued in Canada. The Court held that there was a real and substantial link to British Columbia.

Additionally, in Canada the law on conspiracy is interrelated with territorial jurisdiction. This is provided for as follows in section 465 of the *Criminal Code*:

1. A person who conspires in Canada to commit an act in another country that is an offence under the laws of that country is deemed to have conspired to commit that offence within Canada if that conduct would be an offence if committed in Canada.
2. A person who conspires in another country to commit an offence in Canada is deemed to have conspired within Canada.

In these two cases the court would take jurisdiction as if the offence had occurred within Canadian territory. If an offence under the *Corruption of Foreign Public Officials Act* was or would have been committed by conspirators outside of Canada, then the conspiracy to commit that offence is deemed to have taken place within Canada. It is not necessary that the offence intended by the conspirators be completed.

### 4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according the same principles, "take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official". Commentary 26 on the Convention clarifies that where a Party's principles include the requirement of dual criminality, it "should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute".

Canada rarely asserts extraterritorial jurisdiction, and has not established such jurisdiction with respect to the bribery of a foreign public official. Canada explains that it has generally legislated extraterritorial criminal jurisdiction in cases where there is an international consensus that a crime is of

such universal concern as to justify extraterritorial jurisdiction, as in offences against internationally protected persons, the protection of nuclear material, torture, war crimes, the citizen accused is employed by the federal government to undertake duties outside of Canada (such as a diplomat), or there exists an established consensus in the international community condemning a particular offence (such as the sexual exploitation of children).

Canada considered applying jurisdiction on the basis of nationality. However, Canada has an established policy of exercising jurisdiction over property, persons, actions, or events within its territory. This policy position is consistent with Canadian law and legal history. Canada states that its choice of territorial jurisdiction is consistent with the obligations of the Convention.

### 4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Canada states that informal consultations could occur between Canadian and foreign investigative agencies in the course of investigating an alleged offence. Consultations can also take place between central authorities or via the diplomatic channel. However, there are no legal instruments requiring consultation and eventual transfer of a case.

If two or more countries believe they have jurisdiction over a case, the respective countries would consult on the matter. Furthermore, if the fugitive is located in Canada, the relevant Attorney General would, in good faith, have to direct his/her mind to whether prosecution in Canada would be equally effective in Canada, given the existing domestic laws and international agreements. If the fugitive is located outside of Canada and Canada is of the view that it has jurisdiction, it could seek his/her extradition for the purpose of prosecution in Canada.

### 4.4 Review of Current Basis for Jurisdiction

Canada states that at the moment it has no intention of reviewing the current basis for jurisdiction. No problems have been encountered in this regard, therefore no steps have been identified as necessary to improve the basis for establishing jurisdiction.

## *5.* ARTICLE 5. ENFORCEMENT

Article 5 of the Convention demands that the investigation and prosecution of the bribery of a foreign public official be "subject to the applicable rules and principles of each Party". It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

### Investigation

Canada explains that the competent police authority has the discretion to commence, suspend or terminate an investigation into complaints of bribery of foreign public officials. The discretion to commence an investigation exists where the police determine in their best judgement that an investigation is warranted.

The Canadian authorities confirm that an investigation into the bribery of a public foreign official could not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

**Prosecution**

Canada further explains that once charges have been laid, the Attorney General (usually through Crown counsel) assumes responsibility for conducting the prosecution. The Attorney General has the power to initiate, suspend or terminate a prosecution. No investigative agency, government department or minister of the Crown may instruct the Attorney General (and his or her counsel) with respect to pursuing or continuing a particular prosecution. The decision to initiate or continue a prosecution requires consideration of whether the evidence justifies the initiation or continuation of proceedings, and where there is enough evidence, whether it is required by the public interest. Canada states that the Attorney General exercises a broad discretion in the public interest. That discretion, based upon tradition and the common law, must exclude partisan views or the political consequences to the Attorney General or cabinet colleagues. Canada indicates that this discretionary power is fully set out in relevant public policy documents.

For instance, according to the *Crown Counsel Policy Manual* available on the WEB[7], generally, the more serious the offence, the more likely the public interest will require that a prosecution be pursued. One of the public interest factors that may arise on the facts of a particular case include "whether prosecution would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest".

## 6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for "an adequate period of time for the investigation and prosecution" of the offence.

In Canada, there is no limitation period with respect to the bribery of public foreign officials.

## 7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

### 7.1 Domestic Bribery

Bribery of a domestic official is a predicate offence in Canada's money laundering legislation. This legislation applies to "enterprise crime offences", which also include crimes such as fraud on the government and breach of trust by a public officer. Additionally, "enterprise crime offences" apply to crimes of conspiracy, attempt, being an accessory after the fact or any counselling in relation to those offences. The domestic provisions contain a money laundering offence and an offence prohibiting the possession of property obtained by a crime.

[7] http://Canada.justice.gc.ca./cgi-bin/folioisa.dll/stdobject//level1.gif/CRIMLITE.NFO/query=*/toc/{@1}?34,12

The maximum penalty for the possession of property and proceeds obtained by crime is a maximum of 10 years imprisonment when prosecuted by indictment[8]; and 50,000 dollars or a maximum of 6 months imprisonment, or both, when prosecuted by summary conviction[9].

The maximum penalty for laundering the proceeds of crime is a maximum of 10 years imprisonment, when prosecuted by indictment[10]; and 50,000 dollars or a term of imprisonment not exceeding six months, or both, when prosecuted by summary conviction[11].

Forfeiture of the proceeds from these offences (i.e., any property, benefit or advantage, within or outside of Canada, obtained or deprived directly or indirectly from the crime) can be sought upon conviction of the predicate offence, using the criminal standard of proof. These provisions cover proceeds that are found in Canada from an offence that occurred outside Canada that, had it occurred in Canada, would have constituted an enterprise crime offence.

Additionally, the domestic provisions permit pre-charge seizure or restraint of identified proceeds that may be forfeited. They also permit access to such property to cover the individual's business, living or legal expenses, with the possibility of a fine in lieu of forfeiture if the assets are dissipated. The fine alternative results in a period of incarceration if the fine is not paid. The provisions protect innocent third parties and give priority to restitution orders for victims.

### 7.2 Foreign Bribery

Section 5 of the *Corruption of Foreign Public Officials Act* contains the money laundering provisions applicable to the bribery of a foreign public official. Section 5(1) establishes that a person commits an offence who "uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means" any property or any proceeds of any property for the purpose of concealing it, knowing or believing that it was obtained in the commission of: the offence, pursuant to section 3, of bribing a foreign public official; or an act or omission that occurred outside Canada that, had it occurred in Canada, would have constituted an offence under section 3 of the Act. Section 5(2) states that a person who commits an offence under section 5(1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years; or is guilty of a summary conviction offence and liable to a fine of not more than $50,000 or to imprisonment for a term not exceeding 6 months, or to both.

Additionally, section 7 of the *Corruption of Foreign Public Officials Act* applies sections 462.3 and 462.32 to 462.5 of the *Criminal Code* on search, seizure and detention of proceeds of crime to proceedings for an offence under section 5 of the Act. Canada states that these provisions provide for seizure, restraint and forfeiture of the proceeds of crimes in the same manner as is currently covered with respect to the domestic "enterprise crime offences".

Canada further states that pursuant to this new initiative, it may be able to share the forfeited proceeds of crime resulting from convictions or *in rem* forfeiture applications with other countries that provide assistance in a Canadian prosecution leading to a forfeiture.

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8. Section 355 of the Criminal Code.

9. Subsection 163.1(2)(b) of the Customs Act, R.S.C. 1985, c.1 (2d Supp.)

10. Section 462.31 of the Criminal Code.

11. Subsection 163.2(2)(b) of the Customs Act.

## 8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

### Penalties for Accounting Omissions and Falsifications

Canada believes that if persons establish off-the-books accounts, make off-the-books or inadequately identified transactions, record non-existent expenditures, enter liabilities with incorrect identification of their object, or use false documents, for the purpose of bribing foreign public officials or of hiding such bribery, then, a number of Criminal Code provisions may come into play. These practices would invariably become subject to criminal prosecution as, at some point or other, those companies undertaking such practices will seek to deceive others or induce others to rely on their inaccurate books and records.

Key *Criminal Code* provisions that are particularly relevant are: ss. 321 (definition of "false document"), 362 (false pretence or false statement), 366 (forgery), 380 (fraud), 397 (falsification of books and documents) and 400 (false prospectus).

The criminal penalties for these offences are as follows:

1. For false pretence or false statement, imprisonment not exceeding 10 years, where the property obtained is a testamentary instrument or the value of what is obtained exceeds five thousand dollars; or imprisonment for a term not exceeding 2 years, or summary conviction, where the value of what is obtained does not exceed five thousand dollars.

2. For forgery, imprisonment for a term not exceeding 10 years; or summary conviction.

3. For fraud, imprisonment for a term not exceeding 10 years where the subject-matter is a testamentary instrument or the value of the subject matter exceeds five thousand dollars; or imprisonment for a term not exceeding 2 years, or summary conviction where the value of the subject-matter of the offence does not exceed five thousand dollars.

4. For falsification of books and documents, imprisonment for a term not exceeding 5 years.

5. For false prospectus, imprisonment for a term not exceeding 10 years.

The accounting and auditing professions are governed by professional societies, which can impose administrative sanctions on their members. In addition auditors face criminal sanctions if their actions amount to an offence under the *Criminal Code* or other federal legislation such as the *Corruption of Foreign Public Officials Act*.

### Generally Accepted Accounting Standards

In addition to the *Criminal Code* provisions, Canada explains that there are Generally Accepted Accounting Standards (GAAS), which do not have the force of law. The auditor's responsibility to detect material misstatements resulting from illegal acts (including bribery) is as follows:

1. The auditor's professional responsibility is to conduct the audit in accordance with the GAAS.

2. The GAAS require that the auditor design procedures to reduce the risk of not detecting a material misstatement in the financial statements to an appropriately low level. Misstatements can result from either "errors" or "fraud and other irregularities."

3. If the auditor encounters circumstances that make him or her suspect that the financial statements are materially misstated, the auditor is required to perform procedures to confirm or dispel that suspicion. Circumstances shall be identified that may make the auditor suspect that the financial statements are materially misstated as a result of the consequences of an illegal act. Circumstances that could indicate bribery include: unusually large cash receipts or payments, transfers to numbered bank accounts or accounts in financial institutions with which the entity does not normally do business, and unsupported payments.

Moreover, Canada explains that the GAAS require reporting of significant misstatements and illegal or possible illegal acts (unless considered inconsequential) to the appropriate levels of management and at least one level above the level of suspected involvement and to the audit committee. The GAAS do not require reporting to other bodies or authorities.

**Entities Required to Keep Books and Records, etc.,**

All financial institutions, companies incorporated under federal or provincial legislation and securities institutions must prepare adequate accounting records and maintain those records for a specified period after the end of the financial year to which the records relate.

Statutory audits of financial statements are required for Canadian companies and corporations in all jurisdictions except for the provinces of Prince Edward Island and New Brunswick. For example, a company incorporated in British Columbia must appoint an auditor. Limited exemptions are available in some jurisdictions, such as for private companies under certain circumstances. In Ontario all entities over a certain size require an audit.

## 9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing "prompt and effective legal assistance" with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

### 9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

#### 9.1.1 Criminal Matters

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

Canada states that pursuant to the *Mutual Legal Assistance in Criminal Matters Act* (MLACMA), it can provide mutual legal assistance in criminal matters, including corruption offences, in relation to requests submitted to it pursuant to treaty. This legislation gives Canadian courts the power to issue

compulsory measures to gather evidence in Canada in response to foreign requests for assistance. Canada states further that the requirements that must be met under the MLACMA will vary depending on the nature of assistance sought (i.e. whether the production of records, transfer of a prisoner or search and seizure is sought).

The Convention fits the definition of "treaty" in subsection 2(1) MLACMA*:*

*a treaty, convention or other international agreement that is in force, to which Canada is a party and of which the primary purpose or an important part is to provide for mutual legal assistance in criminal matters.*

In addition, where there is no applicable treaty or convention between Canada and another country, subsection 6(1) of the MLACMA provides, *inter alia*, as follows:

*If there is no agreement between Canada and a state or entity, or the state's or entity's name does not appear in the schedule, the Minister of Foreign Affairs may, with the agreement of the Minister, enter into an administrative agreement with the state or entity providing for legal assistance with respect to an investigation specified in the arrangement relating to an act that, if committed in Canada, would be an indictable offence.*

The MLACMA does not create an obligation for Canada to provide mutual legal assistance. The obligation to assist arises from bilateral treaty, convention or international agreement.

The legislation allows for assistance to be rendered at any stage of a criminal matter, from investigation to appeal. The legislation deals with the following types of assistance: search and seizure; evidence gathering orders for testimony from persons or production of documents and things for use in a foreign state; lending of evidence; enforcement of foreign fines; and temporary transfer of detained persons to testify or assist.

### 9.1.2 Non-Criminal Matters

Canada is party to some twenty bilateral agreements on mutual legal assistance in civil and commercial matters. It is also a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. However, civil matters are under provincial jurisdiction.

Canadian courts do not require a treaty to provide mutual legal assistance in non-criminal matters. Generally, as a matter of comity, courts will assist a foreign court.

## 9.2 Dual Criminality

Canada states that the provision of mutual legal assistance is not conditional on dual criminality.

## 9.3 Bank Secrecy

Pursuant to section 18 of the MLCMA, a court may order the production of banking records in response to a request thereof where satisfied that there are "reasonable grounds" to believe that,

(a) an offence has been committed with respect to which the foreign state has jurisdiction; and

(b) evidence of the commission of the offence or information that may reveal the whereabouts of a person who is suspected of having committed the offence will be found in Canada.

Canada adds that "reasonable grounds" means that there must be some factual basis for the belief that the evidence requested will be found in Canada. It involves more than mere suspicion or speculation.

## 10. ARTICLE 10. EXTRADITION

### 10.1 Extradition for Bribery of a Foreign Public Official

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it "may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official".

The Minister of Justice has tabled legislation, the new *Extradition Act* (Bill C-40), expected to come into force in 1999, which provides as follows:

*Subsection 3(1):*
*A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on – or enforcing a sentence imposed on – the person if*
*(a) subject to a relevant extradition agreement, the offence in respect of which extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and*
*(b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,*
*(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and*
*(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to the relevant extradition agreement.*

Canada explains that the new *Extradition Act* provides a modern framework to meet Canada's existing treaty provisions and will allow the implementation of Canada's multilateral obligations. It is also flexible enough to provide for extradition without treaty on the basis of designation or case specific agreement. In the absence of a bilateral or multilateral legal instrument, Canada can extradite to a country that has been designated under the *Extradition Act* as an extradition partner. Alternatively, pursuant to subsection 10(1) of the Act, the Minister of Foreign Affairs may, with the agreement of the Minister of Justice enter into a specific agreement with a state or entity for the purpose of giving effect to a request for extradition in a particular case.

### 10.2 Legal Basis for Extradition

"Extradition agreement" is defined in Bill C-40 as "an agreement that is in force, to which Canada is a party and that contains a provision respecting the extradition of persons…" Thus, Canada states this definition makes the legislation applicable to those agreements that Canada has entered into, either bilateral or multilateral, whenever such agreement contains provisions respecting extradition. And hence the Convention constitutes legal grounds for extradition.

### 10.3 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Canada states that there is no impediment in Canada's extradition legislation to extraditing nationals. However, subsection 6(1) of the Canadian Charter of Rights and Freedoms provides that "every citizen of Canada has the right to enter, remain in and leave Canada."

The Supreme Court of Canada, in its decision of U.S.A. v. Cotroni, [1989] 1 S.C.R. 1469, found that extradition is a reasonable limit to a Canadian citizen's right to remain in Canada. The Court determined that "the infringement of s. 6(1) that results from extradition lies at the outer edges of the core values sought to be protected by that provision" and since the objectives of extradition are "essential to the maintenance of a free and democratic society", they "warrant the limited interference with the right guaranteed by s. 6(1) to remain in Canada".

The only situation where the extradition of a Canadian national may result in a denial of extradition is if prosecution in Canada for the conduct for which extradition is sought in Canada is a realistic option and the relevant Attorney General exercises his discretion to prosecute the individual in Canada.

The grounds of refusal for extradition are set out in sections 44 to 47 of the new *Extradition* A*ct* (Bill C-40). Some are mandatory grounds; others are discretionary. Nationality is not listed as a mandatory or a discretionary ground.

### 10.5 Dual Criminality

Article 10.4 states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

Canada states that the existence of dual criminality is a condition for extradition, and that the condition will be fulfilled by the use of the offence of bribing a foreign public official in the new *Corruption of Foreign Public Officials Act*.

## 11. ARTICLE 11: RESPONSIBLE AUTHORITIES

### 11.1 Designation of Authorities

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

The authority responsible for the duties mentioned in Article 11 of the Convention is:

Department of Justice
International Assistance Group
Justice Headquarters
284 Wellington Street
Ottawa, Ontario
K1A 0H8 Facsimile: (613) 957-8412.

## B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

### 3. TAX DEDUCTIBILITY

Beginning in 1991, the Income Tax Act disallowed the deduction of a payment in respect of a conspiracy, in Canada, to bribe a foreign public official.

Section 67.5 of the Income Tax Act has been amended by section 10 of the *Corruption of Foreign Public Officials Act* in order that:

*in computing income, no deduction shall be made in respect of an outlay made or expense incurred for the purpose of doing anything that is an offence under section 3 of the Corruption of Foreign Public Officials Act…*

***Tax deductibility where there is a conviction***

Revenue Canada will deny a deduction concerning an illegal payment made or incurred by a person that has been convicted under section 3 of the *Corruption of Foreign Public Officials Act* or under any of sections 119 to 121 (bribery of Canadian officials and frauds on the government), 123 to 125 (municipal corruption and selling or influencing appointments to office), and 426 (secret commissions by an agent) of the *Criminal Code* as it relates to an offence described in any of those sections.

Section 67.5(2) of the *Income Tax Act* empowers the Minister of National Revenue to reassess taxation years in order to give effect to the non-deductibility of illegal payments without regard to the normal time limits on reassessment. So, if a person has been convicted under any of the above sections of the above Acts, Revenue Canada will be able to reassess that person without the normal time limits on reassessment.

***Tax deductibility where there is no conviction***

If Revenue Canada decides to reassess a person that has not been convicted under the above sections of those Acts and if the Minister of National Revenue in his/her assessment is satisfied that the unlawful act has been committed, then the onus of proof is on the person to establish that, contrary to the Minister's assumptions and conclusion, the unlawful act has *not* been committed. The standard of proof is the balance of probabilities.

## EVALUATION OF CANADA

### General Remarks

The Working Group complimented the Canadian government on its rapid enactment of the legislation implementing the Convention. It thanked the Canadian authorities for the comprehensive and informative responses, which significantly assisted in the evaluation process. Canada enacted a special law, the Corruption of Foreign Public Officials Act, to address issues relating to the implementation of the OECD Convention. Canada has represented that all of the rules of evidence and procedure applicable to other criminal offences are applicable to this Act.

Overall, the Working Group is of the opinion that the Canadian Act meets the requirements set by the Convention. In addition, there are some issues, including nationality jurisdiction, which might benefit from further discussion during the Phase 2 evaluation process.

### Specific Issues

#### 1. Elements of the offence

#### 1.1 The defences for "reasonable expenses incurred in good faith" and "acts of a routine nature"

Under section 3(3)(b) and 3(4), "reasonable expenses incurred in good faith....." and payments to secure performance of any "act of a routine nature" are exempted from the purview of the offence. Canada stated that these defences must be raised and argued by the defendant and that these terms are sufficiently well defined in the Canadian legal system as to prevent abuse. Canada further noted that it viewed these types of payments as implicit in the Convention but that for purposes of legal clarity, it chose to address them explicitly in its legislation.

The Group noted that these are issues that may affect implementation of the Convention so that it would be advisable to review experience with the application of these provisions in the Phase 2 evaluation process.

#### 2. Corporate criminal liability

Article 2 calls on Parties to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official. Canada provides for criminal liability of legal persons based on the principle of the identification theory of liability according to which a corporation is liable for the acts of a natural person if the person is the "directing mind" of the corporation.

Canada explained that under its common law, the "directing mind" was not limited to senior management or the board of directors. This concept would include any officer or employee acting in the field assigned to them by the legal person and that judicial interpretation of this concept has given it broad applicability.

The Working Group was of the opinion that the Canadian legislation complies with Article 2 of the Convention. The Group noted, however, that effective implementation of the Convention will depend, in part, on all Parties enacting functionally equivalent thresholds for corporate liability. The Group expressed its view that this issue would benefit from a horizontal analysis of the standards implemented by all Parties to the Convention.

**3. Sanctions**

Article 3 of the Convention requires Parties to impose effective, proportionate, and dissuasive criminal and non-criminal penalities, including monetary sanctions. The Working Group stated that it was satisfied that Canada has implemented the requirements of the Convention.

The Group noted that the Canadian Act does not impose a minimum or maximum fine on either a natural or legal person. However, the amount of the fine in a specific case set would be within the discretion of the sentencing court, taking account of different factors. Therefore, the adequacy of this provision will depend on actual implementation. A review of this issue in the Phase 2 evaluation process would be advisable to determine whether monetary sanctions were sufficiently dissuasive.

**4. Nationality jurisdiction**

The Group recalled that Article 4 of the Convention requires that each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the principles under which it asserts such jurisdiction [see Commentaries to the Convention, paragraph 26, last sentence]. Under its constitution, Canada has the ability to assert such jurisdiction and has done so in other cases. However, in Canada's opinion, such jurisdiction is extraordinary and it will only assert it where there is supporting international consensus. Canada has chosen not to establish such jurisdiction with respect to the bribery of a foreign public official and in its view this choice is consistent with the obligations of the Convention and with its Commentaries.

Canada explained that territorial jurisdiction is very broadly interpreted by Canadian courts and, in its opinion, that it is a very effective basis of jurisdiction. Some concerns were expressed that Canada's decision not to assert nationality jurisdiction could create a gap in the coverage of its implementing legislation.