DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

CANADA: PHASE 2

REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

This report was approved and adopted by the Working Group on Bribery in International Business Transactions (CIME) on 25 March 2004.

TABLE OF CONTENTS

A. INTRODUCTION

1. Nature of the on-site visit

1. From 17 to 21 February, 2003, Canada underwent the Phase 2 on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions. Pursuant to the procedure for the Phase 2 self and mutual evaluation of the implementation of the Convention and the Revised Recommendation, the purpose of the on-site visit was to study the structures in place in Canada to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Canada's compliance in practice with the 1997 Recommendation.

2. The team from the OECD Working Group was composed of lead examiners from Switzerland[1] and the United States[2] as well as representatives of the OECD Secretariat[3]. The meetings brought together officials from the following ministries and other government bodies at the federal level: Department of Justice[4], Department of Foreign Affairs and International Trade[5], Department of the Solicitor General, the Royal Canadian Mounted Police (RCMP)[6], Canada Customs and Revenue Agency, Department of Finance, Treasury Board Secretariat, Public Works and Government Services Canada, Department of National Defence, Financial Transactions Reports and Analysis Centre of Canada (FINTRAC), Industry Canada, Competition Bureau, Export Development Canada, Canadian International Development Agency, Canadian Commercial Corporation, Office of the Superintendent of Financial Institutions, Canadian Public Accountability Board, and the Public Accounts Committee of the House of Commons. At the provincial level, the following government bodies were represented: Alberta Department of Justice, Ministry of the Attorney-General of Ontario, Ontario Provincial Police, Sûreté du Québec, Toronto Police Service, Ontario Securities Commission, and Commission des Valeurs Mobilieres du Québec.

---

1. In alphabetical order, Switzerland was represented by: Peter Häfliger, Deputy Head, Penal Code-General Part Section, Federal Office of Justice, Federal Department of Justice and Police; Bernard Jaggy, Deputy Head, Financial Section, Economic and Financial Division, Federal Department of Foreign Affairs; Jean-Bernard Schmid, Deputy Prosecutor General, Republic and Canton of Geneva; Thomas Stauffer, Policy Officer, International Investment and Multinational Enterprises Unit, State Secretariat for Economic Affairs, Federal Department of Economic Affairs.

2. In alphabetical order, the U.S. was represented by: Peter B. Clark, Deputy Chief, U.S. Department of Justice, Criminal Division, Fraud Section; Richard Grime, Assistant Director, United States Securities and Exchange Commission; and Philip Urofsky, Special Counsel for International Litigation, U.S. Department of Justice, Criminal Division, Fraud Section.

3. The OECD Secretariat was represented by: Nicola Bonucci, Deputy Director, Legal Directorate; Kayo Ishihara, Associated Expert, Anti-Corruption Division, Directorate for Financial, Fiscal and Enterprise Affairs (DAFFE); Christine Uriarte, Principal Administrator, Anti-Corruption Division, DAFFE; and Frédéric Wehrlé, Principal Administrator, DAFFE.

4. Officials from the Department of Justice included representatives of the Criminal Law Policy Section and the Federal Prosecution Service, including the International Assistance Group and the Strategic Prosecution Policy Section.

5. Officials from the Department of Foreign Affairs and International Trade included officials from the Criminal, Security and Treaty Law Division, International Crime and Terrorism Division, Human Rights Division, Investment Trade Policy Division and Export Financing Division.

6. The RCMP was represented by Chief Superintendent, Director General, Financial Crime; officials from the Federal Services Directorate, Economic Crime Branch; the Integrated Proceeds of Crime Unit (IPOC); and the Canada/U.S. Integrated Border Enforcement Teams; as well as officials from the Alberta (Calgary Commercial Crime Section) and Ontario offices.

3. The OECD also met with representatives of the following civil society organisations: Transparency International Canada, International Institute for Public Ethics, Canadian Centre for Ethics and Corporate Policy, Canadian Labour Congress and the National Union of Public and General Employees. In addition, the private sector was represented by the following bodies: Toronto Stock Exchange, corporations (Acres International, Bombardier, INCO, Nexen, Nortel Networks and Talisman Energy), and legal counsel from several law firms[7]. The accounting and auditing profession was represented by four major accounting firms[8], as well as the Canadian Institute of Chartered Accountants and the Financial Executives Institute.[9]

4. In preparation for the on-site visit, Canada provided the Working Group with responses to the Phase 2 Questionnaire and relevant legislative and case law material, which were reviewed and analysed by the visiting team in advance. The visiting team also undertook extensive independent research to ensure that it had broadly based information from sources outside the government as well as within. The on-site visit involved meetings for three days in Ottawa, where the focus was on the implementation of the Convention and 1997 Recommendation from a federal perspective. Then two days were spent in Toronto where the lead examiners were able to focus more on the provincial/territorial and business/civil society perspective. Following the on-site visit, the Canadian authorities continued to provide the visiting team with follow-up information. Throughout the various stages of the Phase 2 examination process, the Canadian authorities cooperated fully with the examination team, providing additional information and documents when requested, and liaising with the team for the purpose of organizing the fairly heavy schedule of meetings for the visit.

2. General observations

2.1 Observations about the Canadian Legal System

5. Canada is a federal state, and pursuant to the Constitution Act, 1867, the governing power of the country is divided between the federal government and provincial governments.[10] The Constitution Act enumerates the legislative powers of the federal and provincial legislatures, and for the purposes of reviewing Canada's compliance with the Convention and 1997 Recommendation, two heads of power are of particular relevance—the criminal law power and the power to tax—since they are shared to a certain extent by both levels of government.[11]

---

7. Milos Barutciski of Davies, Ward, Philips and Vineberg; Edward Belobaba of Gowling, Lafleur, Henderson; John Keefe of Goodmans, John O'Sullivan of Weir and Foulds, and James Klotz of Davies and Co.

8. Ernst and Young LLP Canada, Price Waterhouse Coopers, KPMG, Deloitte and Touche.

9. The four major accounting firms, the Canadian Institute of Chartered Accountants and the Financial Executive Institute presented to the lead examiners a list of recommendations on how Canada can improve its compliance with the accounting, auditing and internal control provisions of the Convention and the 1997 Recommendation.

10. Canada consists of ten provinces (Alberta, British Columbia, Manitoba, Newfoundland and Labradour, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Québec and Saskatchewan), and three territories (Northwest Territories, Nunavut, and Yukon Territories).

11. The federal government has jurisdiction over the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters; whereas the provinces have jurisdiction over the administration of justice in each province, including the Constitution, maintenance and organization of provincial courts in both civil and criminal jurisdictions, and civil procedure as applied in provincial courts. How the division of criminal legislative power between the federal government and the provinces bears on the implementation of the obligations under the Convention and the offence of bribing a foreign public

6. Canada is characterized by strong governmental institutions with a well-developed civil society component consisting of numerous non-governmental bodies interacting in various ways with the government. The Canadian government places a high degree of emphasis on consulting with the provinces as well as a wide range of interested persons and bodies in relation to law reform initiatives, and this process has resulted in substantial public support for its laws and legal institutions.

2.2 General Observations about Canada's implementation of the Convention and 1997 Recommendation

7. During the on-site visit, officials from the federal government stated that corruption is considered serious, and is given high priority, but it was the impression of the lead examiners that, although domestic corruption may be given adequate priority on the government's agenda, foreign bribery has only received limited attention in terms of the government's overall planning since the passing of the CFPOA. No government-wide agenda for proactively addressing foreign bribery has been developed, although some awareness initiatives have been taken independently by certain government agencies.

8. Canada is one of the world's leading trading economies, with exports of goods and services representing approximately 45 per cent of gross domestic product and accounting for one in three jobs.[12] Over the last three decades the sectors involved in exporting have been moving from resource-based industries towards non-resource based products, such as machinery and equipment, but exports from the primary sectors continue to play a significant role, and are responsible for a quarter of Canada's total exports. In 2001, the principal commodities from Canada included automobile products (20 per cent), mineral fuels and oils (14.1 per cent), industrial machinery (14.1 per cent), wood, wood pulp, wood articles and paper (11 per cent) chemicals, plastics, fertilizers (7 per cent), aircraft (3.3 per cent), aluminium (2 per cent), and telecommunications equipment (1.3 per cent).[13] The destinations of trade are changing also—with the share of commodity exports to the U.S. reaching 87.2 per cent in 2001, and countries such as China, Mexico and South Korea displacing traditional European partners in the top 10 export destinations.[14] In 2001, China was Canada's fourth largest export destination, with total commodity exports from Canada totalling almost 3 billion U.S. dollars.[15] In 2000, the value of Canadian direct investment in Russia was estimated at 940 million dollars (Canadian)[16], involving mainly the oil and gas, mining, food and high technology sectors, including more than 50 Canadian companies with a permanent presence there.[17] Moreover, Russia is expected to remain a key strategic market for Canadian resource extraction, agri-food and the housing/construction sectors[18]. It would, therefore, appear that there is a potential for Canadian companies engaging in foreign trade to be exposed to demands for bribes, and this

---

official established by the Corruption of Foreign Public Officials Act, is described in detail in the discussion concerning the investigation and prosecution of the offence and associated issues to do with the coordination and sharing of information between the two law enforcement levels.

12. Message from the Minister for International Trade—Pierre Pettigrew in "Opening Doors to the World: Canada's International Market Access Priorities 2001".

13. OECD, International Trade by Commodity Statistics Database.

14. Source: OECD.

15. OECD, International Trade by Commodity Statistics Database.

16. On 31 March 2003, 10 Canadian dollars was valued at 6.80 U.S. dollars and 6.29 Euros.

17. Countries in Europe: Russia: Canada-Russia Relations (Department of Foreign Affairs and International Trade).

18. Opening Doors to the World: Canada's International Market Access Priorities, 2001 (Canada, Department of Foreign Affairs and International Trade).

has been confirmed by a lawyer for small and medium enterprises who stated that in his experience SME's involved in foreign trade are encountering these kinds of situations.

9. Since the mid-1990's, media attention has been given to several allegations of foreign bribery involving certain Canadian companies[19], although these cases concern alleged foreign bribery transactions that took place before the coming into force of the CFPOA.

10. At the time of the on-site visit, proceedings were ongoing in respect of charges against the Hydro Kleen Group Inc., an Alberta-based company, and two individuals, for the bribery of a U.S. Immigration official contrary to section 426 (1)(a)(i) of the Criminal Code (secret commissions) and section 3(1)(a) of the CFPOA. The U.S. official had already been convicted of corruptly accepting secret commissions under section 426 (1)(a)(ii) of the Criminal Code, after having entered a guilty plea. The sum of money involved was allegedly $28, 299.88, and pursuant to the "Agreed Statement of Facts" filed with the Provincial Court of Alberta in the proceedings against the U.S. official, it can be concluded that it was allegedly paid for the purpose of obtaining preferential treatment over competitors in terms of gaining access to the U.S. in order to do business there. Since the case was before the Court at the time of the on-site visit, the Canadian authorities were not at liberty to discuss the case in detail, and the lead examiners have limited their discussion of it in this report to information that is publicly available.

B. ANALYSIS OF EFFECTIVENESS OF CANADA'S MEAUSURES FOR DETECTING, INVESTIGATING, PROSECUTING AND SANCTIONING THE BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Awareness and detection

1.1 Awareness and Priority of CFPOA

1.1.1 Government Awareness and Training

11. The Department of Justice (DoJ) and Department of Foreign Affairs and International Trade (DFAIT), in their role as the agencies of the Government of Canada that were instrumental in the initiative to have the Convention translated into law, and in their continuing role as the primary agencies responsible for the oversight and implementation of the Convention and the CFPOA, have been involved in awareness raising activities since the enactment of the CFPOA. Within three months of the coming into force of the CFPOA, DoJ published a guide on the Act (The Corruption of Foreign Public Officials Act: A Guide). The Canadian authorities add that the CFPOA has been discussed at federal, provincial and territorial meetings of officials responsible for justice matters, including prosecutors, and has been raised with police

19. The Canadian media has reported several pre-CFPOA allegations of foreign bribery in cases including the following: 1. It is reported that in 1994 Atomic Energy of Canada's (AECL manufactures CANDU reactors) agent in South Korea was convicted and imprisoned in Korea for corruption and bribery, after giving a bribe to the head of KEPCO, the Korean state utility that owns and operates Korea's nuclear power plants . [The CANDU Syndrome: Canada's Bid to Export Nuclear Reactors to Turkey (David H. Martin, Nuclear Awareness Project for the Campaign for Nuclear Phaseout, September, 1997)]. {Note that in the Senate debates on the CFPOA, a senator, concerned about whether the CFPOA covers Crown corporations, stated that $15 million was paid for the sale of a CANDU reactor "in a certain country" [Debates of the Senate (Hansard, 1st Session, 36th Parliament, volume 137, Issue 100, 3 December 1998—The Honourable Gildas L. Molgat, Speaker)].} 2. In September 2002, Acres International, a Toronto-based firm, was convicted in the Lesotho High Court of having paid bribes to an official of the Lesotho government in relation to the Lesotho Highlands Water Project. [The Economist (21 September 2002) Note that the conviction is currently under appeal] 3. Pre-CFPOA allegations of the bribery of foreign public officials have also been reported in respect of the mining and aircraft sectors in Canada.

by the relevant justice authorities. In addition, DFAIT has been involved in providing training for its trade commissioners and commercial officers, heads of missions and embassy personnel, on the CFPOA and the Convention, and submits that these programs have been quite effective in disseminating information about the existence of the offence. The Investment Trade Division of DFAIT is developing training modules for trade commissioners that will include a corruption component, and feels that trade commissioners already have a high level of awareness of the CFPOA. The Canadian authorities also indicated following the on-site visit that DFAIT's Trade Commissioner Service recently added the promotion of corporate social responsibility, which includes counselling Canadian businesses against engaging in foreign bribery, to the range of services provided by the Trade Commissioner, and the DFAIT intranet website (Horizons) now provides information to Canadian trade officers on how to counsel businesses abroad on the CFPOA and the risks of bribery. The Canadian authorities further represented that the Investment Trade Policy Division is in the process of distributing, to Canadian missions abroad, recommendations on how they should promote corporate social responsibility to Canadian businesses abroad.[20]

12. In spite of the awareness training at DFAIT, the lead examiners learned of an instance where DFAIT released inaccurate information about the implementation of the CFPOA. On this occasion, in response to media inquiries about the ambit of the CFPOA, an official of DFAIT stated that Canada is only obliged to act if a foreign public official is bribed in Canada. In response, steps are being taken to ensure that the DFAIT media relations division has an accurate understanding of the CFPOA. The lead examiners also noted that neither DFAIT nor DoJ was aware, until informed by the lead examiners, that the Canadian International Development Agency (CIDA)[21] had published erroneous information about the application of the exception under the CFPOA for facilitation payments in a document "Anti-Corruption Programming: A Primer"[22]. Officials from both DFAIT and DoJ indicated concern about the information, and following the on-site visit the Canadian authorities indicated that this document is being amended to provide accurate information about the facilitation payments exception in the CFPOA.

13. The representative of the Royal Canadian Mounted Police (RCMP)[23], who met with the lead examiners in Ottawa, was fully knowledgeable about the CFPOA and the related enforcement issues. However, the level of awareness of the RCMP appeared low due to, for instance, the absence of any reference to the CFPOA in a document referred to the lead examiners by the RCMP—"PROOF Criteria and Weights: Economic Crime"[24]. This document provides guidelines to the RCMP on determining the priority of a case for investigation by assigning a weight to it. Assurances were given that these guidelines

---

20. These recommendations include specific instructions on how to promote the CFPOA and to counsel businesses against engaging in foreign bribery.

21. CIDA, which is the federal agency responsible for planning and implementing most of Canada's international development cooperation program, provides contracting opportunities to Canadian firms and non-governmental organisations through, for instance, the Industrial Cooperation Program, which provides financial support to facilitate the formation of collaborative ventures between Canadian firms and their counterparts in developing countries.

22 Officials from DoJ indicated that although in theory an offender cannot be legally protected by incorrect guidelines, the courts have been increasingly accepting the common law defence of "officially induced error". Misleading guidance from the government could, among other factors, be a consideration weighed in applying prosecutorial discretion or a mitigating factor in determining the severity of the sentence. In addition, see discussion of this issue under *2.3.1.1.1 Facilitation Payments*.

23. A discussion of the role of the various police forces, including the RCMP, in the enforcement of the CFPOA, is discussed below under *2.1 Cooperation and Communication between Federal and Provincial Authorities*.

24. PROOF was developed by the Economic Crime Program and in 1999 it was implemented Canada-wide in the Commercial Crime Section. It is currently used by all of the RCMP's federal programs.

place a very high priority on fact situations involving corruption. The document, made available after the on-site visit, indicated that the investigation of corruption issues is only part of the Economic Crime Program mandate where the Government of Canada is the victim.[25] The RCMP is now taking steps to add the CFPOA to the PROOF document. In addition, two officers from different provincial police forces had not been aware of the CFPOA until being invited to the meetings and a prosecutor from a provincial department of justice had only recently become aware of it due to having sought advice from DFAIT on an unrelated issue.

14. In recent years, several initiatives have been launched for the purpose of combating crime, including smuggling activities[26] between the Canada/U.S. border.[27] None of these specifically targets the link between the bribery of foreign public officials and smuggling, even though it is reported that organised crime is largely responsible for contraband smuggling between these two countries, and employs highly sophisticated methods with huge resources and a potential for violence and corruption[28]. A representative of the RCMP stated that until now investigators have neither uncovered nor specifically looked for foreign bribery in the context of smuggling operations. However, he suggested that it would not be ignored if it were uncovered. The Deputy-Chief of a municipal police force agreed about the need to be vigilant about the connection between cross-border smuggling and foreign bribery, and stated that he would begin raising awareness of the CFPOA in this context.

15. Following the on-site visit, the Canadian authorities advised that the Canada Customs and Revenue Agency (CCRA)[29], which administers the tax laws for the Government of Canada and for most provinces and territories, had begun the process of developing a section in its Audit Manual to deal with

---

25. In addition, on page 3 of the document, the list is provided of offences under federal statutes for which it is the mandate of the Economic Crime Program to investigate. The CFPOA is not included in the list (note that the list includes the Canada Students Loans Act, Copyright Act, Income Tax Act and Employment Insurance Act).

26. Canada is particularly vulnerable to smuggling activities between the Canada/U.S. border, including the smuggling of people, drugs, child pornography, alcohol, tobacco, automobiles and firearms [David Griffin, Executive Officer, Canadian Police Association (Police Magazine, Jan 2001)]. Canada and the U.S. share the longest undefended border in the world, and approximately 200 million people cross the Canada/U.S. border every year. There are 135 land border points along the Canada/U.S. border, 203 airports (including 13 international airports), 187 commercial vessel clearance points and 313 small marine points [Terrorism and the Canada—U.S. Border (Frank J. Cilluffo, isuma, vol.2, no.4, Winter 2001, ISSN 1492-0611)].

27. The following initiatives have been launched: 1. A criminal investigation into cigarette smuggling between Canada and the U.S. (3 March 2001). 2. The RCMP Immigration and Passport Program, which is responsible for investigating violations of the Immigration Act, Citizenship Act, Canadian Passport Order and Criminal Code, for the purpose of combating and preventing organized migrant smuggling. 3. The Canada-U.S. Cross Border Crime Forum, which was created for the purpose of working on transborder crime problems such as organized crime, smuggling and money laundering. 4. The Anti-Smuggling Initiative, which has led to 17,000 smuggling charges resulting in fines in excess of $113 million and $118 million in evaded taxes and duties. (Note that in June 1999, the Government of Canada injected $78 million over the next four years into the program.) 5. Canada/U.S. Integrated Border Enforcement Teams (IBETs), which have been established as a multi-agency enforcement team to combat cross border crime. IBETs have been successful at disrupting smuggling rings, have confiscated illegal drugs, firearms, liquor, tobacco and automobiles, and intercepted criminal networks involved in smuggling illegal migrants between Canada and the U.S. $135 million has been earmarked for IBETs (other than Cornwall) for the period of February 2001 to June 2005.

28. See comment of David Griffin, Executive Officer, Canadian Police Association (Police Magazine, Jan 2002) about the connection between contraband smuggling and corruption, etc.

29. The CCRA is discussed in more detail under *1.2.2.1 Tax Authorities*.

the application of section 67.5 of the Income Tax Act as it relates to the outlays and expenses incurred under section 3 of the CFPOA. The CCRA Investigation Manual currently refers to the bribery offences under the Criminal Code, and following the on-site visit the Canadian authorities advised that it also will be revised to include a reference to the CFPOA and the new section in the Audit Manual. It would appear that, to date, specific training on the CFPOA has not been provided to tax auditors.

1.1.2 Private Sector Awareness

16. Export Development Canada (EDC)[30] has taken significant steps to raise the awareness of the CFPOA with its customers. EDC posts information on its website about corruption and bribery, including the CFPOA, the Convention, and the OECD Export Credits Group Action Statement on Bribery and Officially Supported Export Credits. At various times in the last two years, EDC has written to its customers to inform them about the Convention and the CFPOA. Additionally, EDC sponsored a cross-Canada workshop for companies in the spring of 2002, and has developed an anti-corruption brochure for its customers. Transparency International Canada (TI) informed the lead examiners that EDC and CIDA have both made impressive attempts to inform their customers about the CFPOA by, for instance, holding cross-country seminars on corruption issues, but that these have been very poorly attended by SMEs due to, inter alia, insufficient resources.

17. Problems with the awareness level of SMEs were described by a lawyer who represents them. He explained that the level of awareness of SMEs concerning the CFPOA is very low, and that most of his clients are unaware of its existence when they first retain his services. It is his impression that SMEs are often exposed to opportunities to bribe foreign public officials, and those that are aware of the CFPOA perceive that there is a small risk of being punished. A representative of TI stated that it is his impression that fewer than fifty per cent of Canadian companies doing business internationally are aware of the CFPOA.

18. The other principal agencies providing assistance and support to Canadian exporters—Team Canada Inc[31], Industry Canada's International Trade Centres[32], Canada Business Service Centres[33], Canadian Commercial Corporation[34], and the Business Development Bank of Canada[35]--do not currently

30. EDC is Canada's official export credit agency and is a Crown corporation that operates at arm's length from its government shareholder. According to common governance principles, EDC's policies and procedures are determined by EDC's Board of Directors and/or management. EDC's mandate is to support and develop, directly or indirectly, Canada's export trade and Canada's capacity to engage in that trade, and to respond to international business opportunities. It provides Canadian exporters with financing, insurance and bonding services as well as foreign market expertise. (EDC website: http://www.edc.ca/)

31. Team Canada Inc, is a partnership of 21 federal government departments, agencies and Crown corporations, including the Business Development Bank of Canada, Canadian Commercial Corporation, Department of Foreign Affairs and International Trade, Export Development Canada and Industry Canada. It has published a booklet entitled "A Step-by-Step Guide to Exporting", which is designed primarily for SMEs that are considering entering the export arena for the first time.

32. Industry Canada's International Trade Centres, located in each province, offer a range of services for small and medium-sized companies (e.g. export counselling, market entry support services, and market developing financing).

33. Canada Business Service Centres provide the main access to government information for businesses. They provide a wide range of information on government services, programs and regulations.

34. The Canadian Commercial Corporation, a Crown corporation, is Canada's export contract agency and also provides Canadian exporters with assistance in selling to any foreign government or international organization.

provide any information about the CFPOA or, in a more general sense, the legal and commercial risks of bribery and the appropriate course of action when solicited for a bribe, in their main publications and websites. However, following the on-site visit the Canadian authorities indicated that Team Canada had begun plans to add links on the CFPOA to its Export Source website and refer to the CFPOA in the next edition of its "Step by Step Guide to Exporting".[36] Since these are the sources that SMEs look to when engaging in export activities, they could play an important role in raising SME's awareness about the CFPOA.

19. Large companies appear to have a higher level of awareness of corruption-related issues than SMEs. For instance, according to a corporate lawyer who participated in the on-site meetings, large companies are obtaining advice on how to design internal compliance programs. In addition, companies with a U.S. parent have more experience in this area due to robust compliance programs that have been developed in response to many years of experience under the U.S. Foreign Corrupt Practices Act (FCPA).

20. The lead examiners were given the opportunity to review the codes of conduct of six large Canadian companies, and noted that each one addresses the issue of illegal or improper payments or bribes and two of them refer specifically to the CFPOA. Three of the codes place the notion up front of acting in accordance with the laws of the jurisdictions in which conducting business, and in one company's code, the notion also includes respect for the customs and business practices of such countries. However, the absence in some of the codes of clear direction that the law of Canada must always be obeyed when transacting business abroad, even where the standard in the foreign country (whether through laws, custom or business practice) is lower, could be confusing, and as a result employees could misjudge certain situations.

21. The Canada Labour Congress (CLC) represents 70 trade unions (i.e. the majority of national and international trade unions in Canada) and a total of 2.5 million workers, or 16 per cent of the Canadian labour force. The lead examiners were encouraged by the efforts of the CLC to promote the Guidelines on MNEs, and its generally high level of interest in issues related to socially responsible corporate behaviour, and feel that with sufficient awareness of the CFPOA, CLC has the potential to effectively disseminate information about the foreign bribery offence to a wide audience.

Commentary

The lead examiners recommend that the Government of Canada improve its efforts at promoting awareness of the CFPOA at the following four levels: 1. Within the agencies responsible for the oversight and implementation of the Convention—the Department of Justice and Department of Foreign Affairs and International Trade; 2. To the police and prosecutorial authorities; 3. To the agencies involved indirectly in the enforcement of the CFPOA, including the Canada Customs and Revenue Agency; and 4. To the agencies most likely to come into contact with companies engaging in business abroad—Industry Canada, Team Canada Inc, Canada Business Service Centres, Canadian Commercial Corporation and the Business Development Bank of Canada. The lead examiners also recommend that the Government of Canada establish a more systematic, coordinated approach to promoting awareness, and for ensuring that the various relevant agencies

---

35. The Business Development Bank of Canada, which provides support to businesses venturing out into the export market for the first time as well as those that are already exporting, has published a booklet entitled "Export Laws and Regulations: Pitfalls to Avoid".

36. In addition, the Export Source website (http://exportsource.gc.ca), which provides information about various trade issues, including standards and regulations, international trade agreements, Canadian customs information, and international trade law resources, will be revised to refer to the CFPOA and the risks of bribery.

are undertaking effective awareness activities of their own. Moreover, the lead examiners welcome the announcement that the RCMP document "PROOF Criteria and Weights: Economic Crime" will be amended to include offences under the CFPOA in the mandate of the Economic Crime Program.

The lead examiners also encourage Canada to continue to include details on the training and awareness activities undertaken by the Government of Canada in the Annual Report to Parliament prepared by the Minister of Foreign Affairs and International Trade and the Minister of Justice on the implementation of the Convention and the enforcement of the CFPOA, pursuant to section 12 of the CFPOA, as a means of tracking these efforts and ensuring their effectiveness.

1.2 Reporting Requirements

1.2.1 Government Employees (Internal Disclosure)

22. As some government agencies provide goods and services to foreign governments in certain situations that could make them vulnerable to solicitations for bribes, it is important that there be a clear obligation to report cases involving the bribery of foreign public officials on the part of government employees. For the purpose of assessing the effectiveness of the reporting obligations in this regard, the lead examiners met with representatives of the Treasury Board Secretariat of Canada and Public Works and Government Services Canada.

23. The Treasury Board Secretariat of Canada has issued two interrelated policy statements concerning the internal disclosure of wrongdoing in the workplace, which apply to all departments and organizations of the Public Service of Canada. The first one, entitled "Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace"[37], describes the responsibilities of employees and managers when instances of wrongdoing in the workplace, including a violation of any law or regulation, are discovered. The Canadian authorities explain that this policy statement establishes an internal process for disclosure, involving a chain of reporting beginning with a report by an employee who becomes aware of a wrongdoing to his/her immediate manager, to a higher level manager, or, if he/she wishes, to the Senior Officer responsible for receiving, recording and reviewing disclosures. The employee also has the option of disclosing to the Public Service Integrity Officer if he/she believes that an issue cannot be disclosed within his/her own department, or raised the issue in good faith through departmental mechanisms but believes that the disclosure was not adequately addressed. It states that employees and managers may be subject to administrative and disciplinary measures up to and including termination of employment when they "retaliate against another employee who has made a disclosure in accordance with this policy or against an employee who was called as a witness and/or choose to disclose in a manner that does not conform to this policy and its procedural requirements."[38] In addition, in the preamble to this policy document it is stated that "in certain exceptional circumstances an employee might be justified in making an external disclosure, for example when there is an immediate risk to the life, health or safety of the public", and that "employees might be also justified in making an external disclosure where they have exhausted all internal procedures".

24. The second policy statement, entitled "Policy on Losses of Money and Offences and Other Illegal Acts against the Crown"[39], deals specifically with the reporting of illegal acts in the workplace, which include "kickbacks and bribery". The reporting instructions clarify that "incidents occurring outside of

37. This document is available at: http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/idicww-diicaft1_e.asp

38. ibid. Page 5 below heading "Administrative and disciplinary measures".

39. This document is available at: http://www.tbs-sct.gc.ca/Pubs_pol/dcgpubs/TBM_142/4-7_e.asp

Canada that would be an offence if they occurred in Canada are also reportable". They also include the "policy statement" that "suspected offences be reported to the responsible law enforcement agency". Additionally, according to the "policy requirements" part of this document, suspected cases that do not require an immediate response may be referred to departmental legal services, which will consult with the Criminal Prosecutions Section of the Department of Justice before providing an opinion, and in another part of the document it is stated that criminal proceedings are the exclusive responsibility of law enforcement authorities and departments do not have any discretion in these matters. The Canadian authorities explain that in practice an employee who becomes aware of an illegal act is required to report it in writing to a supervisor, the relevant deputy minister or directly to the law enforcement authorities. In addition, they state that where an immediate response is required, senior management or the director of the investigating unit in the department is permitted to report to the relevant law enforcement authority. Moreover, the Canadian authorities draw attention to section 80(e) of the Financial Administration Act (FAA), which establishes an offence for failing to report, in writing, to a superior officer, knowledge or information about the contravention of the FAA, any revenue law of Canada by any person, or fraud committed by any person against Her Majesty.[40]

25. Viewed together, it would appear that these two policy statements, as well as the prohibition in the FAA, could create confusion in the minds of Government of Canada employees who become aware of the bribery of a foreign public official committed by another government official about how the matter should be disclosed, and in particular whether it can be directly reported to the law enforcement authorities.[41] It is the position of the Canadian authorities that the relevant policy documents and the FAA do not create the impression that Government of Canada employees are prohibited from reporting offences in the workplace directly to the law enforcement authorities. In any case, the Canadian authorities indicate that awareness training sessions will be held in order to assist them in interpreting these policies.

Commentary

The lead examiners recommend that the Canadian authorities consider clarifying the policy statements on reporting wrongdoing and illegal acts in the workplace with a clear statement that an employee may either follow the internal procedure or report an offence directly to the law enforcement authorities, and that there should be no administrative or disciplinary measures applied to an employee who, in good faith, does decide to report directly to the law enforcement authorities.

1.2.2 Government Employees (External Disclosure)

1.2.2.1 Tax Authorities

Québec

26. During the on-site meetings, the lead examiners learned that the federal tax authorities were not certain whether the provincial tax authorities had followed the federal lead in denying the tax deductibility of bribes to foreign public officials. In follow-up communications, the lead examiners were informed that

40 The Canadian authorities state that CIDA employees are subject to the FAA. They add that guidelines of the Treasury Board Secretariat require CIDA to conduct regular audits to determine CIDA's compliance with the requirements of the FAA, and that it has been the long-standing practice of CIDA to inform senior management and/or the RCMP about allegations of bribery and other forms of corruption.

41 Following the on-site visit (12 June 2003), Bill C-46 on capital market fraud and evidence-gathering was introduced into Parliament, which, inter alia, includes a proposed amendment to the Criminal Code that would create a new offence of employment-related threats or retaliation.

the tax legislation of one province, Québec[42], does not deny the deductibility of bribe payments made in violation of the CFPOA[43]. Following the on-site visit, the Minister of Finance of Québec announced in the budget speech given on 11 March 2003 that the Québec Income Tax Act would be amended to disallow payments for the purpose of doing anything that is an offence under section 3 of the CFPOA, and that the amendment would operate retroactively to the date that the CFPOA came into force (i.e. 14 February 1999).

Reporting Obligation

27. Pursuant to subsection 241(1) of the federal Income Tax Act (ITA), tax officials are prohibited from sharing tax information except in accordance with that section.[44] Subsection 241(2) states that notwithstanding any other Act of Parliament or other law, no official shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information. Subsection 241(3) provides that subsections (1) and (2) do not apply in respect of criminal proceedings, either by indictment or on summary conviction, under an Act of Parliament. Thus, the effect of section 241 is to prohibit tax officials from disclosing information about the bribery of foreign public officials unless required to do so in the course of criminal proceedings (i.e. following the laying of a charge), pursuant to, for instance, a subpoena to give evidence at trial or in a preliminary inquiry (in the case of an indictable offence).

28. Representatives of the Canadian Customs and Revenue Agency (CCRA) stated at the on-site visit that despite the prohibition against reporting the foreign bribery offence, there are other ways in which the law enforcement authorities might be able to obtain relevant tax information. For instance, if an offence under the ITA, such as tax evasion, were tried by a court, the information would be a matter of public record. In addition, a copy of a search warrant obtained pursuant to section 487 of the Criminal Code (i.e. authorizing the search of any building, etc for any document that may afford evidence as to the commission of an offence under the ITA) would be publicly available unless sealed.

Commentary

The lead examiners encourage the National Assembly of Québec to pass the amendment to the Québec Income Tax Act denying the tax deductibility of bribes paid to foreign public officials in violation of the CFPOA, as soon as possible. In addition, the lead examiners are sensitive to Canada's desire to protect the confidentiality of tax information, but consider that it would be advisable for the Canadian authorities to consider reviewing the prohibition under the federal Income Tax Act against reporting non-tax criminal offences detected in the course of their audits

---

42. Québec contributes 21 per cent of the GDP of Canada and 18 per cent of its exports. The economy of Québec is heavily reliant on exports such as primary goods, manufactured goods such as electronic, telecommunications and transport equipment, as well as aluminium and aircraft.

43. All Canadian provinces except Québec deny the tax deductibility of illegal payments by reference to section 67.5 of the federal Income Tax Act (ITA), which denies a deduction for an outlay made or expense incurred for the purpose of doing anything that is an offence under section 3 of the CFPOA as well as under certain listed sections of the Criminal Code. Section 421.8 of the Québec Income Tax Act denies the deductibility of payments that constitute offences under the Criminal Code, but does not refer to payments made in contravention of the CFPOA (which is not part of the Criminal Code).

44. The Canadian authorities note that the confidentiality of taxpayer information has always been a cornerstone of the self reporting tax system. Exceptions to section 241 of the ITA have been made over the years on a very restrictive basis. For example, the exception that was introduced for investigations in relation to designated substance offences and criminal organisations requires the police to apply to a judge for a disclosure order under section 462.48 of the Criminal Code.

to the law enforcement authorities, in order to determine whether limitations could be imposed on it, taking into consideration the limitations imposed by the Canadian Charter of Rights and Freedoms.

1.2.2.2 Money Laundering Reporting (FINTRAC)

29. An effective legislative and procedural framework for the reporting of money laundering transactions can be a useful means of detecting the bribery of foreign public officials where such illegal activity comprises the predicate offence. Moreover, an effective anti-money laundering scheme can reduce the incentive to bribe foreign public officials.

30. In June 2000, the Proceeds of Crime (Money Laundering) Act (PCMLA)[45] came into force, the purpose of which was to establish the Financial Transaction and Reports Analysis Centre of Canada (FINTRAC), Canada's financial intelligent unit, to provide for mandating suspicious transaction reporting, the reporting of cross-border movements of large currency and monetary transactions[46], and sanctions for a failure to report. FINTRAC, which was created pursuant to Part 3 of Act, is an independent agency of Her Majesty that acts at arms length from law enforcement agencies and other entities to which it is authorised to disclose information. It is responsible for receiving, analysing, assessing and disclosing information provided to it by those entities obligated to report to it pursuant to the Act, in order to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities. The Department of Finance develops the policy and legislation respecting money laundering reporting and terrorist financing, and represents Canada in the Financial Action Task Force (FATF).

31. Canada has taken important steps in the fight against money laundering by enacting the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and Regulations, and by creating FINTRAC. Since the legislation was not in place at the time of the Phase 1 examination by the Working Group in July 1999, this report includes an analysis of the regulatory framework, as well as a review of its practical

45. The Anti-Terrorism Act, which received Royal Assent on 18 December 2001, addresses the deterrence, detection and prosecution of terrorist financing offences. In particular, it amends the PCMLA, re-named the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, to expand the mandate of FINTRAC to encompass terrorist financing. It also requires financial institutions and other financial intermediaries to report financial transactions to FINTRAC where there are reasonable grounds to suspect that they are related to terrorist property.

46. The Act and Regulations thereunder establish the following reporting obligations on reporting entities: 1. Pursuant to section 7 of the Act and the Proceeds of Crime (Money Laundering) Suspicious Transactions Reporting Regulations, financial institutions and certain other entities have been required to report suspicious transactions related to money laundering since 8 November 2001. Pursuant to the Act and these Regulations reporting entities have had the same obligation to report suspicious transactions related to terrorist activity financing offences since 12 June 2002. 2. Pursuant to section 9 of the Act and section 12(1) of the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, which came into effect on 31 January 2003, financial entities and other reporting entities have been obligated to report large cash transactions of $10,000 and more made in a single transaction. 3. Section 12(1)(b) and (c) of the Regulations, which came into force on 12 June 2002, provide an obligation for financial entities to report respectively the sending out of Canada, at the request of a client, of an electronic funds transfer of $10,000 or more in the course of a single transaction, and the receiving from outside of Canada, at the request of a client, of the same. This covers electronic funds transfers through the Society for Worldwide Interbank Financial Telecommunications (SWIFT) network. On 31 March 2003, this will be extended to include non-SWIFT international electronic funds transfers. 4. Section 12 of Part 2 of the Act, which came into force on 6 January 2003, creates a reporting obligation on exporters, importers, etc of currency and monetary instruments of $10,000 or more to "officers" (customs officers), who, in turn shall send the report to FINTRAC.

implementation. The lead examiners reviewed the obligations on reporting entities to report suspicious and other prescribed transactions to FINTRAC, and the obligation on FINTRAC itself to disclose suspicious transactions to the law enforcement authorities.

32. Pursuant to the Regulations, certain non-financial entities—accountants and accounting firms, real estate brokers and sales representatives--are required to report suspicious and other prescribed transactions where they have engaged in one of the following activities on behalf of any person or entity: 1. receiving or paying funds; 2. purchasing or selling securities, real properties or business assets or entities (with respect to real estate professionals it is the depositing or withdrawing of funds); and 3. transferring funds or securities by any means (with respect to real estate professionals it is the transferring of funds by any means). In addition, accountants and accounting firms are subject to the reporting requirements when they give instructions on behalf of any person or entity regarding any of these activities. At the time of the on-site visit lawyers and legal firms were also subject to the reporting requirements; however due to a court challenge launched by lawyers against the reporting requirements in respect of them, and recent Supreme Court of Canada decisions dealing with solicitor-client privilege, these provisions were repealed on 20 March 2003, and the Canadian authorities indicate that a new legislative and regulatory framework will be established.[47] At the on-site visit, the representative of the Department of Finance explained that real estate professionals in Canada do not frequently engage in the receiving or paying of funds or any of the other prescribed activities, and that in order to cover the majority of real-estate transactions lawyers were made subject to the reporting requirements. It would appear that, as long as there is no legislative or regulatory framework regarding the reporting of suspicious transactions by lawyers, an important source of information about money laundering through, for example, the purchase of real estate, will not be available.

33. FINTRAC is required to disclose information to law enforcement and other agencies only where there are reasonable grounds to suspect that designated information would be relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence. "Designated information" includes the details of a transaction, which includes the amount, place, date, financial institution involved, transit and account number and persons involved—it does not include additional information including the reasons for the financial institution's suspicions or the relevant analyses conducted by FINTRAC. In order to obtain additional information, the police must obtain a court order[48] (production order) requiring further disclosure by FINTRAC. The representatives of FINTRAC informed the lead examiners that to date the police have not come back with a court order.

34. An official from the Department of Justice (DoJ) explained that in creating the legislative framework for the establishment of FINTRAC and the necessary reporting obligations, it was imperative that the system be consistent with the protection against unreasonable search and seizure under section 8 of the Charter of Rights and Freedoms. It would not have been possible to circumvent the process that had required the police to obtain a court order for obtaining bank information, by authorizing FINTRAC to turn over all relevant information. He added that the system has not yet been challenged under the Charter.

---

47. In 2001, the Federation of Law Societies of Canada launched a court challenge to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act on the grounds that the provision therein regarding the reporting responsibilities of lawyers will prevent lawyers from providing confidential legal advice to their clients. On 20 November 2001, the Federation obtained a temporary injunction from the B.C. Supreme Court (which has since been issued by courts in other provinces) exempting lawyers from the reporting obligations pending the decision of the court on the constitutionality of the provisions. In addition, the lawyers have been told by the law societies that in the event that the challenge is unsuccessful, they will not be required to report transactions that occurred while the injunction was in force and that therefore they must not collect information for the purpose of providing it to FINTRAC during this period.

48. FINTRAC is immune to search warrants.

35. Although the RCMP's budget has been renewed at existing levels despite the expected increased caseload resulting from FINTRAC's mandate, the RCMP has been assured by the Government of Canada that FINTRAC has state of the art systems for analysing intelligence, and representatives from FINTRAC state that considerable effort is being dedicated to refining their analytical tools[49]. The official from the RCMP who participated in the meetings stated that the RCMP works on the assumption that what it receives from FINTRAC is good intelligence, but so far he has not been aware of very many strong cases having been reported by FINTRAC to the police authorities.[50] He indicated that the RCMP are not dependent on FINTRAC for obtaining information about money laundering cases, but regard it as a "powerful tool".

Commentary

The lead examiners recognise the balance between creating an effective system for combating money laundering and meeting the guarantee against unreasonable search and seizure under the Charter. However, given the newness of the system, they recommend revisiting this issue to better understand how it works, once there has been sufficient practice. The lead examiners further recommend that this follow-up include a review of the legislative and regulatory framework regarding the reporting of suspicious transactions by lawyers and legal firms to the competent authorities, which the Canadian authorities have stated they intend to establish in light of the repeal of previous provisions in this respect.

1.2.2.3 CIDA, EDC, and Embassy Personnel

36. Government agencies that provide assistance to companies doing business abroad comprise another potentially important source of information about companies engaging in foreign bribery. Export Development Canada (EDC) and the Canadian International Development Agency (CIDA) are two examples, as they enter into contractual business relationships with companies doing business abroad, including in countries particularly prone to corruption. Embassy personnel would also have opportunities to come into contact with Canadian companies engaging in business abroad, although the quality of the relationship would be essentially different as it would normally involve the provision of practical advice on doing business in the countries in which they are situated.

37. Neither the law nor policy guidelines establish an obligation on employees of EDC or CIDA to disclose suspicions of offences under the CFPOA to the law enforcement authorities. Thus, there is no mechanism for ensuring that a public employee working for EDC or CIDA who detects a CFPOA violation in the course of auditing a company that has received government subsidies or other support for an international project would report the suspicion to the competent authorities.

38. The representatives of EDC described a process to assist in the detection of transactions that may involve corruption. This process, which EDC indicates is consistently applied to all transactions, requires that all cases of suspected corruption be reported by the officer processing the application to EDC

---

49. As of 1 March 2003, FINTRAC was approximately 82 per cent staffed.

50. Note that between 8 November 2001 and 31 March 2002, FINTRAC received 3,747 suspicious transaction reports, involving over 11,000 transactions. In addition, during the first 5 months of operation, designated information involving 161 suspicious transaction reports was disclosed to law enforcement. [FINTRAC Annual Report: March 31, 2002] FINTRAC informs the lead examiners that as of 1 March 2003, more than 70 case disclosures had been made to law enforcement and intelligence agencies. At the on-site visit, representatives of FINTRAC further informed that they received over 1,000 suspicious reports every month, and that they expect to receive over one million large transaction reports this year (The requirement concerning large cash transaction reports came into force on 31 January 2003).

management and the legal department. In turn, reporting to the law enforcement authorities is one of the options available to EDC's management and the legal department. EDC's representatives also explained that EDC would have a strong bias towards consulting with the Department of Justice, and that in determining the proper course of action, various factors, including the following would be considered[51]: 1. the duty of confidentiality; 2. whether the evidence is sufficient to reasonably conclude there was corrupt activity; 3. EDC's public policy mandate; 4. the severity of the situation; and 5. subsequent actions demonstrating rehabilitation. Since some of the criteria, including the rehabilitation of the applicant, are relatively subjective, it appears that they could lead to an inconsistent decision-making policy framework.[52]

39. Embassies that become aware of Canadian companies engaging in business abroad could play an important role in detecting the bribery of foreign public officials. However, specific instructions have not been issued by DFAIT to them concerning the steps that should be taken where allegations that a Canadian company has bribed or intends to bribe a foreign public official come to the notice of embassy personnel.

Commentary

The lead examiners recommend that specific instructions be issued to foreign representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Canada.[53] They also recommend that the Canadian authorities review the disclosure policy and procedure at CIDA and EDC with a view to ensuring that there is a consistent and reliable framework for disclosing suspicions forthwith where, in the course of transacting business with a company, credible evidence arises that a violation of the CFPOA has occurred.[54]

1.2.3 Accountants and Auditors

40. The lead examiners reviewed Canada's accounting and auditing standards with a high level of input from the relevant government agencies and the accounting profession. Their objective was to determine whether the accounting and auditing standards are adequate for the purpose of detecting bribe payments to foreign public officials, and whether the reporting obligations are strong enough to ensure that foreign bribery activity detected in the course of an audit would be reported to the law enforcement

---

51 The disclosure policy is outlined in a document prepared by EDC for the purpose of the on-site visit entitled "OECD Anti-Corruption Convention: Phase 2 On-Site Monitoring Visit (February 18, 2002)".

52 EDC officials provided the lead examiners with a written summary of an explanation that had been given to a non-governmental organization concerning the steps that would be taken where an applicant for support had been convicted of bribing a foreign public official. It is stated therein that while a heavy burden would be applied to previously convicted companies, they must be given an opportunity to demonstrate to the satisfaction of EDC that they are rehabilitated. Factors that would be considered in this determination would include the seriousness of the offence (i.e. whether the offence was premeditated, whether it constituted single or multiple dealings, the size of the bribe and the size of the proceeds) and whether the culture of the company was responsible for the bribery or an individual. The critical factor is whether the company has changed its corporate culture and practice so that there is no longer a risk of corruption.

53 The lead examiners note that this is a general issue for many Parties.

54 The lead examiners note that this is an issue for other Parties. This commentary shall not be interpreted as a suggestion that the policies of EDC do not meet the standards set out in the Action Statement (of the OECD Working Party on Export Credits and Credit Guarantees) on Bribery and Officially Supported Export Credits. However, meeting the standards under the Action Statement does not necessarily imply that the standards under the 1997 Recommendation have also been met.

authorities. The lead examiners also reviewed the rules and practice in Canada concerning internal company controls.

41. Federal (Canada Business Corporations Act) and provincial legislation regarding the accounting rules for corporations do not specifically prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation. In addition, they do not require the full identification and description of transactions in the accounts, accurate and proper classification of transactions and adequacy of the audit trail. Instead, Canada has relied on the accounting profession to develop its own accounting and auditing standards. However, the reliance on professional standards raises enforcement issues, including the effectiveness of sanctions for violating the rules.[55] Nevertheless, the lead examiners welcome the initiatives that have been undertaken by the accounting profession in recent years to increase accounting and auditing standards[56]

42. Pursuant to the Canada Business Corporations Act (CBCA), the penalty for making or assisting in making a document required by the Act that (a) contains an untrue statement of a material fact, or (b) omits to state a material fact required therein or necessary to make a statement contained therein not misleading in the light of the circumstances in which it was made, is a fine not exceeding 5 thousand dollars or imprisonment for a term not exceeding 6 months or both. Although these sanctions would appear to be relatively low, potentially much higher penalties are available pursuant to provincial securities legislation for a misleading or untrue statement in an application, prospectus, or financial statement, etc (e.g. under the Ontario Securities Act the sanctions are a fine of not more than 1 million dollars or imprisonment of not more than one year or both[57]). However, the application of these penalties is limited to circumstances where a misrepresentation would reasonably be expected to have a significant effect on the market price or value of securities, and therefore would likely have a narrow application to accounting offences related to foreign bribery.

43. Pursuant to the CBCA and pursuant to securities legislation, all public companies in Canada are required to submit to an independent external audit. On the other hand, privately owned corporations can exempt themselves from an independent external audit with the unanimous consent of the shareholders. Representatives of the major accounting firms indicated that in practice privately-owned Canadian companies are generally not independently audited unless specifically requested by a lender or investor, which rarely occurs. As a result, some of the largest companies in Canada are not subject to such an audit. Moreover, a privately owned corporation can obtain an exemption from consolidating accounts with the unanimous consent of the shareholders. Thus it is possible that some very large corporations (including

---

55. It is Canada's position that certain offences in the Criminal Code might be relevant [i.e. section 362—offence of false pretence or false statement (maximum imprisonment 10 years); section 366—forgery (maximum imprisonment 10 years); section 368—uttering forged document (maximum imprisonment 10 years); section 380—fraud (maximum imprisonment 10 years); section 397—falsification of books and documents (maximum imprisonment 5 years); and 400—false prospectus (maximum imprisonment 10 years).

56. For instance, in May 1998 the Canadian Institute of Chartered Accountants (CICA) Task Force on Standard Setting released a report containing a number of recommendations, which included the establishment of the Accounting Standards Oversight Council. In May 2002, the Council held public meetings to discuss the implications of recent U.S. accounting failures for Canadian accounting standards. In addition, in October 2002 Canada's chartered accounting profession announced the establishment of the Auditing and Assurance Standards Oversight Council, an independent body to oversee the setting of auditing and assurance standards.

57. Note that pursuant to Bill 198, this is to be increased to a fine of 5 million dollars, imprisonment for up to 5 years, or both.

foreign subsidiaries located in Canada) could exempt themselves from an independent audit and have no accounting records kept in Canada, which could create an accounting/auditing loophole.

44. Section 161(1) of the CBCA, which provides the rules on the independence of auditors for federally incorporated companies, states that a person is disqualified from performing the audit of a corporation where he/she is not independent of the corporation, any of its affiliates, or the directors or officers of any such corporation or its affiliates. Subsection (2) provides that a person is not independent where he/she or his/her business partner is a business partner, director, officer, or an employee of the corporation or any of its affiliates, or a business partner of any director, officer or employee of any such corporation or any of its affiliates. Spouses of such persons are not expressly excluded, but the rules of the provincial accounting institutions exclude spouses of the persons listed in the CBCA from participating in an audit. Subsection (2) also excludes a person who beneficially owns or controls, directly or indirectly, a "material interest" in the securities of the corporation or any of its affiliates. "Material interest" is not defined, but according to the major accounting firms, the rules of the accounting profession clarify that an auditor is permitted to hold up to a 5 per cent interest in the securities of the corporation, and this is going to be decreased to 1 per cent. In addition, they stated that in practice, there is no tolerance level in respect of major corporations. The lead examiners were informed that in September 2002, the Canadian Institute of Chartered Accountants (CICA) released new draft rules[58] on auditor independence, the objective of which is to improve the existing rules in the codes of conduct issued by the provincial institutes of chartered accountants. A person who contravenes the rules on the independence of auditors in the CBCA is liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both. Sanctions for violating the rules of the professional institutions (including the rules on the independence of auditors) range from admonishment to removal of the chartered accountant designation, and in some provinces the sanctions can now also be applied to accounting firms.

45. Pursuant to section 171 of the CBCA, an auditor who becomes aware of a "material" error or misstatement in a financial statement on which he/she has reported shall inform each director thereof. In turn, the directors shall either prepare and issue a revised financial statement, or inform the shareholders. A director who fails to comply with this obligation is liable on summary conviction to a fine not exceeding $5,000 or imprisonment up to 6 months, or both. Section 171 does not provide a penalty for auditors that fail to comply with the reporting obligation. Section 5136 of the CICA Handbook somewhat conflicts with the rule contained in the federal legislation, as it states that auditors should ensure that the audit committee or equivalent and appropriate levels of management are informed of material misstatements in financial statements arising out of illegal acts. It also states that an auditor should consider his/her responsibilities to communicate illegal acts to third parties, but that such a communication is not ordinarily the responsibility of an auditor as the duty of confidentiality would normally preclude it. Under the CICA rule, neither the audit committee nor management is in turn required to report illegal acts to the law enforcement authorities.

46. It does not appear that federal legislation requires the development and adoption of adequate internal company controls, including standards of conduct. However, the lead examiners take note of two important initiatives that have been undertaken in this regard—one at the provincial legislative level and the other by the accounting profession. In the legislative field, the province of Ontario has, through Bill 198, which was introduced into the provincial legislature on 30 October 2002, proposed amendments to the Securities Act (Ontario) for the overall purpose of restoring investor confidence in the capital markets. These amendments would provide the Ontario Securities Commission (OSC) with the authority to make rules requiring reporting issuers to establish and maintain internal controls and disclosure controls and

58. These draft rules are based on the standard in the International Federation of Accountants rule, adapted to Canadian circumstances, and are also expected to incorporate the U.S. Securities and Exchange Commission requirements.

procedures, requiring chief executive officers and chief financial officers to provide certifications related to these controls and procedures, and defining auditing standards for reporting on internal controls. The accounting profession has also started to address this issue through CICA, which has established the Criteria of Control Board, for the purpose of issuing voluntary guidelines on designing, assessing, and reporting on the control systems of organizations.

Commentary

The lead examiners believe that the Canadian accounting profession and the corporate community are concerned about improving accounting and auditing standards and internal compliance, and that significant progress has been made by the accounting profession. The lead examiners also recognise the important legislative proposals introduced by the province of Ontario. The lead examiners welcome these initiatives, and recommend that the federal government make the most of the current momentum for change in this area by considering the introduction of amendments to the CBCA to prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation. The lead examiners recommend that the federal government consult with the provinces in an effort to ensure that the provincial legislation also meets these standards. They also recommend revisiting the issue of sanctions for omissions and falsifications in respect of books, records and accounts of companies, related to CFPOA offences, to determine whether the sanctions provided in practice are sufficiently effective, proportionate, and dissuasive.

Furthermore, the lead examiners recommend that consistent with Sections V B (i) and (ii) of the 1997 Recommendation, the Government of Canada in consultation with the provinces reviews the relevant legislation with a view to considering: 1. whether the requirements to submit to an independent external audit are adequate, in view of the rule that permits large private corporations to exempt themselves from the requirement; and 2. broadening the prohibitions for participating in audits in order to improve auditor independence.

In addition, the lead examiners believe that the effectiveness of the reporting obligations of auditors could be enhanced by obligating the auditor to report indications of foreign bribery to the competent authorities, and recommend that, consistent with Section V B (iv) of the 1997 Recommendation, Canada consider inclusion of such a requirement. The lead examiners note that this is a general issue for many parties.

The lead examiners welcome the initiatives by the province of Ontario and the accounting profession regarding internal company controls, and recommend that the federal government should further encourage the development and adoption of adequate internal company controls, including standards of conduct.

2. Investigation and prosecution

47. Canadian law does not provide a statute of limitations for the offence of bribing a foreign public official. Thus there should be ample time for the investigation and prosecution of complex cases requiring, for instance, the obtaining of mutual legal assistance from other countries.

2.1 Cooperation and Communication between Federal and Provincial Authorities

2.1.1 Investigation

48. With respect to the enforcement of the criminal law by the police, the division of powers between the federal and provincial governments has resulted in three levels of police forces: federal, provincial and

municipal. The Royal Canadian Mounted Police (RCMP) is the federal police agency, and is primarily responsible for enforcing the criminal provisions under federal statutes other than the Criminal Code, including the Bankruptcy Act, Canada Shipping Act, Customs Act, Excise Act and the Immigration and Refugee Protection Act. It is the only policing agency serving the territories, and has also been contracted out by eight provinces to provide policing services. Ontario and Québec are the only provinces currently operating their own provincial police forces, whose duties cover the geographic areas not covered by the municipal police. As of 1998, there were 571 municipal police forces in Canada—201 under contract to the RCMP and 29 under contract to the Ontario Provincial Police (OPP).

49. In provinces with provincial or municipal police forces separate from the RCMP, both the RCMP and the local force have jurisdiction to investigate CFPOA offences alleged to have taken place within that province's territory. The Canadian authorities explained that in theory, the RCMP normally investigates cases with an inter-provincial or international dimension as well as "national interest" cases such as fraud in certain circumstances. The lead examiners felt that it was necessary to review the mechanisms for consulting and sharing information between the police agencies, in order to evaluate the impact that concurrent jurisdiction might have on the effective investigation of a case under the CFPOA.

50. The various police agencies are not required to notify one another when they initiate an investigation respecting an offence, such as one under the CFPOA, for which another agency would also have jurisdiction, nor are they required to notify each other when they decline or terminate an investigation. Thus, it would appear possible that more than one police agency could be investigating the same offence, or that one agency could decline to investigate an offence due to the erroneous belief that another agency has already commenced an investigation.

51. The official from the Department of Foreign Affairs and International Trade (DFAIT) who participated in the on-site meetings stated that the complex structure of the law enforcement system ensures consultation and coordination, and the RCMP representative indicated that to his knowledge every corruption offence that has come to the attention of the RCMP has been investigated where there has been at least a prima facie case. He acknowledged that it is conceivable that two police forces could be investigating the same offence, but explained that such a situation is unlikely to occur due to the use of information systems shared by the police agencies. He stated that the RCMP would not launch a CFPOA investigation without informing police forces with concurrent jurisdiction about the decision, and believes that provincial and municipal police forces would do the same if such an investigation were launched by them. The representatives of the provincial police forces present at the on-site visit supported this view. In addition, the official from the RCMP stated that the RCMP might pick up a case declined by a local police force due to, for instance, inadequate resources. Since there are regional economic differences between the provinces, and the municipal governments have relatively low resources[59], the lead examiners view it as particularly important that the RCMP would be able to take over cases, particularly complex ones, for which the provinces do not have sufficient resources to pursue. In any case, the Canadian authorities announced following the on-site visit that, in order to reinforce the practice that has evolved concerning the sharing of information about cases between the police agencies, the RCMP has undertaken to work with its partners to establish a protocol whereby police agencies would inform the RCMP about cases involving the CFPOA.

52. The Government of Canada initiated the Integrated Justice Information Action Plan in 1999 with the overall objective of enhancing the sharing of information between all partners to Canada's criminal justice system. The foundation of this system is the creation of the Canada Public Safety Information Network (CPSIN), which will provide a network of criminal justice information, including a National

59. See discussion on the provinces and municipalities in terms of their economies in: OECD Territorial Reviews: Canada (2002), at pp. 34, 58, 84 and 238.

Index of Criminal Justice Information to provide broader access to essential information about crimes and offenders, and the Police Reporting Occurrence System (PROS), which would be the internal operational records management system of the RCMP. The five-year Action Plan envisages outreach to the provinces and territories in order to establish a nation-wide information sharing system. When this system has been fully implemented and the provinces and territories have become full partners in it, the coordination and sharing of information about CFPOA cases could be significantly enhanced. In the meantime, it would appear that the only system to which all the police agencies have access is the Canadian Police Information Centre (CPIC), which does not provide information about ongoing investigations, or investigations that have been declined or terminated.

2.1.2 Prosecution

53. The Attorney General of Canada and the Attorneys General of the provinces have concurrent jurisdiction over the prosecution of offences, such as the offence under the CFPOA, which are contained in federal statutes other than the Criminal Code. The Federal Prosecution Service of the Department of Justice[60] is the relevant prosecution authority with responsibility to represent the Attorney General of Canada in such cases. According to the Federal Prosecution Service (FPS) Review[61], the FPS is primarily responsible for drug prosecutions, regulatory prosecutions, mutual legal assistance and extradition. In addition, the FPS Deskbook states that the Attorney General of Canada has the authority to prosecute in cases including the following: 1. the prosecution takes place in the territories; 2. a person other than a federal official lays the information, which is then by arrangement or practice referred to a federal prosecutor; and 3. where a provincial attorney-general has conferred authority on the federal Attorney-General to prosecute a specific charge. According to a provincial prosecutor who participated in the meetings, the FPS traditionally had the primary responsibility for prosecuting offences under independent federal statutes other than the Criminal Code, but the evolving practice has been for the provincial authorities to take increasing responsibility in this regard.[62]

54. The lead examiners note that the Federal Prosecution Service Review (2002) recommends that the FPS should meet with the provinces and territories to examine how the prosecution function and prosecution resources in the country could be collectively managed and rationalized, and that the FPS should initiate the establishment of a federal-provincial network of prosecutors with expertise in complex cases for the purposes of knowledge sharing, advice and support. More specifically, the lead examiners note that in the Report to Parliament of 23 October 2002 by the Minister of Justice and the Minister of

---

60. The Federal Prosecution Service is headed by the Assistant Deputy Attorney General (Criminal Law) and consists of the Criminal Law Branch (in Ottawa), regional prosecutors working in the Department's twelve regional offices and sub-offices, and the prosecutors with the Competition and Consumer Law Division within the Departmental Legal Services Unit at Industry Canada. In addition, the Criminal Law Branch in Ottawa is composed of the Strategic Prosecution Policy Section, which coordinates the Department's participation in the Proceeds of Crime Units and the Criminal Law Section. The Criminal Law Section consists of various groups, including the International Assistance Group, which carries out the responsibilities of the Minister of Justice as the central authority for Canada in extradition and mutual legal assistance matters (Department of Justice Canada)

61. Federal Prosecution Service Review (Department of Justice, 2001). The steering committee consisted of representatives from the Department of the Solicitor General, the RCMP, Health Canada, the Treasury Board Secretariat and Privy Council Office, and senior officials from the Department of Justice who were selected to oversee the Review.

62. The CFPOA case against the Hydro Kleen Group Inc., which was before the courts at the time of the on-site visit, was being prosecuted by the Alberta Attorney-General. The Canadian authorities point out that this might have been due to the investigation having initially focussed on the secret commissions offence under the Criminal Code.

Foreign Affairs and International Trade on the implementation of the Convention and the CFPOA, it is stated that "prosecutions will be infrequent and require specialized knowledge in this area, which could, for practical reasons, be obtained and maintained by Justice Canada".

Commentary

The lead examiners appreciate the challenges posed by working within the framework for the division of criminal powers mandated by the Constitution, and the uniquely Canadian criminal justice system that has evolved from this. They believe that the system is generally effective, but feel that in addressing offences under the CFPOA, the system could be reinforced by establishing a coordinating role for one of the principal agencies responsible for the implementation of the CFPOA for the purpose of collecting information from the police and prosecutorial authorities about investigations and prosecutions. This information could be available to the various police and prosecutorial authorities in order to be able to verify whether a particular case under the CFPOA is already under investigation, etc. It could also be available for the purpose of preparing the Annual Report to Parliament on the implementation of the Convention and the CFPOA. The lead examiners view such an initiative as particularly important in light of the current absence of a federal-provincial wide data system containing case related information, and the absence of a formal process for the sharing of information between the relevant agencies. Moreover, the lead examiners encourage the federal government in achieving the goals set under the Integrated Justice Information Action Plan, which should significantly enhance information sharing between the relevant agencies once the provinces have become full partners in its implementation. They also welcome the announcement that the RCMP will work with its partners to establish a protocol requiring police agencies to inform the RCMP about CFPOA-related cases.

The lead examiners also believe that the coordinating role could include maintaining specialized knowledge on the CFPOA, to be available to the provincial (and where applicable, municipal) authorities involved in the enforcement of the offence, consistent with the statement in the Report to Parliament of 2002. They note that investigating and prosecuting offences under the CFPOA would normally involve a high level of expertise necessitating complicated financial analysis. The lead examiners also note that the federal government has previously taken on a coordination role with respect to certain other offences with unique enforcement challenges (e.g. telemarketing fraud) and believe that the offence under the CFPOA also lends itself to such an approach, especially in light of the complex international issues that it raises.

2.2 Practical Difficulties related to Search and Seizure

55. Mechanisms for the effective search and seizure of documents relevant to the investigation and prosecution of cases involving the bribery of foreign public officials are central to the effective enforcement of the CFPOA as well as for satisfying Canada's obligations for the provision of mutual legal assistance to other parties to the Convention. In reviewing the legal and procedural framework for the search and seizure of documents in Canada, in particular financial records, the lead examiners identified the following issues: 1. practical difficulties in respect of search warrants for financial institutions; and 2. the use of evidence in criminal proceedings that was obtained through search warrants executed in non-criminal or regulatory proceedings.

2.2.1 Obtaining and Executing Search Warrants on Financial Institutions

56. In a brief submitted to the Standing Committee on Legal and Constitutional Affairs Concerning Bill C-24 (organized crime legislation) by police agency representatives it was stated that the obtaining of search authorizations places onerous demands on police agencies, requiring the preparation of thousands of

pages of documents[63], and in a message from the Executive Officer of the Canadian Police Association, it was stated that "a typical search warrant authorization for proceeds of crime cases could take six to eighteen months to prepare".[64] These delays have been attributed to legal thresholds that have been established as a result of the interpretation of section 8 of the Canadian Charter of Rights and Freedoms[65]. The overall recommendation in the brief submitted to the Standing Committee was that due to the onerous demands placed on police agencies, there is a need to streamline the criteria for obtaining the courts' approval. The representative of the Ontario Provincial Police who participated in the on-site meetings concurred in this assessment. He also stated that it is not unusual for an investigation to completely stall owing to these obstacles. A representative of the RCMP indicated that in his experience search warrants for complex cases involving economic crimes can take weeks or months to prepare.

57. The participants from the various police agencies also described significant delays in executing search warrants that have been served on financial institutions. For instance, in the province of Ontario it can take months or years for a financial institution to produce requested documents[66]. Representatives of the Attorney-General of Ontario's office, the Ontario Provincial Police and the Toronto police stated that they have lobbied the federal government to put into place legislation on production orders, in order that search warrants are not necessary to obtain financial information. The principal advantage of this method is that the custodian of the documents is required to deliver or make them available within a certain time limit. In a recent initiative of the federal government on the review of lawful access laws (i.e. interception of communications and search and seizure of information by law enforcement and national security agencies)[67], the Government states that legislative proposals are currently under consideration to create the authority for a general production order in the Criminal Code[68]. The availability of this authority should

---

63 Brief to the Senate Standing Committee on Legal and Constitutional Affairs Concerning Bill C-24 [An Act to amend the Criminal Code (Organized Crime and Law Enforcement) and to make consequential amendments to other Acts (Appearances: Mike Niebudek, Vice President Canadian Police Association and President Mounted Police Association of Ontario, and Yves Prud'homme, President of Québec Federation of Municipal Police Officers, 21 November 2002)].

64. Organized Crime in Canada (David Griffin, Police Magazine, January 2001). The Canadian authorities point out that it is not clear from the statement of David Griffin whether he is referring to the time it takes to prepare the documentation to obtain a search warrant or an authorization to intercept communications, both of which are available in CFPOA investigations. In addition, note that the Canadian authorities point out that there are two components in calculating the time that it takes to prepare a search warrant: 1. The time it takes to complete the necessary investigative steps to justify a search warrant; and 2. The time it takes to prepare the paper work involved in the application for the search warrant.

65. Section 8 of the Charter guarantees everyone "the right to be secure against unreasonable search and seizure".

66. In Ontario, the practice for executing search warrants on financial institutions has been to provide the financial institution in question with a list of documents required, and once the documents have been ready the police have obtained the search warrant and served it on the bank.

67. Lawful Access Consultation Document (August 2002--Department of Justice, Industry Canada, Solicitor General of Canada). The main thrust of the review of Canada's lawful access laws is to ensure that crimes and other threats to public safety can continue to be investigated effectively, in the face of rapidly evolving technologies.

68. At the time of the on-site visit, the authority for production orders existed under some federal laws, such as the Competition Act. Following the on-site visit, Bill C-46 [An Act to amend the Criminal Code (capital markets fraud and evidence-gathering)] was tabled in Parliament on 12 June 2003. This Bill proposes, inter alia, that justices or judges be provided with the authority under the Criminal Code to make general (section 487.012) and specific (section 487.013) production orders in respect of all criminal offences. The purpose of these orders is to enable investigators to compel the custodian of documents or data (including financial records) to produce pertinent documents or data from third parties (i.e. those not under

also enhance Canada's ability to obtain and provide mutual legal assistance in the form of access to bank records, since it is not possible for Canadian law enforcement authorities to execute a Canadian search warrant abroad, and vice-versa.

58. Another potential obstacle to obtaining search warrants for accessing financial records from financial institutions is the specificity of information that is required in the warrant. In order to obtain a "specific search warrant" under section 487 of the Criminal Code, the name of the bank, and location of the branch or bank or transit number is required. An official from the Department of Justice stated that this is not an obstacle to obtaining a search warrant, because pursuant to section 487.01 of the Criminal Code a "general search warrant"[69] is available in the absence of such information where there are reasonable grounds to believe that the relevant information is present in a financial institution in Canada. The Department of Justice official added that Canada has the ability to respond to a search warrant nation-wide, and that in practice a general warrant would be served on all of Canada's banks (of which there are twenty main ones). On the other hand, the Ontario Provincial Police indicated that bank information can only be obtained through a specific search warrant.

2.2.2 Use of Evidence obtained through Search Warrants executed in Non-criminal or Regulatory Proceedings

59. It is not unusual for the execution of a search warrant in non-criminal or regulatory proceedings to disclose evidence of a criminal offence. Examples of situations in which this could occur in relation to foreign bribery include the following: 1. Tax information that relates to a bribe given to a foreign public official could be obtained as the result of the execution of a search warrant in a regulatory investigation into a case involving tax evasion; 2. A search warrant executed under provincial civil procedure legislation for the purpose of obtaining evidence in a civil law suit could disclose evidence of foreign bribery; and 3. A production order obtained under section 29 of the Canada Evidence Act in a civil proceeding for the purpose of inspecting and taking copies of any entries in the books or records of a financial institution could contain evidence of bribing a foreign public official. Pursuant to section 8 of the Charter, the admissibility in criminal proceedings of evidence that has been obtained in a regulatory process has been challenged before the courts, as it was obtained pursuant to a process that requires a lower standard than required by the criminal process. The Department of Justice referred to three recent decisions of the

---

investigation) within a specified period, and failure to comply would constitute a summary conviction offence punishable by a term of imprisonment not exceeding six months and/or a fine of up to $250,000. [Government of Canada Announces New Measures to Deter Capital Markets Fraud (Department of Justice, Canada, News Room, 12 June 2003); and Federal Strategy to Deter Serious Capital Market Fraud (Department of Justice, Canada, News Room, 12 June 2003)]. According to the Canadian authorities, it is intended that general production orders would be available pursuant to the same standard of proof as search warrants under section 487 of the Criminal Code, and that the standard would be slightly lower for obtaining specific production orders, although specific production orders are limited in ambit to compelling financial institutions to produce in writing specific account information (i.e. the account number of a person named in the production order, the name of a person whose account number is specified in the order, the status and type of the account, and the date on which it was opened or closed).

69. In practice, one of the main differences between a specific search warrant and a general search warrant is the authority from whom it is obtained—a specific search warrant is obtained from a "justice" ("intake" judges who are available to consider an application without notice), and a general search warrant is obtained from a provincial court judge, a judge of a superior court of criminal jurisdiction or a judge defined in section 522 of the Criminal Code. Access to a judge for the purpose of obtaining a general search warrant is more limited and appointments must be made to make the application, thus requiring the passage of substantially more time.

Supreme Court of Canada on this issue[70], in which the Court took a cautious approach to admitting evidence of this nature in a criminal proceeding. Thus there remains some uncertainty about the use of such evidence in fact situations different from those considered by the Court. The RCMP representative indicated that in response to the cautious approach taken by the Supreme Court of Canada, where there is concern about the admissibility of such evidence, the RCMP would "cleanse" the information by executing a search warrant on itself. It is not clear, however, whether there is a Canada-wide policy on the use of this technique, including whether it is used by the provincial and municipal police forces. In addition, the lead examiners were not provided with supporting case-law on its effectiveness in practice.

Commentary

The ongoing review by the federal government of lawful access laws could be an opportunity to address a broader range of issues concerning search and seizure, especially in light of the substantial body of law that has evolved on an incremental basis since 1982 under section 8 of the Canadian Charter of Rights and Freedoms. In particular, the lead examiners recommend that the parameters of the review be broadened to address the following issues, which relate to the effectiveness of search and seizure for the purpose of investigating cases involving the bribery of foreign public officials: 1. Consideration of how the criteria for obtaining search warrants for the purpose of obtaining access to financial records can be streamlined. 2. Clarification of the availability of general search warrants for the purpose of obtaining access to financial records; and 3. Clarification on the collection and use of evidence in criminal proceedings obtained in a regulatory process. Moreover, the lead examiners welcome the announcement following the on-site visit that a bill has been tabled in Parliament (12 June 2003), which proposes, inter alia, amendments to the Criminal Code that would provide the authority for judges or justices to make general and specific production orders in respect of all criminal offences for the purpose of compelling the custodians of documents and data to produce information within a specified period. The lead examiners believe that the availability of production orders for the offence of bribing a foreign public officials could enhance the ability of law enforcement authorities to obtain access to bank records relevant to the investigation of CFPOA offences as well as the provision and obtaining of mutual legal assistance in the form of access to bank records, and recommend that the effectiveness of these orders be followed-up once there has been sufficient practice.

2.3 Features of CFPOA

2.3.1 Elements of the Offence

2.3.1.1 Interpretation of Exceptions

2.3.1.1.1 Facilitation Payments

60. Section 3(4) of the CFPOA provides an exception to the offence of bribing a foreign public official for a "loan, reward, advantage or benefit…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". An inclusive list of actions of a routine nature that would qualify for the exception is provided, and includes "the issuance of a permit, licence or other document to qualify a person to do business" and "the processing of official documents such as visas and work permits". The exception is quite similar to the one under the U.S. Foreign Corrupt Practices Act (FCPA), and like the U.S. exception it is not expressly limited in its application to "small" facilitation payments. However, the U.S. exception is limited to a

70. Quebec (Attorney General) v. Laroche (SCC 2002), R. v. Ling (S.C.C. 2002), and R. v. Jarvis (S.C.C. 2002).

"payment", whereas the Canadian exception covers "a loan, reward, advantage or benefit". The exception in the CFPOA would therefore appear to be open to a broader interpretation. It is, however, Canada's position that the definition of facilitation payments in the CFPOA makes it sufficiently clear that such payments fall within Commentary 9 to the Convention.

61. The Canadian courts have not yet interpreted the exception; nor has any official guidance or interpretive rules been provided by the Department of Justice. However, the Canadian International Development Agency (CIDA) issued a guideline in its publication entitled Anti-Corruption Programming: A Primer[71], stating that "facilitation payments are typically small payments to low-level government officials to speed up a process which it is the official's job to do"—such as issuing licenses or permits, clearing goods through customs, etc". It also states that "*small* is relative—to the bribee's income and to the briber's potential rewards".

62. The official from the Department of Foreign Affairs and International Trade who participated in the on-site meetings explained that because the CFPOA is an independent piece of federal legislation expressly stating in its title that it is for the purpose of implementing the Convention, the courts could be guided by the Convention in interpreting the offence in the CFPOA, including the exception for facilitation payments. In support of this position, the Canadian authorities referred the lead examiners to two Supreme Court of Canada decisions[72], one Federal Court of Appeal decision[73], and cited several other Supreme Court of Canada decisions involving various human rights issues[74].

63. Corporate and criminal defence lawyers from the private sector who participated in the meetings expressed a high level of dissatisfaction with the exception for facilitation payments. The opinion of some lawyers was that the exception creates a large area of uncertainty, and some of them also felt that it should be repealed.

Commentary

As noted in the Phase 1 Report of Canada, the exception under the CFPOA for facilitation payments "may affect the implementation of the Convention". The lead examiners are of the view

---

71. This point is also discussed earlier in the report in relation to the issue of awareness (1.1.1 Government Awareness and Training).

72. In the case of National Corn Growers Association v. Canada (Import Tribunal), [1990] S.C.R. 1324 the Court referred to the GATT Subsidies Code in order to adopt a broad interpretation of Canadian legislation for the protection of corn growers in Canada from subsidized imports. In Baker v. Canada [1999] 2 S.C.R. 817, the Court looked at international human rights instruments to incorporate the notion of protecting the rights of Canadian born children of immigration applicants into the Immigration Act.

73. In Suresh v. Minister of Citizenship and Immigration (2000), 183 D.LR. (4th) 629 (FCA), the appellant challenged a provision in the Immigration Act that does not provide absolute protection against being returned to a country in which torture could be used against him. One of the issues before the Court was whether in this respect the Immigration Act contravened international human rights conventions, and the Court, in deciding that the Immigration Act does not contravene these conventions, acknowledged that "international conventions on human rights may inform our understanding of what qualifies as a fundamental principle of justice".

74. In these cases, some of which involved criminal offences, the Court referred to international instruments to determine essentially two types of issues: 1. Whether a legislative provision contravened a right under the Charter (e.g. whether the offence of possessing child pornography contravenes the guarantee of freedom of expression); and 2. What would be the appropriate remedy under the Charter for the breach of a right thereunder (e.g. the appropriate remedy for a violation of the right to be tried for an offence within a reasonable time).

that the Canadian authorities should consider issuing some form of guidance to assist in the interpretation of this exception. However, they consider that nothing learned in the on-site review leads to the conclusion that the exception interferes with the effective enforcement of the CFPOA. The lead examiners recommend that this issue be revisited once there has been sufficient practice under the CFPOA.

2.3.1.1.2 Reasonable Expenses Incurred in Good Faith

64. Section 3(3)(b) of the CFPOA provides another exception to the offence of bribing a foreign public official where a loan, reward, advantage or benefit "was made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official" that relate directly to (i) the promotion, demonstration or explanation of products and services, or (ii) the execution or performance of a contract with a foreign state. Again, the provision is very similar to one under the U.S. FCPA, except for the following two differences: 1. The FCPA provides an affirmative defence, thus necessitating that the defendant raises and proves it. On the other hand, since the CFPOA provides an exception, the prosecution would have the burden of proving beyond a reasonable doubt that the exception does not apply. 2. The FCPA expressly states that "travel and lodging expenses" are of the nature of the expenditures targeted by the defence, whereas the CFPOA does not contain this information.

65. Similar to the exception for facilitation payments, the courts in Canada have not yet interpreted the provision. In addition, it is not the practice of the federal Department of Justice to issue interpretive guidelines or provide advice on the application of the law.[75] However, officials from Canada's Department of Justice explained that this exception is not open to abuse as it is their opinion that it is not prohibited by the Convention, and they believe that the presence of the language "reasonable" provides the courts with sufficient direction for interpreting its application, as Canadian courts are accustomed to interpreting the notion of reasonableness in various contexts under Canadian law (e.g. reasonable grounds, reasonable person and reasonable belief). The Canadian authorities contended that the "reasonable" standard should not be considered too broad, as it would be interpreted in light of the circumstances on a case-by-case basis, and would exclude criminal activities.

Commentary

As noted in the Phase 1 Report of Canada, the exception under the CFPOA for reasonable expenses incurred in good faith "may affect the implementation of the Convention". In the absence of case law or official guidance on the application of this exception, the lead examiners are of the view that this issue needs to be followed-up once Canada has had sufficient practice under the CFPOA. However, the lead examiners consider that nothing learned at the on-site visit leads to the conclusion that this exception interferes with the effective enforcement of the CFPOA.

2.3.1.2 "For Profit" Requirement

66. The offence of bribing a foreign public official under section 3(1) of the CFPOA applies in respect of a person who bribes "in order to obtain or retain an advantage in the course of business", and section 2 defines "business" as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit". The Convention does not distinguish between bribes

75. In this respect the U.S. experience is quite different, because the U.S. Department of Justice has addressed the issue numerous times pursuant to its opinion release procedure, which enables a company to obtain an opinion about whether a future transaction would be caught under the FCPA. On the facts presented, the DOJ will issue an opinion on whether it would take enforcement action. The opinions are not binding, and are strictly limited in application to the specific facts presented.

for the purpose of obtaining or retaining an advantage in the course of business for profit or not for profit. During the passage of the Corruption of Foreign Public Officials Bill through Parliament in late 1998, the Senate voiced concern about the purpose of the "for profit" requirement. In particular, it was unclear to members of the Senate whether non-profit corporations were excluded from the ambit of the CFPOA, but in the end they accepted inclusion of the requirement on the basis of assurances that it "fits the OECD Convention, which was to deal with business transactions", and that if a non-profit organization was "in the business of making a profit", it would be covered.[76]

67. During the Senate debates, the question was raised whether the "for profit" requirement was intended to exclude non-profit corporations from the application of the CFPOA or cases where the transaction in question was for the purpose of creating a profit. These same questions were raised at the on-site visit. Officials from the Department of Justice stated that the CFPOA targets transactions that are for profit[77], and provided as an example of non-application the case where a person pays a foreign public official in order to obtain his/her child's release from prison. On the other hand, an official from the Department of Foreign Affairs and International Trade (DFAIT) stated that the for profit requirement refers to the business and not the transaction, but that in determining whether the business is for profit the focus is not on the entity in question. The official from DFAIT also indicated that guidelines on the interpretation of this concept are not necessary as the term is self-explanatory.

68. The CFPOA does not exempt from its application non-profit corporations, as it applies to "every person", which is given a sufficiently broad interpretation for this purpose under section 2 of the Criminal Code. However, it remains unclear what is captured by the term "for profit", and the explanations given by the Canadian authorities have not clarified the issue. Moreover, even though non-profit corporations are covered by the term "person", it is still possible that the term "for profit" could result in excluding the application of the offence to them in practice. One official from the DoJ pointed out that a non-profit corporation would not be excluded if the transaction in question was carried out for profit. However, by definition non-profit corporations do not make a profit and their accounting treatment differs accordingly.

69. The non-profit sector in Canada is quite sizable, and as of 2001, it comprised 180,000 incorporated non-profit groups of which approximately 80,000 were charitable organizations. The sector employed almost 1.3 million people (almost 10 per cent of working Canadians), and had annual revenues of $90 billion and assets of more than $100 billion.[78] The non-profit sector in Canada is extremely diverse, and has, since the mid 1990's become more competitive, with non-profit companies operating like large business firms, producing surpluses for sustainability and competing with other non-profit as well as for-profit companies.[79] In addition, certain non-profit organizations, including trade associations and chambers of commerce as well as technological design or testing units and bodies carrying out economic or management studies, are founded by particular industries and are primarily financed and controlled by them.[80] Therefore, a requirement that results in practice in the non-application of the CFPOA to non-profit companies would create a substantial gap in the coverage of the foreign bribery offence.

---

76. Debates of the Senate (Hansard) [1st Session, 36th Parliament, Volume 137, Issue 100, 3 December 1998—The Honourable Gildas L. Molgat, Speaker].

77. This interpretation is also provided in a publication of the DoJ [The Corruption of Foreign Public Officials Act: A Guide (May 1999)].

78. Voluntary Sector Initiative: Joint Tables.

79. Competition in the Voluntary Sector: The Case of Community Based Trainers in Alberta (Walter Hossle, Muttart Foundation, October 2000).

80. A System of National Accounts (United Nations, 1968)

70. Moreover, the question remains whether for-profit companies might be able to describe individual transactions as not for profit in order to escape the application of the offence, and whether a bribe emanating from the public sector could escape the "for profit" designation.

Commentary

The lead examiners believe that the term "for profit" in the CFPOA is very unclear and that there is a high degree of uncertainty about its application. The explanations of the Canadian authorities did not convincingly dispel concerns about the possibility of the non-application of the CFPOA to non-profit companies, and the lead examiners believe that such a gap in the CFPOA would result in the non-coverage of a sizable sector in the Canadian economy. Moreover, it is uncertain whether the "for profit" requirement might enable for-profit companies to escape the application of the CFPOA in certain circumstances by describing the transactions in question as not for profit, and whether bribes emanating from the public sector could also escape coverage. The lead examiners therefore recommend that the Canadian authorities consider amending the part of the definition in section 2 of the CFPOA that results in the requirement that the purpose of the bribe be for obtaining an advantage in the course of business for profit.

2.3.2 Liability of Legal Persons

71. Pursuant to section 2 of the Criminal Code, legal persons are liable for criminal offences, including an offence under the CFPOA. The standard of liability, which is contained in the common law, is commonly known as the "identification theory". The leading case on this principle is the decision of the Supreme Court of Canada in Canadian Dredge and Dock Co. v. The Queen [1985] 1 S.C.R. 662, in which it is stated that liability can be attributed to a company when an offence is committed by a "directing mind" or "ego" of the corporation. The Court provided that the "directing mind" could be located in the board of directors, the managing director, the superintendent, the manager or anyone else to whom the board of directors has delegated the governing executive authority of the corporation. The corporation can be held liable for the act of the directing mind where the action taken by him/her was within the field of operation assigned to him/her, was not totally in fraud of the corporation, and was by design or result partly for the benefit of the company. In addition, the Court stated that where acts of the ego of the corporation are taken within the assigned managerial area, corporate criminal liability may be triggered regardless if there has been a formal delegation, there is awareness of the activity in the board of directors or the officers in the company, or there has been an express prohibition. In 1993, the Supreme Court qualified the notion of a directing mind further in Rhone v. Peter A.B. Widener, [1993] 1 S.C.R. 497 by stating that "the key factor which distinguishes directing minds from normal employees is the capacity to exercise corporate policy, rather than merely to give effect to such policy on an operational basis".

72. Thus it would appear that corporate liability can in effect only be triggered by the acts of persons with the authority to devise or develop corporate policy, and thus would normally be limited to the acts of a company's senior corporate officials. However, following the decision in Rhone, there has been one case [R. v. Church of Scientology of Toronto and Jacqueline Matz (1997), 116 C.C.C. (3d) 1 (Ont. C.A.)] in which the Ontario Court of Appeal located the "directing mind" at a lower level of authority (i.e. the appellant was a case officer and the director of operations of one of the management arms of the legal person), in a legal person with a decentralized decision-making structure. As a result, the law in this area has been described as in a state of flux.[81] The current approach has been criticized for encouraging the isolation of senior corporate officials to ensure that they are not aware of any doubtful conduct.[82]

81. See: Corporate Criminal Liability: A Discussion Paper (Anne-Marie Boisvert, Faculty of Law, University of Montreal, Uniform Law Conference of Canada); Corruption and Corporate Criminal Liability (Gerry

73. In 2002 the Government of Canada accepted the conclusion of the Standing Committee on Justice and Human Rights that "the Government table in the House legislation to deal with the criminal liability of corporations, officers and directors". The Government accepted the conclusion of the Standing Committee that legislative change is required and stated that it intends to present specific proposals in the House of Commons in 2003.[83] This initiative was undertaken largely in response to concerns about safety issues in the wake of a mining disaster in 1992, and due to widespread concerns that the current law on corporate liability, which has evolved through court decisions on case-by-case basis, is inadequate for modern conditions. During the hearings held by the Standing Committee there was virtually no support for the current model of corporate liability, which was viewed as enabling corporations to hide behind their more complex decision-making processes and exposing smaller companies to liability.[84] Under the Government's proposals, the law on corporate criminal liability would be reformed to clarify and expand its application to the following cases[85]: 1. Where a senior person with policy or operational authority (a) commits an offence personally, or (b) has the necessary intent and directs the affairs of the corporation in order that lower-level employees carry out the illegal act, or (c) fails to take action to stop criminal conduct of which he/she is aware or wilfully blind; and 2. For crimes of negligence[86], where the acts and omissions of a corporation's representatives taken as a whole deviate significantly from the standard normally expected in the circumstances, even if no single individual has acted with criminal negligence. In addition, the principles of sentencing in the Criminal Code would be amended to provide more guidance when determining the appropriate sentence for a corporation.

74. Statistics on the application of criminal liability to domestic bribery cases involving legal persons have not been provided. The representative of the Ontario Ministry of the Attorney General stated that he has prosecuted legal persons for domestic bribery offences, including secret commissions offences under section 426 of the Criminal Code. However, the public perception of prosecutorial activity in this area would appear quite different, if the perception of a media representative, who reported in 2001 that there has not been a single court case brought against a Canadian company for bribery, is widely shared.[87] Nonetheless, the CFPOA case currently before the court in Alberta, involves charges against the company Hydro Kleen Group Inc.

Ferguson, University of Victoria, Seminar on New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions, February 1999, Vancouver, B.C.).

82. Corporate Criminal Liability (Department of Justice, Discussion Paper, March 2002)

83 Following the on-site visit, the Minister of Justice tabled in Parliament, on 12 June 2003, Bill C-45 entitled "An Act to amend the Criminal Code (criminal liability of organizations)", which appears to embody the proposed amendments (summarised in this paragraph of the Report) concerning the liability of legal persons that were first outlined in the Government's response in November 2002 to the 15th Report of the House of Commons Standing Committee on Justice and Human Rights on workplace safety and corporate liability.

84. Government Response to Fifteenth Report on Standing Committee on Justice and Human Rights (June 2002).

85. Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights—Corporate Liability (Department of Justice, November 2002).

86. An official from the Department of Justice indicated that the offence under the CFPOA is not a crime of negligence.

87. Hypocrisy Surrounds Bribery Issue (Richard Gwyn, Toronto Star, 18 July 2001).

Commentary

The lead examiners welcome the most recent initiative of the Government of Canada to reform the law on corporate criminal liability by clarifying (through codification) and expanding its scope, and believe that the revised law would significantly improve the effectiveness of the liability of legal persons for the bribery of a foreign public official. In addition, the lead examiners recommend that the issue of corporate criminal liability be followed-up once Bill C-45 ["An Act to amend the Criminal Code (criminal liability of organizations)"] has been enacted and has been in place long enough for the Working Group to assess its effectiveness in practice in respect of CFPOA cases.

2.3.3 Jurisdiction

75. In Phase 1, some concerns were expressed by the Working Group that Canada's decision to not establish nationality jurisdiction over the offence of bribing a foreign public official under the CFPOA could create a gap in coverage. However, it is the position of the Government of Canada that territorial jurisdiction is very broadly interpreted by Canadian courts, and that it is a very effective basis of jurisdiction. The Canadian authorities also maintain that its policy decision on this matter is consistent with Canadian law and legal history, and its obligations under the Convention.

76. Pursuant to the Criminal Code, Canada has established extraterritorial jurisdiction over offences including the following: air piracy, the sexual exploitation of children, terrorist acts, offences against internationally protected persons, the protection of nuclear material, torture, war crimes, murder and bigamy. The Canadian authorities explain that nationality jurisdiction was not established over the foreign bribery offence because it has generally been the policy to only take extraterritorial jurisdiction where there has been a treaty obligation to do so.

77. With respect to the effectiveness of territorial jurisdiction, the Canadian authorities referred to four court decisions regarding the extent of a connection that is required between an offence and Canada. The leading case is R v. Libman [1985] 2 S.C.R. 178, in which the Supreme Court of Canada stated that "…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" and that "it is sufficient that there be a 'real and substantial link' between an offence and this country". In R v. Libman, the facts involved a fraudulent telephone sales scheme, in which the whole operation that made it function had taken place in Canada. Thus the court found that the fact that the victims were harmed outside Canada did not exclude liability. The value of the other three cases[88] as support for the position of the Canadian authorities appeared rather ambiguous, because in two of the cases the fact situations involved substantial physical links with Canada (the third case concerned a request for extradition), and in effect an element of the offences had taken place in Canada. The uncertainty about the effectiveness of territorial jurisdiction in respect of the CFPOA offence was confirmed by statements of the representatives of the Ontario Provincial Police and the Ontario Ministry of the Attorney General that jurisdiction could not be exercised where a person made a telephone call from Canada to set up a meeting with a foreign public official, and then flew from a Canadian airport to a foreign jurisdiction to meet with the foreign public official, in order to make

88. 1. Canada (Human Rights Commission) v. Canadian Liberty Net [1988] 1 S.C.R. 626—In this case the legislation expressly prohibited the act in question (i.e. spreading racist messages "by means of facilities of a telecommunications undertaking within the legislative authority of Parliament"); 2. United States of America v. Lépine [1994] 1 S.C.R. 286—This case concerns whether in extradition cases, the court should be considering whether the requesting state has sufficient jurisdiction. The court held that the Extradition Act does not require the extradition judge to consider the jurisdiction of the requesting state; 3. R v. Hammerbeck (1993) R.F.L. (3d) 265 (B.C.C.A.)—The Court determined that there was a sufficient territorial link in a kidnapping case because the accused had abducted his children in Canada and taken them to the U.S.

an offer or promise or gift. The Canadian authorities point out that the interpretation of the law on criminal jurisdiction provided by the authorities in Ontario has not, however, been tested before the courts.

Commentary

The lead examiners are not convinced that territorial jurisdiction under Canadian law is broad enough to enable the effective application of the offence under the CFPOA. In their view an element of the offence would likely be required by the courts to have taken place in Canada. In addition, the lead examiners note that, although it has generally been the policy of Canada to only take extraterritorial jurisdiction where there has been a treaty obligation to do so, there have been exceptions to this rule. The lead examiners therefore recommend that the Government of Canada reconsider its position in this respect. In the event that Canada does not choose to establish nationality jurisdiction, the lead examiners recommend that this issue be followed-up once there has been sufficient practice under the CFPOA to assess the effectiveness in practice of territorial jurisdiction.

2.4 Prosecutorial Discretion

78. In Canada, the prosecutorial authorities are required to consider two principal issues when deciding whether to prosecute a particular case—whether there is a "reasonable prospect of conviction", and if there is, whether the prosecution is in the public interest.[89] Prosecutorial discretion comes into play in relation to the second test, and, although it may be appropriate in some cases to obtain the views of the investigative agency, it is ultimately the Crown counsel who must decide independently whether the public interest requires prosecution.[90] The Federal Prosecution Deskbook lists the public interest factors that may be considered in making this decision, which include such matters as the seriousness or triviality of the alleged offence, significant mitigating and aggravating circumstances, and the likely length and expense of a trial. The representatives of the Federal Prosecution Service (FPS) advised that factors such as these would not be determinative, and that all the circumstances of a case would be weighed.

79. Certain public interest considerations could potentially involve conflicts of interest, and one such factor is included in the list in the FPS Deskbook—"whether prosecuting 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". Hypothetical cases that could create a conflict of interest include those where prosecuting a high ranking political figure who has allegedly bribed a foreign public official could cause embarrassment to Canada, or a bribery transaction involving a contract with a foreign government could harm international relations if prosecuted. The Deskbook partly negates the potential for certain considerations to create a conflict of interest by providing, under the list of "irrelevant criteria", the " possible political advantage or disadvantage to the government or any political group or party". However, some ambiguity on Canada's position in this regard has resulted from the inclusion of the following statement of the Canadian government in the letter accompanying the transmission of the Canadian Instrument of Ratification of the Convention[91]:

> *As noted during the negotiations, in accepting the language of Article 5 of this Convention as written, Canada does so on the clear understanding that the obligation contained in this article is to ensure that investigation and prosecution of the bribery of a foreign public official is not*

89. Chapter 15, Federal Prosecution Service Deskbook (Department of Justice, 2000)

90. ibid.

91. The letter was sent to the Secretary-General of the OECD by the Ambassador and Permanent Representative of the Permanent Delegation of Canada to the OECD on 17 December 1998.

influenced by improper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural ***or*** *legal entities involved.*

From this statement, it could appear that Canada intended to reserve an exception to Article 5 where proper considerations of national economic interest, etc, exist.

80. The FPS Deskbook recommends that, where a decision is made not to institute proceedings, a record be kept of the reasons therefor. Otherwise, there is no formal procedure for ensuring the independence of the prosecutorial authorities in making a decision to not prosecute in a potential conflict of interest situation. A representative of the FPS indicated that, however, in practice, in a potential conflict of interest situation, the federal prosecutor could refer the case to a provincial attorney-general's office or to a special prosecutor, but conceded that there is no direction in this respect contained in guidelines. The Canadian authorities explain that all federal prosecutors are subject to the functional authority of the Assistant Deputy Attorney-General (Criminal Law), a senior officer within DoJ, who is institutionally insulated from political pressures. They also emphasize that there is a strong culture of prosecutorial independence in Canada at both the federal and provincial levels, and that political interference in the exercise of prosecutorial discretion would be dealt with harshly in both the judicial and political arenas. Nevertheless, in order to reinforce the recommendation in the Deskbook concerning the recording of reasons for non-prosecution, the Canadian government announced following the on-site visit that it intends to provide further particulars in respect of it through amendments to the Deskbook, which should be available on the DoJ website within two months.

Commentary

The lead examiners recommend that the guidelines in the FPS Deskbook regarding the exercise of prosecutorial discretion be amended to clarify that, in investigating and prosecuting the bribery of a foreign public official, there are no proper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved. In addition, the lead examiners believe that there is a potential for conflict of interest situations to arise in certain CFPOA cases, because of the nature of the parties involved, and that the exercise of prosecutorial discretion should therefore include safeguards to protect against political interference. The lead examiners are confident that the culture of prosecutorial independence is strongly entrenched in the Canadian criminal justice system, but in the absence of formal safeguards, they recommend that Canada establish guidance to prosecutors on how to proceed when they decline to prosecute a case that potentially involves one of the public interest factors listed in the FPS Deskbook. The lead examiners welcome the initiative to particularize the recommendation in the FPS Deskbook on the recording of reasons for decisions to not prosecute as an important step.

3. Sanctions

3.1 Criminal Sanctions

Sanctions in General

81. The annual report by the Minister of Foreign Affairs and International Trade and the Minister of Justice to Parliament on the implementation of the Convention and the enforcement of the CFPOA, pursuant to section 12 of the CFPOA, will provide information about sanctions and charges under the

CFPOA for both natural and legal persons[92], and the Canadian authorities indicate that efforts will continue to gather the relevant information for the purpose of the report. It is, however, not clear whether further information that would assist in evaluating the effectiveness of those sanctions, such as the amount of the bribe and the proceeds of bribery, will be included. In any case, at this time, in the absence of convictions under the CFPOA, an analysis of the effectiveness of sanctions is not possible. A certain amount of information has been provided about the sanctions that have been imposed in nine domestic bribery-related cases under the Criminal Code dating from 1977 to 1994[93]. The terms of imprisonment imposed ranged from 90 days intermittent to 3 years (with the majority of terms in the 6 to 12 month range). Fines were imposed in two cases; one of $7,500 (or 6 months on each count of two) and one of $12,000 (and one day, or in the alternative 12 months). In addition, the lead examiners note that at this time statistical information compiled by the Government of Canada about sanctions for other offences does not distinguish between natural and legal persons, and has been collected from the provincial and territorial courts of nine out of thirteen jurisdictions[94], representing 80 per cent of the overall caseload in Canada.

Plea Agreements

82. Statistical information collected by the Canadian government on sanctions does not differentiate between convictions that have been obtained through the plea-bargaining process and those through ordinary trial proceedings.[95] Since it is estimated that plea-bargaining is employed in 80 to 90 per cent of criminal cases[96], it is likely that most CFPOA cases will be dealt with through this process[97]. For this reason, essential information is needed to be able to determine whether sanctions under the CFPOA that have been imposed through plea-bargaining are effective, proportionate and dissuasive.

Forfeiture

83. Pursuant to section 426.37 of the Criminal Code, where an offender is convicted of a "designated offence" (which includes an offence under the CFPOA)[98] and the court is imposing the sentence, the court

---

92. Note that it is feasible that offences of bribing a foreign public official could be charged under section 426 of the Criminal Code, but that these cases would not be described in the annual report on the CFPOA unless charges had also been laid under the CFPOA.

93. These sanctions were imposed pursuant to the following Criminal Code sections: 119(1)(b) 120(b), 121(1)(a), 121(1)(b), and 123(1)(a).

94. The Canadian authorities have provided statistical information obtained from the Adult Criminal Court Survey about the offences of fraud, false pretence, forgery, the falsification of books and records, false prospectus, and failure of a trader to keep accounts. In addition, fraud statistics from the Ontario Court of Justice have been provided regarding the number of charges "received" and "disposed" from 1998 to 2002.

95. The FPS stated that it is likely that statistical information on plea-bargaining is kept in some provincial jurisdictions.

96. Plea Bargaining (Victims of Violence, 2002). The representative of the FPS agreed that a fairly large proportion of cases are dealt with this way.

97. The FPS Deskbook contains guidelines on the process, including the need to keep a record of plea discussions, the types of pleas that are acceptable, and practices that are not acceptable, but does not contain guidelines on the appropriate ranges for specific offences. In addition, although the FPS indicated that an agreed statement of facts could be deposited with the court, this is not required, and, there are no rules concerning when it would be appropriate to provide the court with a pre-sentence report to ensure that the court has sufficient offender-specific information to ensure that the plea-agreement is appropriate.

98. The definition of a "designated offence" under section 462.3 (1) of the Criminal Code includes "an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation".

has the authority to order forfeiture of the proceeds of crime upon application by the Attorney-General[99]. An official from the FPS explained that members of the FPS would automatically apply for forfeiture where such a request was supported by the evidence. Furthermore, he advised the lead examiners that the provincial attorneys-general take a less active role in this respect, but that they are changing.

Commentary

At this time, it is not possible to assess the effectiveness of the criminal penalties for the offence of bribing a foreign public official under the CFPOA, due to the absence of convictions. The lead examiners therefore recommend that this issue be followed-up once there has been sufficient practice under the CFPOA. In addition, they recommend that, in order to be able to make a complete assessment of Canada's implementation in practice of Article 3 of the Convention on sanctions, the Canadian authorities compile information in a manner that differentiates between the sanctions for legal persons versus natural persons and includes information about the forfeiture of bribes and the proceeds of bribery, and that they consider differentiating between the sanctions obtained through the plea-bargaining process as opposed to those obtained through ordinary trial proceedings.

3.2 Non-Criminal Consequences

84. The CFPOA does not impose additional civil or administrative sanctions upon a person convicted of the bribery of a foreign public official; nor are specific civil or administrative sanctions provided elsewhere in the law. However, the policy approach of certain key agencies of the Canadian government involved in providing contracting and financing opportunities to Canadian firms, where their clients have been convicted of the bribery of foreign public officials is worth reviewing. Thus the lead examiners looked at the following agencies: 1. Export Development Canada (EDC), 2. The Canadian International Development Agency (CIDA), which is involved in providing contracting opportunities to Canadian firms operating in developing countries; and 3. Public Works and Government Services Canada, the central federal agency involved in public procurement.

85. EDC prepared a written presentation on how it addresses the issue of foreign bribery under the CFPOA for the purpose of the on-site visit.[100] This presentation restates the affirmation in EDC's Code of Business Ethics that "EDC will not support a transaction that involves the offer or giving of a bribe, and will exercise reasonable diligence and care not to support unknowingly such a transaction". It also provides an Action Statement on Bribery and Corruption outlining the steps that must be carried out by EDC staff involved in processing applications for support, including the obtaining of an anti-corruption declaration and informing applicants about the legal consequences of bribery. With respect to the policy regarding applicants convicted of foreign bribery, the presentation states that EDC's response will be

99. In fact, under section 462.37 (1) the court shall order forfeiture where satisfied on a balance of probabilities that any property is the proceeds of crime and that the designated offence was committed in relation to that property. And under subsection (2), the court may make an order of forfeiture where satisfied beyond a reasonable doubt that the property is proceeds of crime, where the evidence does not establish to the satisfaction of the court that the designated offence of which the offender is convicted, was committed in relation to the property in question.

100. OECD Anti-Corruption Convention: Phase 2 On-Site Monitoring Visit (EDC, Anti-Corruption Program, 18 February 2002).

determined by factors including the deterrent effect of the sentence and subsequent actions demonstrating rehabilitation.[101]

86. CIDA requires all contribution agreements to contain a clause in which the company in question "declares and guarantees that no offer, gift or payment, consideration or benefit of any kind, which constitutes an illegal or corrupt practice, has been made or will be made to anyone (by the company), either directly or indirectly, as an inducement or reward for the award or execution of (the) Contribution Agreement". According to an administrative bulletin (99-7), this clause must be inserted in all aid-related contracts, including abridged contracts, standing offers and contribution agreements of all branches. Nevertheless, there were some questions about CIDA's policy in cases where wrongdoing is established after funding has been provided. Representatives of CIDA explained that in cases where, for instance, a company had been convicted of bribery in relation to the contract with CIDA, a forensic audit would be performed to determine whether the specific funds provided by CIDA for a project had been used to bribe the foreign public official. However, it is not evident that such an audit could conclusively determine whether CIDA funds have been used as part of a bribe. The Canadian authorities indicate that CIDA's auditors are exploring the possibility of conducting joint audits with other donors to more effectively verify and trace the use of funds.

87. According to a document entitled "Instructions to Bidders/Contractors" issued by Public Works and Government Services Canada (PWGSC), Canada may reject a bid for a public procurement contract where the bidder or any employee or subcontractor included as part of the bid has been convicted under section 121 ("frauds on the government"), 124 ("selling or purchasing office"), or 418 ("selling defective stores to Her Majesty") of the Criminal Code. The PWGSC may also reject a bid where, with respect to current or prior transactions with the Government of Canada, evidence, satisfactory to Her Majesty, has been received of "fraud, bribery, fraudulent misrepresentation or failure to comply with any law protecting individuals against any manner of discrimination". Thus, authority is not provided to reject a bid where there is a conviction of foreign (or domestic) bribery with respect to a prior transaction that was not with the Government of Canada.

Commentary

In light of the absence in Canada of additional civil or administrative sanctions upon persons and entities convicted of the bribery of a foreign public official, the lead examiners recommend that the Canadian authorities consider revisiting the policies of agencies such as EDC, CIDA and PWGSC on dealing with applicants convicted of bribery and corruption for determining whether these policies are sufficiently effective for the purpose of deterring companies that deal with them from engaging in the bribery of foreign public officials.[102]

C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

1. Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Canada, the Working Group (i) makes the recommendations to Canada

101 The policy of EDC concerning applicants convicted of bribing a foreign public official is discussed in more detail in footnote 52.

102 This Commentary shall not be interpreted as a suggestion that the policies of EDC do not meet the standards set out in the Action Statement (of the OECD Working Party on Export Credits and Credit Guarantees) on Bribery and Officially Supported Export Credits. However, meeting the standards under the Action Statement does not necessarily imply that the standards under the 1997 Recommendation have also been met.

under part 1, and (ii) will follow-up the issues in part 2 when there has been sufficient practice in Canada in respect of cases involving the bribery of foreign public officials.

1. Recommendations

1.1 Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

2. The Working Group recommends that, with respect to promoting awareness of the Convention and the CFPOA, Canada establish a more systematic and coordinated approach to promoting awareness, and increase efforts to promote awareness of the CFPOA in all the government agencies involved in the implementation of the CFPOA. (Revised Recommendation, Paragraph I)

3. Concerning the investigation and prosecution of cases involving the bribery of foreign public officials, the Working Group recommends that Canada consider establishing a coordinating role for one of the principal agencies responsible for the implementation of the CFPOA for purposes including the following: 1. Collecting information from the police and prosecutorial authorities at the federal and provincial levels about investigations and prosecutions to ensure that, for instance, resources are not duplicated where more than one authority has jurisdiction; and 2. Maintaining specialized knowledge on the CFPOA to be available to the provincial (and where applicable, municipal) authorities involved in the enforcement of the offence. (Revised Recommendation, Paragraph I)

4. With respect to the prevention and detection of the bribery of foreign public officials through accounting requirements, external audit and internal company controls, the Working Group recommends that Canada:

    a) Consider the introduction of amendments to the federal Canada Business Corporations Act (CBCA) to prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation, and consult with the provinces in an effort to ensure that the provincial legislation also meets these standards [Convention, Article 8.1; Revised Recommendation, Paragraph V. A. (i)]

    b) Review the relevant legislation in consultation with the provinces to consider: 1. whether the requirements to submit to an independent external audit are adequate, in view of the rule that permits large private corporations to exempt themselves from the requirement; and 2. broadening the prohibitions for participating in audits in order to improve auditor independence. [Revised Recommendation, Paragraphs V. B. (i) and (ii)]

    c) Consider requiring the auditor to report indications of foreign bribery to the competent authorities.[103] [Revised Recommendation, Paragraph V. B. (iv)]

    d) Encourage the development and adoption of adequate internal company controls, including standards of conduct. [Revised Recommendation, Paragraph V. C. (i)]

5. With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Canada:

    a) Consider clarifying the policy statements on reporting wrongdoing and illegal acts in the workplace with a clear statement that an employee may either follow the internal disclosure procedure or report an offence directly to the law enforcement authorities, and that there

103 The Working Group notes that this is a general issue for many Parties.

should be no administrative or disciplinary measures applied to an employee who, in good faith, does decide to report directly to the law enforcement authorities. (Revised Recommendation, Paragraph I)

b) Issue specific instructions to foreign representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Canada.[104] (Revised Recommendation, Paragraph I)

c) Review the prohibition under the federal Income Tax Act against reporting non-tax criminal offences detected in the course of tax audits performed by the Canadian Customs and Revenue Agency to the law enforcement authorities. (Revised Recommendation, Paragraph I)

d) Review the disclosure policy and procedure of the Canadian International Development Agency (CIDA) and Export Development Canada (EDC) to ensure that there is disclosure to the law enforcement authorities or the Federal Prosecution Service of the Department of Justice, where, in the course of transacting business with a company, credible evidence arises that a violation of the CFPOA has occurred.[105] (Revised Recommendation, Paragraph I)

1.2 Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution and Sanctioning of Foreign Bribery Offences

6. The Working Group recommends that Canada:

a) Consider issuing some form of guidance to assist in the interpretation of the exception under section 3 (4) of the CFPOA for facilitation payments. (Convention, Article 1; Commentary 9 to Convention)

b) Consider amending the part of the definition of "business" in section 2 of the CFPOA that results in the requirement that the purpose of the bribe be for obtaining an advantage in the course of business for profit. (Convention, Article 1)

c) Reconsider the decision to not establish nationality jurisdiction over the offence of bribing a foreign public official. In the event that Canada does not change its position, the Working Group recommends that this issue continue to be monitored. (Convention, Article 4.2 and 4.4; Phase 1 Evaluation)

d) With respect to prosecutorial discretion and the guidelines in the FPS Deskbook, clarify that, in investigating and prosecuting the bribery of a foreign public official, there are no proper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved, and establish guidance to prosecutors on how to proceed when they decline to prosecute a case that potentially involves one of the public interest factors listed in the FPS Deskbook. (Convention, Article 5)

---

104 The Working Group notes that this is a general issue for many Parties.

105 The Working Group notes that this is an issue for other Parties. This recommendation shall not be interpreted as a suggestion that the policies of EDC do not meet the standards set out in the Action Statement on Bribery and Officially Supported Export Credits.

e) Consider revisiting the policies of agencies such as Export Development Canada (EDC), the Canadian International Development Agency (CIDA) and Public Works and Government Services Canada (PWGSC) on dealing with applicants convicted of bribery and corruption, given that Canada does not impose additional civil or administrative sanctions upon a person or company convicted of the bribery of a foreign public official. [Convention, Article 3.4, Revised Recommendation, Paragraphs II v) and VI ii)][106]

f) Compile statistical information on the sanctions for the offence of bribing a foreign public official as well as related omissions and falsifications in respect of the books, records and accounts of companies, in a manner that differentiates between the sanctions for legal persons versus natural persons and includes information about the forfeiture of bribes and the proceeds of bribery. It is also recommended that Canada consider differentiating between the sanctions obtained through the plea-bargaining process and those obtained through ordinary trial proceedings (Convention, Article 3.1, 3.3 and 8.2).

2. Follow-up by the Working Group

7. The Working Group will follow-up the following issues once there has been sufficient practice under the CFPOA:

a) Application of the revised law on the liability of legal persons [Bill C-45 "An Act to amend the Criminal Code (criminal liability of organizations)"], which was introduced in the House of Commons on 12 June 2003, to CFPOA cases. (Convention, Article 2; Phase 1 Evaluation)

b) Application of the exception under section 3 (3) of the CFPOA for reasonable expenses incurred in good faith.

c) Application of sanctions to natural and legal persons for offences under the CFPOA as well as related omissions and falsifications in respect of the books, records and accounts of companies. [Convention, Article 3.1, 3.3 and 8.2; Phase 1 Evaluation; Revised Recommendation, Paragraph V. A. (ii)]

8. In addition, the Working Group will follow-up implementation of the various initiatives[107] announced by the Government of Canada following the on-site visit.

---

106 This recommendation shall not be interpreted as a suggestion that the policies of EDC do not meet the standards set out in the Action Statement (of the OECD Working Party on Export Credits and Credit Guarantees) on Bribery and Officially Supported Export Credits.

107 Following the on-site visit, the Canadian authorities announced that it would be undertaking initiatives including the following:

- Ensure that the DFAIT media relations division has an accurate understanding of the CFPOA (in response to the release of erroneous information about the application of the CFPOA to the media).
- Amend the CIDA document "Anti-Corruption Programming: A Primer" to provide accurate information about the facilitation payments exception in the CFPOA
- RCMP will take steps to add the CFPOA to the list of offences for which it has the mandate to investigate in its PROOF document.
- The CCRA began developing a section in its Audit Manual to deal with the application of section 67.5 of the Income Tax Act as it relates to outlays and expenses incurred under section 3 of the

CFPOA. As well, CCRA undertook to revise its Investigation Manual to include a reference to the CFPOA.

- Team Canada plans to add links on the CFPOA to its Export Source website and will refer to the CFPOA in the next edition of "Step-by-Step Guide to Exporting".
- Awareness training sessions will be held in order to assist federal public servants in interpreting the two policy documents regarding the internal disclosure of information on offences committed by government officials.
- The Minister of Finance of Québec announced in the budget speech of 11 March 2003 that the Québec Income Tax Act would be amended to disallow payments for the purpose of doing anything that is an offence under section 3 of the CFPOA, and that the amendment would operate retroactively to the date the CFPOA came into force.
- In order to reinforce the practice that has evolved concerning the sharing of information about cases between the police agencies, the RCMP has undertaken to work with its partners to establish a protocol whereby police agencies would inform the RCMP about cases involving the CFPOA.
- The FPS Deskbook will be amended to reinforce the recommendation already contained therein about the recording of reasons for decisions to not prosecute.
- CIDA's auditors are exploring the possibility of conducting joint audits with other donors to more effectively verify and trace the use of funds where an applicant has been convicted of bribery.
- The Government of Canada announced that on 12 June 2003 a Bill was introduced into Parliament [Bill C-46 "An Act to amend the Criminal Code (Capital Markets fraud and evidence-gathering)"], which, inter alia, 1. creates an offence of threatening or retaliating against employees who report unlawful conduct to the law enforcement authorities, and 2. establishes the authority for a justice or judge to issue general and specific production orders for the obtaining of documents from persons, including financial institutions, other than those under investigation.
- Establish a legislative and regulatory framework regarding the reporting by lawyers and legal firms of money laundering transactions to competent authorities.