


April 2015

## The Global Fight Against Foreign Bribery: Is Canada a Leader or a Laggard?

Susana C. Mijares

*Western Law*, [smijares@uwo.ca](mailto:smijares@uwo.ca)

Follow this and additional works at: <https://ir.lib.uwo.ca/uwojls>

 Part of the [Antitrust and Trade Regulation Commons](#), [Business Organizations Law Commons](#), [Comparative and Foreign Law Commons](#), [Government Contracts Commons](#), [International Business Commons](#), [International Law Commons](#), [Jurisdiction Commons](#), [Law and Economics Commons](#), [Rule of Law Commons](#), [Securities Law Commons](#), and the [Transnational Law Commons](#)

---

### Recommended Citation

Susana C. Mijares, "The Global Fight Against Foreign Bribery: Is Canada a Leader or a Laggard?", (2015) 5:4 online: UWO J Leg Stud 2 <<https://ir.lib.uwo.ca/uwojls/vol5/iss4/2>>.

This Article is brought to you for free and open access by Scholarship@Western. It has been accepted for inclusion in Western Journal of Legal Studies by an authorized editor of Scholarship@Western. For more information, please contact [tadam@uwo.ca](mailto:tadam@uwo.ca), [wlsadmin@uwo.ca](mailto:wlsadmin@uwo.ca).

---

# The Global Fight Against Foreign Bribery: Is Canada a Leader or a Laggard?

## Abstract

This paper explores international responses to foreign bribery with a specific focus on Canada's increased role in combating the issue. It outlines international anti-bribery measures and their impact on Canada's approach to foreign bribery, with an overview of Canada's anti-bribery legislation, the Corruption of Foreign Public Officials Act (CFPOA). These measures have met with international criticism, to which Canada has responded with legislative amendments. Four Canadian legal decisions since the CFPOA amendment exemplify Canada's stricter enforcement of the Act. Transparency International (TI) issued a progress report that commented on Canada's current and future role in the fight against foreign bribery. The paper concludes with an examination of Canada's 2014 anti-bribery legislation, the Extractive Sector Transparency Measures Act (ESTMA). Canada's recent measures suggest it is ready to follow international leaders in enforcing foreign bribery. This will result in more prosecutions of Canadian individuals and corporations.

This article is helpful for readers seeking to learn more about:

- foreign bribery, anti-bribery legislation, anti-bribery measures, corporate social responsibility, corruption, improper payments

Topics in this article include:

- Transparency International, United Nations, OECD Convention, foreign bribery, facilitation payments, Bribe Payers Index, Corruption Perception Index, Global Corruption Barometer, UN Global Compact, Global Corporate Sustainability Report, TRACE, Extractive Industries Transparency Initiative, EITI Standards, Foreign Affairs and International Trade Canada, OECD Working Group, nationality jurisdiction principle, Anti-Corruption Unit, Bill S-14, SNC-Lavlin Group, self-reporting

Authorities cited in this article include:

- Declaration Against Corruption and Bribery in International Commercial Transactions.
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- Corruption of Foreign Public Officials Act, SC 1998, c 34
- Extractive Sector Transparency Measures Act, SC 2014, c 39
- Foreign Corrupt Practices Act
- Bribery Act 2010, (UK) c 23
- Inter-American Convention Against Corruption
- OECD Convention Recommendations on Bribery in International Business Transactions
- Criminal Code of Canada, RSC, 1985, c C-46

- 
- United Nations Convention Against Corruption
  - R v Watts / R v Hydro-Kleen Group Inc, [2005] AJ No 568
  - R v Niko Resources Ltd (2011), 101 WCB (2d) 118 (Alta QB)
  - R. v. Griffiths Energy International, [2013] AJ No 412 (ABQB)
  - R v Karigar, 2013 ONSC 5199

**Keywords**

foreign bribery, anti-bribery legislation, anti-bribery measures, corporate social responsibility, corruption, improper payments, Transparency International, United Nations, OECD Convention, foreign bribery, facilitation payments, Bribe Payers Index, Corruption Perception Index, Global Corruption Barometer, UN Global Compact, Global Corporate Sustainability Report, TRACE, Extractive Industries Transparency Initiative, EITI Standards, Foreign Affairs and International Trade Canada, OECD Working Group, nationality jurisdiction principle, Anti-Corruption Unit, Bill S-14, SNC-Lavlin Group, self-reporting

## THE GLOBAL FIGHT AGAINST FOREIGN BRIBERY: IS CANADA A LEADER OR A LAGGARD?

SUSANA MIJARES PEÑA \*

### INTRODUCTION

In the 1990s, corruption emerged as serious global political issue,<sup>1</sup> prompting the creation of the United Nation's (UN) *Declaration Against Corruption and Bribery in International Commercial Transactions*<sup>2</sup> and the Organization for Economic Cooperation and Development's (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*<sup>3</sup> (*OECD Convention*). These conventions marked the beginning of a global attempt to combat foreign bribery.

Foreign bribery refers to “[t]he corrupt payment, receipt, or solicitation of a private favor for [foreign public] official action.”<sup>4</sup> World Bank data indicates that corrupt officials in developing countries receive \$50 to \$80 billion annually.<sup>5</sup> Further, the World Bank estimates that the global cost of corruption reaches \$1 trillion each year, which is sufficient to feed 400 million starving people for the next 27 years.<sup>6</sup>

Foreign bribery has had a particularly negative impact on low-income individuals. Corporate Social Responsibility (CSR) practices attempt to counteract this misallocation of resources by creating business practices that balance “the economic, environmental, and social imperatives without foregoing the expectations of shareholders, and give something back to the wider community.”<sup>7</sup>

Canada and other countries have taken national CSR measures to ensure that

---

Copyright © 2015 by SUSANA MIJARES PEÑA.

\* Susana Mijares Peña is a qualified lawyer in Venezuela, earning her undergraduate degree in law in 2008 at Universidad Católica Andrés Bello. She also completed her LLM degree at Osgoode Hall Law School in 2011. She is currently a third-year law student completing her J.D. degree at Western Law. Her area of concentration is international business transactions. Susana expresses her gratitude to Professor Sara Seck for her guidance in developing this paper and providing her expertise and knowledge.

<sup>1</sup> James W Williams & Margaret E Beare, “The Business of Bribery: Globalization, Economic Liberalization, and the “Problem” of Corruption” (1999) 32 *Crime, Law & Social Change* 115 at 115.

<sup>2</sup> GA Res 51/191, UNGAOR, 51st Sess, Annex 1, UN Doc A/RES/51/191 (1996), online: UNGAOR <<http://www.un.org/documents/ga/res/51/a51r191.htm>>.

<sup>3</sup> OECD Working Group on Bribery in International Business Transactions, 17 December 1997, S Treaty Doc No 105-43, reprinted in 37 *ILM* 1 (1998) [*OECD Convention*].

<sup>4</sup> Black's Law Dictionary, 9th ed, sub verbo “bribery”.

<sup>5</sup> Carl Pacini, Judyth A Swingen & Hudson Rogers, “The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials” (2002) 37 *Journal of Business Ethics* 385 at 387.

<sup>6</sup> Margot Cleveland et al, “Trends in the International Fight Against Bribery and Corruption” (2009) 90 *Journal of Business Ethics* 199 at 221.

<sup>7</sup> Mirela Popa & Irina Salanta, “Corporate social responsibility versus corporate social irresponsibility” (2014) 9 *Management & Marketing* 137 at 139.

their legal systems are adequately implementing and enforcing the aforementioned international conventions. For example, Canada enacted the *Corruption of Foreign Public Officials Act (CFPOA)* in 1999.<sup>8</sup> However, the *CFPOA* faced substantial criticism from the international community because of Canada's lack of commitment to enforcing the Act. There was only one conviction under the Act between 1999 and 2007. However, recent changes in the *CFPOA* and Canadian jurisprudence suggest that Canada is now committed to enforcing the Act and is determined to contribute to the global fight against foreign bribery.

Part one of this paper discusses the anti-bribery measures taken by various influential international entities and their impact on Canada's approach to combatting foreign bribery. Part two provides an overview of Canada's anti-bribery legislation, focusing on the legislation's development since its enactment. Part three examines the international criticism of Canada's previous, lax anti-bribery measures, and part four discusses the amendments that occurred to the *CFPOA* in response to this international criticism. Part five analyzes four Canadian legal decisions made under the amended *CFPOA*. These cases exemplify Canada's stricter enforcement of the Act. Part six examines Transparency International's (TI) latest progress report and its comments with respect to Canada's current and future role in the fight against foreign bribery.<sup>9</sup> Finally, part seven discusses Canada's most recent anti-bribery legislation, the *Extractive Sector Transparency Measures Act (ESTMA)*, which was enacted in 2014.<sup>10</sup>

## I. INTERNATIONAL ANTI-BRIBERY TRENDS

Both the UN and the international community have increasingly recognized the adverse impact corruption has on the economic development of nations and on the protection of human rights.<sup>11</sup> Evidence shows that corrupt practices impede the government's ability to allocate resources to promote society's best interests. As a result, the most vulnerable members of society do not receive access to basic services, such as health, education, and welfare.<sup>12</sup> Corrupt practices also affect fundamental equality and fair trial rights, since disadvantaged sectors of society lack the resources to bribe corrupt public officials and politicians.<sup>13</sup>

---

<sup>8</sup> SC 1998, c 34 [*CFPOA*].

<sup>9</sup> Fritz Heimann et al, *Exporting Corruption Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery Annual Report* (2013) Transparency International [2013 Progress Report].

<sup>10</sup> SC 2014, c 39, s 376 [*ESTMA*].

<sup>11</sup> United Nations Office of the High Commissioner for Human Rights, "Human Rights and Anti-Corruption", online: OHCHR

<<http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx>>.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

Different social and cultural practices have made it difficult to develop a universal understanding of corruption. For example, delivering a red envelope full of cash to a public official may constitute a clear bribe in Canada, yet in China, it would be considered part of the *hong bao* tradition.<sup>14</sup> For this reason, international law has proved essential in developing a common understanding of unethical and illegal public and private conduct.<sup>15</sup>

TI's *Business Principles for Countering Bribery* defines bribery as “an offer or receipt of any gift, loan, fee, reward or other advantage to or from any person as an inducement to do something which is dishonest, illegal or a breach of trust, in the conduct of the enterprise’s business.”<sup>16</sup> Examples of bribery include the offering of a gift, favour, promise, or advantage to a public official or another person or entity related to a public official. These offers are usually made either to obtain government benefits or to avoid the costs related to business operations.<sup>17</sup> The term “foreign public official” refers to “any person in a foreign country who holds a legislative, administrative, or judicial office, or who exercises a public function, including a public agency or enterprise.”<sup>18</sup>

Three significant historical developments brought the issue of foreign bribery to light, causing the international community to respond with anti-bribery legislation. First, there was a shift in the power balance between governments and the public as a result of increased access to higher education and the rise of the information age.<sup>19</sup> Second, the end of the Cold War, the emergence of an integrated global economy, and the expansion of democracy have led to stronger national medias and an increased ability to hold politicians accountable. Finally, the United States’ anti-corruption lobby has significantly influenced the world’s approach to this issue.<sup>20</sup>

This section will discuss some of the most influential international developments and initiatives, and explain how these initiatives have influenced Canada’s more stringent attitude towards foreign bribery.

---

<sup>14</sup> Cleveland et al, *supra* note 6 at 221.

<sup>15</sup> Heather Manweiller & Bryan Schwartz, “A Proposal for an Anti-corruption Dimension to the FTAA” (2001) 1 *Asper Rev of Int’l Bus and Trade Law* 67 at para 5.

<sup>16</sup> Transparency International, *Business Principles for Countering Bribery: A Multi-Stakeholder Initiative Led by Transparency International* (2009) Transparency International at 5, online: Transparency International <[http://www.transparency.org/whatwedo/pub/business\\_principles\\_for\\_countering\\_bribery](http://www.transparency.org/whatwedo/pub/business_principles_for_countering_bribery)>.

<sup>17</sup> Pacini, Swingen & Rogers, *supra* note 5 at 386, citing Rose-Ackerman, “Corruption as an International Policy Problem: Overview and Recommendations”, in K. Elliott (ed), *Corruption and the Global Economy* (Institute for International Economics, Washington, DC) 175–233.

<sup>18</sup> *Ibid* at 397.

<sup>19</sup> Susan M Hutton & Paul Beaudry, “Canada Takes Aim at Foreign Corruption” (2011) at 1, online: Stikeman Elliot <[http://www.stikeman.com/2011/images/core/ForeignCorruption\\_ALM.pdf](http://www.stikeman.com/2011/images/core/ForeignCorruption_ALM.pdf)>.

<sup>20</sup> *Ibid*.

## US Anti-Bribery Legislation

The US was a pioneer in the fight against foreign bribery. It was the first country to pass extraterritorial legislation prohibiting the bribery of foreign public officials. In response to the US Securities and Exchange Commission's (USSEC) finding of more than \$300 million USD in questionable payments between foreign officials and American companies,<sup>21</sup> the US enacted the *Foreign Corrupt Practices Act (FCPA)*<sup>22</sup> in 1977. The *FCPA* prohibits the payment, offer of payment, or gift to a foreign official in order to obtain or retain business in that country.<sup>23</sup> However, unlike the United Kingdom's *Bribery Act 2010*,<sup>24</sup> the *FCPA* permits "greased" or facilitation payments. These payments are meant to "expedite or to secure the performance of a routine governmental action by a foreign political official, political party, or party official."<sup>25</sup>

After the enactment of the *FCPA*, companies reported a decrease in business operations, claiming that the Act caused a competitive disadvantage to American corporations operating abroad.<sup>26</sup> The US Commerce Department and various US intelligence agencies estimated that between 1994 and 1995, American businesses lost \$11 billion in potential revenue in comparison to other competitors involved in the bribery of foreign officials.<sup>27</sup> As a result, the US government commenced a strong campaign to persuade other countries and international organizations to implement legal measures similar to the *FCPA*.

The US has significantly increased *FCPA* enforcement, resulting in more than 200 civil or criminal proceedings since 2007 and more than \$3.7 billion in fines.<sup>28</sup> Since 2007, there have been 98 *FCPA* enforcement actions listed by the USSEC

---

<sup>21</sup> Lori Ann Wanlin, "The Gap Between Promise and Practice in the Global Fight Against Corruption" (2006) *Asper Rev of Int'l Bus and Trade Law* 209 at para 3.

<sup>22</sup> Pub L No 95-213, 91 Stat 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g) to (h), 78dd-1, 78dd-2, 78dd-3, 78ff), amended by Foreign Corrupt Practices Act Amendment of 1988, Pub L No 100-418, 102 Stat 1107, 1415 (1988) (codified at §§ 78dd-1 to 78dd-3, 78ff), and the International Anti-Bribery and Fair Competition Act of 1998, Pub L No 105-366, 112 Stat 3302 (1998) (codified at §§ 78dd-1 to 78dd-3, 78ff) [*FCPA*].

<sup>23</sup> Sara Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?" (2008) 46 *Osgoode Hall Law Journal* 565 at 569.

<sup>24</sup> (UK) c 23, online: The National Archives <<http://www.legislation.gov.uk/ukpga/2010/23/contents>> [*Bribery Act 2010*].

<sup>25</sup> *FCPA*, *supra* note 22, s 78dd-2(b).

<sup>26</sup> Wanlin, *supra* note 21 at para 5.

<sup>27</sup> Hutton & Beaudry, *supra* note 19 at 2, citing Patrick Glynn, Stephen J Kobrin & Moisés Naím, "The Globalization of Corruption" in Kimberly Ann Elliott, ed, *Corruption and the Global Economy* (Washington: Institute for International Economics, 1997).

<sup>28</sup> Hutton & Beaudry, *supra* note 19 at 1, citing Gibson Dunn, "2011 Mid-Year FCPA Update" (11 July 2011), online: Gibson Dunn <<http://www.gibsondunn.com/publications/Documents/2011Mid-YearFCPAUpdate.pdf>>; Philip Urofsky, "Patterns in the Enforcement of the Foreign Corrupt Practices Act" (July 2011), online: Shearman & Sterling <<http://shearman.symplcity.com/files/ef6/ef696d76ef6a9b953f4cf5c1aeb3910a.pdf>>.

alone.<sup>29</sup> Despite initial concerns, there is now sufficient evidence to conclude that the *FCPA* has not constituted a significant threat to the competitiveness of US corporations.<sup>30</sup>

The *FCPA* was the first law regulating multinational corporations' corrupt behaviours while operating outside of their parent jurisdiction. Although the *FCPA* received an unwelcome reception, this unilateral measure resulted in a global shift towards addressing foreign bribery.

### **International Governmental Organizations (IGOs): Binding International Treaties**

#### *a) Inter-American Convention Against Corruption*

The first international anti-corruption reaction to the *FCPA* was the *Inter-American Convention Against Corruption (IACAC)*, which was adopted by the Organization of American States (OAS) in 1996.<sup>31</sup> The OAS is the world's oldest regional organization. It comprises "all 35 independent states of the Americas and constitutes the main political, juridical, and social governmental forum in the Hemisphere."<sup>32</sup>

The *IACAC* applies to "acts of corruption," a term which includes bribery.<sup>33</sup> It also explicitly regulates the issue of transnational bribery.<sup>34</sup> Similar to the *FCPA*, the convention requires state parties to adopt provisions to criminalize both foreign and domestic bribery. It also requires financial disclosure and transparency in accounting practices, as well as the development of guidelines for international cooperation in business practices. Despite the *IACAC*'s international significance, it lacks a strong monitoring system to control these undertakings, which makes it a weak international treaty.<sup>35</sup>

#### *b) OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*

The OECD is an international economic organization founded in 1968. Its major concern is "to promote policies that will improve the economic and social well-being of people around the world."<sup>36</sup> It currently has 34 member countries, including all G8

<sup>29</sup> US Securities and Exchange Commission, "SEC Enforcement Actions: FCPA Cases", online: USSEC <<http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>>.

<sup>30</sup> Williams & Beare, *supra* note 1 at 137.

<sup>31</sup> 29 March 1996, Organization of American States, 35 ILM 724 (1996), online: OAS <<http://www.oas.org/juridico/english/treaties/b-58.html>> [*IACAC*].

<sup>32</sup> "About the OAS: Who We Are", online: Organization of the American States <[http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp)>.

<sup>33</sup> *IACAC*, *supra* note 31, art VI(1)(b).

<sup>34</sup> *IACAC*, *supra* note 31, art VIII.

<sup>35</sup> Wanlin, *supra* note 21 at para 7.

<sup>36</sup> "The Organisation for Economic Co-operation and Development", online: OECD <<http://www.oecd.org/about/>>.



participants. This organization is said to have a greater economic influence than the OAS, as most of its members are high-income countries.<sup>37</sup> In fact, investors within OECD member countries have decreased their investment in countries characterized as having corrupt systems.<sup>38</sup>

In 1994, the OECD adopted the *OECD Convention Recommendations on Bribery in International Business Transactions*.<sup>39</sup> Since the convention included only non-binding recommendations, its impact fell below the expected objectives of the US.<sup>40</sup> As a result, the OECD adopted the *OECD Convention* in 1997. In addition to the 34 OECD member countries—including Canada—six non-member countries have adopted the *OECD Convention*.<sup>41</sup>

The convention requires member countries to enact domestic legislation criminalizing any improper advantage in the conduct of international business transactions.<sup>42</sup> Those found guilty of corrupting a foreign public official must be punished with “effective, proportionate and dissuasive criminal penalties,” similar to those for the corruption of national public officials.<sup>43</sup> Members must also take legal measures to request books and records, financial statement disclosures, and accounting and auditing standards in order to permit efficient regulation of companies and individuals operating abroad.<sup>44</sup> Finally, a party must “either . . . extradite its nationals or . . . prosecute its nationals for the offence of bribery of a foreign public official.”<sup>45</sup>

The convention was initially criticized for permitting “grease” or facilitation payments for routine government action. However, in November 2009, the OECD changed its position with respect to this matter; it recommended that companies incorporated within OECD member countries’ territories prohibit or discourage the use of such payments through ethics and compliance programs.<sup>46</sup>

The *OECD Convention* was one of the most significant steps forward in the effort to fight bribery in international business operations because its 34 member countries (and six non-member countries) account for approximately two-thirds of world exports.<sup>47</sup>

---

<sup>37</sup> Wanlin, *supra* note 21 at para 8.

<sup>38</sup> Cleveland et al, *supra* note 6 at 200.

<sup>39</sup> OECD Council, Recommendation of the Council on Bribery in International Business Transactions, 829th Sess, C(94)75 (Paris: OECD, 1994).

<sup>40</sup> A Timothy Martin, “Corruption and Improper Payments: Global Trends and Applicable Laws” (1998) 36 *Alta L Rev* 416 at para 49.

<sup>41</sup> *Ibid.*

<sup>42</sup> *OECD Convention*, *supra* note 3, art 1.

<sup>43</sup> *Ibid.*, art 3(3).

<sup>44</sup> *Ibid.*, art 8.

<sup>45</sup> Wanlin, *supra* note 21 at para 27, citing *OECD Convention*, *supra* note 3, art 10(3).

<sup>46</sup> R Christopher Cook & Stephanie L Connor, “OECD Calls for an End to Facilitating Payments Exception” (December, 2009), online: Jones Day <[http://www.jonesday.com/oecd\\_calls/](http://www.jonesday.com/oecd_calls/)>.

<sup>47</sup> Transparency International, “Exporting Corruption: Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery” (2014), online: Transparency International

The convention's influence is clearly reflected in the Canadian legal system. When the convention came into force, the *Criminal Code of Canada (Criminal Code)* did not have a distinct provision regulating foreign bribery of public officials. The *Criminal Code* covered only "improper payments" to federal and provincial government officials.<sup>48</sup> However, in order to ratify the *OECD Convention* and its objectives, Parliament enacted the *CFPOA* in 1999.

c) *United Nations Convention Against Corruption*

The *United Nations Convention Against Corruption*<sup>49</sup> (*UNCAC*) came into force on December 14, 2005. It represented another remarkable development in combatting bribery. The convention sent a clear message regarding the international community's commitment to preventing and controlling corruption. Like the *OECD Convention*, the *UNCAC* requires member countries to establish criminal offences and implement other measures to regulate corruptive acts, including bribery, in cases where domestic law does not regulate them already.<sup>50</sup> Particularly, it sought to amend taxation laws to ensure that bribes were no longer tax deductible in any country. The practice of deducting bribes was common in several European jurisdictions.<sup>51</sup>

Article 15 regulates the bribery of national public officials, and article 16 regulates the bribery of foreign public officials and officials of public international organizations. Both of these articles demand the adoption of necessary measures to criminalize public officials receiving any type of undue advantage, as well as those persons directly or indirectly offering it undue advantage.<sup>52</sup>

The *UNCAC* is the only legally binding international instrument to combat corruption.<sup>53</sup> Therefore, powerful countries that are not signatories, such as China and India, are still bound by the convention and are required to adopt efficient measures for the prevention of corruption.<sup>54</sup> To assist in the effective implementation of the instrument by all member countries, the *UNCAC* created the Implementation Review

---

<[http://www.transparency.org/whatwedo/publication/exporting\\_corruption\\_progress\\_report\\_2014\\_assessing\\_enforcement\\_of\\_the\\_oecd](http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2014_assessing_enforcement_of_the_oecd)>.

<sup>48</sup> Juliette D'Hollander, "Ethics in Business: The New OECD Convention on Bribery" (1999) 33 RJT 147, n 2.

<sup>49</sup> 9 December 2003, 43 ILM 37 (entered into force 14 December 2005), online: UNODC <[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)> [*UNCAC*].

<sup>50</sup> "United Nations Convention against Corruption: Background of the United Nations Convention against Corruption", online, UNODC <<http://www.unodc.org/unodc/en/treaties/CAC/>>.

<sup>51</sup> Cleveland et al, *supra* note 6 at 205.

<sup>52</sup> *UNCAC*, *supra* note 49, arts 15-16.

<sup>53</sup> Canada became a signatory to the *UNCAC* on May 21, 2004; however, it was not until October 2, 2007 that it ratified this Convention. See "United Nations Convention against Corruption", online: UNODC Signature and Ratification Status as of 12 November 2014

<<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>.

<sup>54</sup> Cleveland et al, *supra* note 6 at 205-206.

Group.<sup>55</sup> The *UNCAC* is a unique tool for developing a global response to the problem of bribery.<sup>56</sup>

### Initiatives of Non-governmental Organizations

#### a) *Transparency International*

TI was founded in 1993. It has been a leader in transforming the discussion of corruption “from a taboo topic to a talking point.”<sup>57</sup> TI’s mission is to “stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society.”<sup>58</sup> In 1994, the organization’s recommendations significantly influenced the final implementation of the *OECD Convention*.<sup>59</sup>

TI consists of 100 chapters of established independent sub-organizations that combat corruption in their respective countries. These chapters collaborate with partners in governments, businesses, and civil society to monitor and promote the implementation of the *OECD Convention*.<sup>60</sup> In TI’s annual reports—the “Bribe Payers Index” (BPI)—TI ranks the world’s wealthiest countries by the propensity of their corporations to engage in bribery abroad. These reports also identify the worst offenders. To calculate the final index results, TI uses information provided by senior business executives from developed and developing countries.<sup>61</sup> Each country is given a score ranging from zero to ten. A ten indicates that a country’s domestic companies never engage in bribery abroad. A zero indicates that a country’s companies always engage in bribery abroad.<sup>62</sup>

---

<sup>55</sup> UNODC, “Mechanism for the Review of Implementation of the United Nations Convention against Corruption”, online: UNODC <<http://www.unodc.org/unodc/en/treaties/CAC/IRG.html>>.

<sup>56</sup> UNODC, “UNODC’s Action against Corruption and Economic Crime”, online: UNODC <<http://www.unodc.org/unodc/en/corruption/index.html?ref=menu>> [UNODC].

<sup>57</sup> Transparency International, “Mission, Vision and Values”, online: Transparency International <[http://www.transparency.org/whoweare/organisation/mission\\_vision\\_and\\_values](http://www.transparency.org/whoweare/organisation/mission_vision_and_values)>.

<sup>58</sup> UNODC, *supra* note 56.

<sup>59</sup> Transparency International, “Our History: 1993 in the Beginning”, online: Transparency International <<http://www.transparency.org/whoweare/history>>.

<sup>60</sup> Transparency International, “Our Organisation: Overview”, online: Transparency International <<http://www.transparency.org/whoweare/organisation>>.

<sup>61</sup> Transparency International, “Bribe Payers Index: First Launched in 1999, the Bribe Payers Index Evaluates the Supply Side of Corruption – The Likelihood of Firms from The World’s Industrialised Countries to Bribe Abroad”, online: Transparency International <<http://www.transparency.org/research/bpi/overview>>.

<sup>62</sup> Deborah Hardoon & Finn Heinrich, *Bribe Payers Index Report 2011* (2011) Transparency International at 28, online: Transparency International <<http://www.transparency.org/bpi2011/results>> [Bribe Payers Index Report 2011].

Canada ranked sixth in the 2011 BPI, indicating it no longer ranked as a top country for honest overseas business practices. Canada is now positioned in a middle-ranked position among Western countries.<sup>63</sup>

TI's other important reports are the "Corruption Perception Index" and the "Global Corruption Barometer." In a recent report, "Exporting Corruption: OECD Progress Report 2013," TI concluded that some developed countries, including Canada, have taken "limited or no steps to fight foreign bribery."<sup>64</sup>

Unfortunately, TI's reports are non-binding with respect to CSR practices.<sup>65</sup> However, TI's work provides an adequate universal approach with which to attack the global issues caused by foreign bribery, especially since the enforcement of CSR standards is largely enforced through soft law.<sup>66</sup> Ultimately, TI's work has been, and will continue to be, fundamental for the enactment of mandatory anti-bribery legislation in countries like China, India, and Russia, which all lack this legislation.<sup>67</sup>

TI's surveillance has also been fundamental in combatting foreign bribery. Unlike most CSR initiatives, TI's monitoring mechanisms provide effective awareness of the standards that corporations should implement in order to comply with emerging universal CSR corruption standards.<sup>68</sup> Such follow-up mechanisms are necessary in order to "maintain momentum and commitment."<sup>69</sup>

TI's reports force governments from all countries to recognize corruption. A low score reflects an unfair system for awarding contracts, limited opportunity to develop a competitive private sector, and a constant reputational and financial risk for investors.<sup>70</sup> TI's past comments with respect to Canada's foreign bribery measures have had a significant impact on the Canadian government's recent amendments to its domestic corruption legislation and enforcement.

---

<sup>63</sup> Julian Sher, "Canada Loses Ground on Bribery Ranking", *The Globe and Mail* (1 November 2011), online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/canada-loses-ground-on-bribery-ranking/article2221891/>>.

<sup>64</sup> Transparency International, "Turning a Blind Eye to Bribing Foreign Officials" (7 October 2013), online: Transparency International <[http://www.transparency.org/news/feature/turning\\_a\\_blind\\_eye\\_to\\_bribing\\_foreign\\_officials](http://www.transparency.org/news/feature/turning_a_blind_eye_to_bribing_foreign_officials)>.

<sup>65</sup> Soroya Brantley, "Corporate social responsibility" (2011) 18 *Network Journal* 24 at 24-25.

<sup>66</sup> Adefolake Adeyeye, "Universal Standards in CSR: Are We Prepared?" (2011) 11:1 *Corporate Governance* 107 at 116.

<sup>67</sup> Cleveland et al, *supra* note 6 at 222.

<sup>68</sup> Adeyeye, *supra* note 66 at 114.

<sup>69</sup> Transparency International, "UNCAC Review Mechanism: Up and Running but Urgently Needing Improvement" (25 November 2013), online: Transparency International <[http://www.transparency.org/news/feature/uncac\\_review\\_mechanism\\_up\\_and\\_running\\_but\\_urgently\\_needing\\_improvement](http://www.transparency.org/news/feature/uncac_review_mechanism_up_and_running_but_urgently_needing_improvement)>.

<sup>70</sup> Transparency International, "How do Companies from your Country Behave Abroad?", online: Transparency International <<http://www.transparency.org/bpi2011/results>>.

## United Nations Initiatives

### a) *The United Nations Global Compact*

The United Nations Global Compact has played an important role in developing guidelines and standards that regulate the conduct of transnational corporations operating inter-jurisdictionally. Its complementary and collaborative nature, which promotes a sustainable and inclusive global economy, is often described as a “learning network.”<sup>71</sup> This initiative is a principle-based framework for businesses that spells out its ten principles in the areas of human rights, labour, the environment, and anti-corruption. It consists of more than 10,000 companies from over 140 countries, including 83 Canadian organizations.<sup>72</sup> It is the world’s largest CSR initiative aimed at ensuring that globalization benefits both citizens and markets.<sup>73</sup>

The participants of the UN Global Compact voluntarily organize their operations and strategies in accordance with these ten universally accepted principles.<sup>74</sup> On June 24, 2004, the participant countries adopted Principle Ten, which states that: “[b]usinesses should work against corruption in all its forms, including extortion and bribery.”<sup>75</sup> Three measures are recommended to best implement this principle:

1. Internal: introduce anti-corruption policies and programs within organizations and business operations.
2. External: report on the work against corruption in the annual Communication on Progress, sharing experiences and best practices through the submission of examples and case stories.
3. Collective: join forces with industry peers and other stakeholders.<sup>76</sup>

In 2007, the UN Global Compact started publishing an annual report called the “Global Corporate Sustainability Report.” Using surveys, this report examines how corporate participants are implementing the ten principles, and thus, reaffirming their commitment to the initiative.<sup>77</sup> The Global Corporate Sustainability Report 2013 stated

---

<sup>71</sup> See John Gerard Ruggie, “The Global Compact as Learning Network” (2001) 7 *Global Governance* 371-378.

<sup>72</sup> In November 2012, seven Canadian companies (Barrick Gold, Globescan, Scotiabank, Suncor Energy, Teck Resources, TELUS, and Unilever Canada) explored the possibility of launching a Canadian local network chapter for the UN Global Compact for the first time. As a result, the Global Compact Network Canada officially launched on June 14, 2013 by opening the market at the Toronto Stock Exchange. See <[https://www.unglobalcompact.org/networksaroundtheworld/local\\_network\\_sheet/ca.html](https://www.unglobalcompact.org/networksaroundtheworld/local_network_sheet/ca.html)>.

<sup>73</sup> United Nations Global Compact, “Overview of the UN Global Compact”, online: UN Global Compact <<http://www.unglobalcompact.org/AboutTheGC/index.html>>.

<sup>74</sup> *Ibid.*

<sup>75</sup> United Nations Global Compact, “Global Compact Principle 10”, online: UN Global Compact <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle10.html>>.

<sup>76</sup> *Ibid.*

<sup>77</sup> United Nations Global Compact, *Global Corporate Sustainability Report 2013*, online: UN Global Compact <[http://www.unglobalcompact.org/AboutTheGC/global\\_corporate\\_sustainability\\_report.html](http://www.unglobalcompact.org/AboutTheGC/global_corporate_sustainability_report.html)>.

that only 28 per cent of the participants' sustainability actions were directed towards the implementation of anti-corruption measures in accordance with Principle Ten. The report concluded that the implementation of Principle Ten continues to fall short of realizing the principle's goal.<sup>78</sup>

### **Training Initiatives**

#### *a) TRACE*

TRACE is a training initiative that aims to increase commercial transparency for transnational corporations and their commercial intermediaries by raising the standard of anti-bribery compliance.<sup>79</sup> It is divided into TRACE International and TRACE Incorporated. TRACE International collects resources to provide shared-cost models as well as practical and cost-effective anti-bribery compliance services for multinational company members. TRACE Incorporated offers members and non-members customized training packages and consulting services.<sup>80</sup> Together, the initiatives offer "an end-to-end, cost-effective and innovative solution for anti-bribery and third party compliance."<sup>81</sup>

TRACE has over 220 corporate members, most of which are leaders in the largest global industries.<sup>82</sup> It offers anti-bribery training videos, in-person training, and online training for employees and intermediaries. By utilizing TRACE's training programs, member companies satisfy their anti-bribery compliance obligations while reducing the time, risk, and expense associated with compliance programs.<sup>83</sup> TRACE programs offer a significant tool to assist corporate members with the compliance of anti-corruption laws.

### **Extractive Industries Transparency Initiative**

The Extractive Industries Transparency Initiative (EITI) is a government-led initiative resulting from the collaborative work of governments, companies, and civil society groups aiming to improve "open and accountable management of natural resources."<sup>84</sup> The EITI's objective is to increase transparency in financial transactions by ensuring that the revenues from the extraction of natural resources benefit all citizens in their respective member countries.<sup>85</sup>

---

<sup>78</sup> *Ibid* at 19.

<sup>79</sup> TRACE, "About TRACE," online: TRACE <<http://www.traceinternational.org/about-trace/>>.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid*.

<sup>82</sup> TRACE, "Corporate Multinational Members", online: TRACE <<http://www.traceinternational.org/membership/>>.

<sup>83</sup> *Ibid*.

<sup>84</sup> EITI, "What is EITI?" online: EITI <<http://eiti.org/eiti>>.

<sup>85</sup> *Ibid*.

EITI member countries are required to publish an annual report (the EITI Report) that discloses payments received from any oil, gas, or mining companies. To enforce this, the EITI has implemented the “EITI Standards,” which allows member countries to ensure companies’ full disclosure of taxes and other payments. The EITI Reports make governments more accountable by providing citizens with direct access to country revenue disclosure reports.<sup>86</sup> These reports also improve investment within member countries by “providing a clear signal to investors and international financial institutions” that national authorities are committed to greater transparency.<sup>87</sup>

Extractive industry companies operating within the EITI member countries are expected to implement the EITI Standards when reporting their taxes and other payments. Canada is not an EITI member country, despite Canada’s significant involvement in the production and export of natural resources. However, Canada is categorized as a “supporting country,” meaning “it helps promote more effective resource revenue management by providing policy advice and technical assistance to host country governments.”<sup>88</sup> Canada initially contributed \$750,000 to the EITI Multi-Donor Trust Fund, and an additional \$200,000 per annum between 2008 and 2011.<sup>89</sup>

## II. CANADA’S ANTI-BRIBERY LEGISLATION: THE *CFPOA*

When Canada adopted the *OECD Convention*, it did not have a provision that directly regulated the corruption of foreign officials. Although section 465(3) of the *Criminal Code* provides a potential route to address foreign corruption, the provision will not necessarily address improper payments outside of Canada.<sup>90</sup> Section 465(3) of the *Criminal Code* states, “Everyone who, while in Canada, conspires with anyone to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.”<sup>91</sup>

In order to sign the *OECD Convention*, Canada enacted the *CFPOA*. The Act came into force on February 14, 1999. It criminalizes those who, “in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official.”<sup>92</sup> The *CFPOA* provisions apply to Canadian individuals and corporations, regardless of

---

<sup>86</sup> *Ibid.*

<sup>87</sup> EITI, “Benefits from Implementing EITI”, online: EITI <<http://eiti.org/eiti/benefits>>.

<sup>88</sup> EITI, “The EITI: Improving Governance and Transparency: Canada’s Role in the EITI”, online: EITI <[http://eiti.org/files/page/canada\\_eiti\\_brochure.pdf](http://eiti.org/files/page/canada_eiti_brochure.pdf)>.

<sup>89</sup> *Ibid.*

<sup>90</sup> Wanlin, *supra* note 21 at para 18.

<sup>91</sup> *Criminal Code*, RSC 1985, c C-46, s 465(3).

<sup>92</sup> *CFPOA*, *supra* note 8, s 3(1).

whether they are acting directly or through an agent or third party.<sup>93</sup>

Canada has created various task forces and programs to enforce its domestic and international obligations. In February 2005, the RCMP assigned a commissioned officer to review anti-corruption programs, and in 2008, the RCMP created two seven-person International Anti-corruption Units based in Ottawa and Calgary.<sup>94</sup> Both units investigate cases that involve the alleged bribery of foreign public officials and Canadian public officials within and outside of Canada.<sup>95</sup> In May 2013, the RCMP partnered with the Australian Federal Police, the Federal Bureau of Investigation, and the City of London Police's Overseas Anti-Corruption Unit to establish the International Foreign Bribery Taskforce.<sup>96</sup> The task force aims to support the *OECD Convention*<sup>97</sup> and the *UNCAC* by enabling "like-minded countries to work collaboratively to strengthen investigations into foreign bribery crimes."<sup>98</sup>

Foreign Affairs, Trade, and International Development Canada (DFAIT) is also responsible for implementing and enforcing the *CFPOA*. DFAIT developed instructions for several overseas Canadian missions regarding the appropriate measures to adopt when there is a bribery claim against a Canadian corporation or individual. In 2010, DFAIT adopted the *Policy and Procedure for Reporting Allegations of Bribery Abroad by Canadians or Canadian Companies*. According to the policy, all information that DFAIT receives with respect to Canadian individuals or companies that bribe foreign public officials will be forwarded to the RCMP.<sup>99</sup> Other Canadian authorities involved in the implementation of the *CFPOA* include Export Development Canada, the Canadian International Development Agency, the Canada Border Services Agency, and the Public Prosecution Service of Canada.<sup>100</sup>

Despite the involvement of various authorities in the enforcement of the *CFPOA*, the Act only resulted in one prosecution between 1999 and 2011. By contrast, the US reported 227 cases in 2011 and 169 cases in 2010; Germany reported 135 cases in 2011 and 117 cases in 2010.<sup>101</sup> This discrepancy was the main basis for international

<sup>93</sup> Hutton & Beaudry, *supra* note 19 at 6.

<sup>94</sup> DFAIT, "Bribery and Corruption: Eleventh Report to Parliament", online: DFAIT <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-11.aspx?lang=eng>>.

<sup>95</sup> *Ibid.*

<sup>96</sup> Michael Osborne, "Fighting Foreign Corruption" (2 July 2013), *National* (blog), online: <<http://www.nationalmagazine.ca/Blog/July-2013/Fighting-foreign-corruption.aspx>> [Osborne].

<sup>97</sup> *OECD Convention*, *supra* note 3, art 9. This article also encourages cross border legal assistance in dealing with bribery cases.

<sup>98</sup> Australia Federal Police, "New International Taskforce Combats Foreign Bribery" (12 June 2013), online: Australia Federal Police <<http://www.afp.gov.au/media-centre/news/afp/2013/june/new-international-taskforce-combats-foreign-bribery.aspx>>.

<sup>99</sup> Osborne, *supra* note 96.

<sup>100</sup> *Ibid.*

<sup>101</sup> Fritz Heimann, Gillian Dell & Kelly McCarthy, *Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention*, 4th ed (2011), online: Transparency International



concern. On February 5, 2013, Bill S-14 was introduced to amend the *CFPOA*.

### III. 2012 INTERNATIONAL CRITICISM TO CANADA'S ROLE IN IMPLEMENTING AND ENFORCING ANTI-BRIBERY MEASURES

In 2012, TI and the OECD Working Group on Bribery commented on Canada's weak role in combatting foreign bribery. Specifically, both entities addressed Canada's insufficient implementation and enforcement of the *OECD Convention*.<sup>102</sup> As a result, Canada was ranked as the worst of the G7 nations in fighting bribery.<sup>103</sup>

The OECD Working Group criticized four major elements of Canada's legislative and institutional framework:<sup>104</sup>

- (1) The definition of "business" was limited to "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere *for profit*," thus, excluding charities.<sup>105</sup> Canada was the only OECD member country that used this "for profit" requirement.<sup>106</sup>
- (2) The application of the sanctions was too low to be "effective, proportionate and dissuasive."<sup>107</sup>
- (3) The *CFPOA* did not utilize the nationality jurisdiction principle, which permits the establishment of a "real and substantial" connection with Canada once a Canadian parent corporation or subsidiary is involved.<sup>108</sup>
- (4) Canada's interpretation of Article 5 prohibited consideration of "improper" considerations. The Working Group recommended that Canada clarify that consideration of the Article 5 factors can never be "proper."<sup>109</sup>

TI identified three main flaws in the Canadian legal framework: (i) the exclusion of charities, (ii) the explicit allowance of facilitation payments, and (iii) the absence of provisions requiring the maintenance of accurate books and records.<sup>110</sup> In addition, TI addressed three inadequacies in the Canadian enforcement system: (i)

---

<[http://www.transparency.ca/9-Files/2013-New/20130826-2011\\_OECDReport\\_EN.pdf](http://www.transparency.ca/9-Files/2013-New/20130826-2011_OECDReport_EN.pdf)> [2011 Progress Report].

<sup>102</sup> *Ibid.*

<sup>103</sup> Sher, *supra* note 63.

<sup>104</sup> OECD Working Group, *Annual Report 2011*, (France: OECD Publishing, 2012) at 52, online: OECD <<http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2011.pdf>> [Annual Report 2011].

<sup>105</sup> *CFPOA*, *supra* note 8 (emphasis added).

<sup>106</sup> Annual Report 2011, *supra* note 104 at 53.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.* Under the nationality jurisdiction principle, Canada as a State has jurisdiction over their nationals with respect to their crimes committed outside the country if they are stipulated within the Canadian national law.

<sup>109</sup> *Ibid.*

<sup>110</sup> Progress Report 2011, *supra* note 101 at 25.

inefficiency in handling high-profile, white-collar criminal cases, (ii) the RCMP Anti-Corruption Unit's insufficient resources to conduct high-demand investigations and prosecutions, and (iii) the absence of an efficient sanctions system<sup>111</sup> evidenced by Canada's lack of prosecutions.<sup>112</sup>

#### IV. AMENDMENTS TO THE *CFPOA*

Bill S-14 received Royal Assent on June 19, 2013. There were six significant amendments to the *CFPOA* that responded to most of the OECD's and TI's 2012 suggestions. First, the *CFPOA* jurisdiction was changed; it is now based on the nationality of the accused.<sup>113</sup> Previously, Canada could only exercise territorial jurisdiction as the *CFPOA* solely allowed prosecution of a foreign bribery offence if it was committed at least partly in Canada.<sup>114</sup> Section 5 of the *CFPOA* now allows Canada to prosecute Canadian citizens and permanent residents who are present in Canada after the commission of the offence, regardless of where the commission occurred. The section also applies to companies incorporated under the law of Canada.<sup>115</sup> The adoption of the nationality jurisdiction principle has expanded the power of the Canadian authorities with respect to the prosecution of foreign bribery offences.

Second, individuals and corporations found guilty under the new *CFPOA* may be subject to imprisonment and/or fines. While there is no maximum fine set out in the Act, the maximum jail sentence increased from five to fourteen years for the directing mind of a company.<sup>116</sup>

Third, section 4 of the *CFPOA* was amended in order to echo Article 8 of the *OECD Convention*.<sup>117</sup> Article 8 aims to prevent companies from omitting and falsifying financial records "for the purpose of bribing foreign public officials or of hiding such bribery."<sup>118</sup> To accomplish this, section 4 now prohibits the maintenance of any accounts, transactions, or liabilities that are not disclosed in the company books and records, as required by accounting and auditing standards.<sup>119</sup> The rationale behind this amended section is that full transparency of payments will deter corporations from

---

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> Robin MacKay, "Legislative Summary of Bill S-14: An Act to Amend the Corruption of Foreign Public Officials Act" (28 February 2013), online: Parliament of Canada <[http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?ls=s14&Parl=41&Ses=1&source=library\\_prb&Language=E](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=s14&Parl=41&Ses=1&source=library_prb&Language=E)>.

<sup>114</sup> Jurisdiction is territorial. States are "hesitant to exercise jurisdiction over matters that take place in the territory of other states." See *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077.

<sup>115</sup> *CFPOA*, *supra* note 8, s 5.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *OECD Convention*, *supra* note 3, art 8.

<sup>119</sup> *CFPOA*, *supra* note 8, s 4.

engaging in illegal transactions.

Fourth, section 2—the interpretation section—was also amended by extending the definition of “business.”<sup>120</sup> As previously discussed, the prior definition of “business” did not include non-profit organizations or charities. By removing the words “for profit,” the new definition of “business” now applies to all types of businesses, thereby addressing the OECD’s and TI’s concerns.

Fifth, the new section 6 of the *CFPOA* gives the RCMP exclusive authority to lay charges.<sup>121</sup> In the previous *CFPOA*, the definition of “peace officer” was broadly defined to include mayors, sheriffs, and bailiffs. The new provision only authorizes authority to those whom the RCMP specifically designates.<sup>122</sup>

Finally, Bill S-14 proposed to eliminate “grease” or facilitation payments.<sup>123</sup> This amendment goes beyond the equivalent provisions in the *FCPA*, which exempt facilitation payments that aim “to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”<sup>124</sup> Canada’s new approach to facilitation payments follows the measures adopted by the UK’s *Bribery Act 2010*, which does not provide an exception for facilitation payments.<sup>125</sup> Curiously, it has been reported that the UK is considering allowing facilitation payments within the Act.<sup>126</sup> Whether this could affect Canada’s recent decision is unknown. Regardless, the issue of facilitation payments is a controversial topic both in Canada and globally.

## V. A REVIEW OF CANADIAN ANTI-CORRUPTION JURISPRUDENCE

Although there is very limited case law in Canada under the *CFPOA*, there has been an apparent improvement since the 2013 amendments. The RCMP is currently investigating 34 international corruption cases of Canadian companies and individuals

---

<sup>120</sup> *Ibid*, s 2.

<sup>121</sup> *Ibid*, s 6.

<sup>122</sup> Robin MacKay, Bill S-14: An Act to amend the Corruption of Foreign Public Officials Act: Legislative Summary of Bill S-14, (Ottawa: Library of the Parliament, 2013) (Publication No. 41-1-S14-E) at 7.

<sup>123</sup> *Ibid* at 6.

<sup>124</sup> *FCPA*, *supra* note 22, s (b). However, the US Securities and Exchange Commission has suggested that the legislature will eventually eliminate this exemption in response to international pressure (see Michael S Diamant & Jesenka Mrdjenovic, “Don’t You Forget About Me: The Continuing Viability of the FCPA’s Facilitating Payments Exception” (2012) 73 Ohio St LJ 19 at 20).

<sup>125</sup> *Ibid*.

<sup>126</sup> Samuel Rubinfeld, “The Morning Risk Report: Bribery Act Review Considers Facilitation Payment Exception”, *Wall Street Journal* (13 May 2013), online: Wall Street Journal <<http://blogs.wsj.com/riskandcompliance/2013/05/31/the-morning-risk-report-bribery-act-review-considers-facilitation-payment-exception/>>.

suspected of *CFPOA* violations.<sup>127</sup> This section will discuss the court's recent progressive position with respect to *CFPOA* enforcement.

### ***R v Watts and R v Hydro-Kleen Group Inc***<sup>128</sup>

On January 10, 2005, Hydro Kleen Systems (HKS) pleaded guilty to bribing a foreign official and was ordered to pay a fine of \$25,000. HKS had business operations in Canada and the US. Consequently, it required its employees to travel to the US for work. Robert Watts, the president and majority shareholder of HKS, admitted to bribing a US immigration officer to facilitate entry of the company's employees into the US.

HKS paid the immigration consultant a total of \$28,299.88 for advising HKS's employees on what to say when crossing the border and for drafting the documents required for HKS employees to apply for their US visas.<sup>129</sup> The immigration consultant was not permitted to take this type of outside work without prior authorization from his corporate superiors.<sup>130</sup> Further, the immigration consultant entered negative comments about the employees of HKS's competitors into the US computer system, the National Automated Immigration Lookout System. He did so without HKS's knowledge or request. As a result, these individuals were later denied entry into the US.<sup>131</sup>

Because the US officer pleaded guilty, the *Hydro-Kleen* case does not provide any substantial guidance on the application of the *CFPOA* offences.<sup>132</sup> However, it was the only decision prosecuted under the *CFPOA* when TI and the OECD Anti-Bribery Working Group presented their concerns with respect to Canada's anti-bribery laws in 2012.

### ***R v Niko Resources Ltd***<sup>133</sup>

The *Niko Resources* case is considered the first important decision under the *CFPOA*, imposing a penalty of \$9.5 million in fines, as well as a probation order, on the offending company.<sup>134</sup> Niko Resources is a publicly traded corporation with a head office in Calgary, Alberta (Niko Canada), and a 100 per cent-owned subsidiary in

<sup>127</sup> Theresa Tedesco, "OECD Praises Canada's Anti-corruption Efforts", *The Financial Post* (27 May 2013), online: The Financial Post <<http://business.financialpost.com/2014/12/09/are-canadas-new-anti-corruption-efforts-too-draconian/>>.

<sup>128</sup> [2005] AJ No 568 (QB) [*Hydro-Kleen*].

<sup>129</sup> *Ibid* at paras 44-45, 57.

<sup>130</sup> *Ibid* at para 58.

<sup>131</sup> *Ibid* at para 64.

<sup>132</sup> "International Business and Trade Law Bulletin: The Corruption of Foreign Public Officials Act – An Ounce of Prevention is Worth a Pound of Cure" (February 2010), online: McMillan <[http://www.mcmillan.ca/Files/IBTL\\_Corruption%20of%20Public%20Officials%20Act\\_0210.pdf](http://www.mcmillan.ca/Files/IBTL_Corruption%20of%20Public%20Officials%20Act_0210.pdf)>.

<sup>133</sup> ABQB June 2011, Agreed Statement of Facts, online: Osler

<<http://www.osler.com/uploadedFiles/Agreed%20statement%20of%20facts.pdf>> [*Niko Resources*].

<sup>134</sup> *Ibid* at para 57.

Bangladesh (Niko Bangladesh). On June 24, 2011, Niko Canada pleaded guilty to providing improper benefits to a foreign public official in order to advance its business objectives. Specifically, Niko Bangladesh paid and delivered a vehicle valued at \$190,984 CAD to Bangladesh's State Minister for Energy and Mineral Resources.<sup>135</sup> This payment was an attempt to influence the Minister to continue business with Niko Bangladesh. Niko Canada was aware of the situation at all times. Niko Canada supported the Minister's personal trips to visit family in New York and Chicago, paying a total of \$5,000 in travel and accommodation expenses.<sup>136</sup>

In addition to imposing the first substantial penalty under the *CFPOA*, this case was the first to impose post-conviction obligations on the offender.<sup>137</sup> In the probation order, the court listed eight key elements that are required to establish an effective anti-corruption compliance program including:<sup>138</sup>

- (1) The establishment of a system of internal accounting controls designed to ensure that the company maintains fair and accurate books, records, and accounts in order to prevent the company from using these tools for bribery or concealing bribery;
- (2) The establishment of a rigorous anti-corruption compliance code designed to detect and deter any violations of the *CFPOA*;
- (3) The adoption of periodic risk assessments in order to address the specific foreign bribery risks facing the company;
- (4) An annual review and update of the company's anti-corruption compliance standards and procedures;
- (5) The assignment of anti-corruption compliance responsibility to one or more senior corporate executives for the implementation and oversight of the company's anti-corruption policies, standards, and procedures;
- (6) A mechanism designed to ensure that the company's anti-corruption policies, standards, and procedures are effectively communicated to all directors, officers, employees, agents, and business partners;
- (7) The establishment of appropriate disciplinary procedures to address violations of anti-corruption laws and the company's internal anti-corruption compliance code made by its directors, officers, and employees; and

---

<sup>135</sup> *Ibid* at para 55.

<sup>136</sup> *Ibid*.

<sup>137</sup> Henry Chang, "A Review of Canada's Foreign Anti-Corruption Decisions" *CBA National Section on International Law Newsletter* (July 2013), online: CBA <[http://www.cba.org/CBA/sections\\_international/newsletters2013/anti-corruption.aspx](http://www.cba.org/CBA/sections_international/newsletters2013/anti-corruption.aspx)>.

<sup>138</sup> *R v Niko Resources Ltd*, ABQB June 2011, Probation Order, online: CBA <<http://www.cba.org/CBA/advocacy/PDF/Niko%20Probation%20Order.pdf>> [*Niko Resources, Probation Order*].

(8) If applicable, the establishment of appropriate due diligence and compliance requirements for the retention and oversight of agents and business partners.<sup>139</sup>

The *Niko Resources* case was a “wake-up call”<sup>140</sup> to Canadian individuals and companies. The company’s probation order has been considered a more severe penalty than the fine itself.

### ***R v Griffiths Energy International Inc***<sup>141</sup>

On January 22, 2013, Griffiths Energy International Inc. (GEI), now Caracal Energy Inc., pleaded guilty to contravening section 3(1)(b) of the *CFPOA*. It was consequently fined \$10.35 million, the largest penalty in Canadian history.<sup>142</sup> GEI was a small oil and gas company. It had a head office in Calgary and a wholly owned subsidiary in Chad (GEC). In January 2011, GEC entered into “the Production Sharing Agreement” with Chad. The agreement gave GEC exclusive rights to explore and develop oil and gas reserves and resources in a specific area in a southern part of Chad.<sup>143</sup>

Before the agreement was signed, GEI’s CEO approached the Chadian ambassador to Canada in order to obtain entry into the country. As a result of this meeting, GEI’s CEO offered Chad Oil Consulting LLC—a company wholly owned by Nourcham Niam, the ambassador’s wife—a \$2 million fee as part of a “consulting agreement.” This agreement established that the fee was payable only if GEI was awarded the Production Sharing Agreement on a mutually agreed upon date. In addition to the payable fee, GEI offered a \$4 million founders’ share to Ms. Niam and two of her nominees, at a price of \$0.001 each.<sup>144</sup>

In July 2011, GEI changed its management team with the intention of taking the company public on the Toronto Stock Exchange. However, this was postponed when GEI’s new management team detected the former executives’ unusual agreements.<sup>145</sup>

<sup>139</sup> *Ibid* at 1-8.

<sup>140</sup> Daniel L Kiselbach & Richard Truman, “Canada’s Corruption of Foreign Public Officials Act: Niko Resources Ltd. Receives A \$9.5 Million Fine For Bribery” (November 2011) 207 Miller Thomson Corporate Brief at 1, online: Miller Thomson <[http://www.millerthomson.com/assets/files/article\\_attachments2/DLK\\_2011-11\\_CorpBrief.pdf](http://www.millerthomson.com/assets/files/article_attachments2/DLK_2011-11_CorpBrief.pdf)>.

<sup>141</sup> ABQB January 2013, Agreed Statement of Facts, online: CBA <[http://www.cba.org/CBA/advocacy/PDF/Griffiths\\_Amended\\_Statement\\_of\\_Facts.pdf](http://www.cba.org/CBA/advocacy/PDF/Griffiths_Amended_Statement_of_Facts.pdf)> [*Griffiths Energy*].

<sup>142</sup> Chang, *supra* note 137.

<sup>143</sup> *Griffiths Energy*, *supra* note 141 at para 10.

<sup>144</sup> *Ibid* at paras 23-24.

<sup>145</sup> Brian Hutchinson, “Calgary Oil Company paid \$2M Bribe for Access to Oil Fields in Chad, Court Told” *National Post* (1 January 2013), online: National Post <<http://news.nationalpost.com/2013/01/28/calgary-oil-company-paid-2m-bribe-for-access-to-oil-fields-in-chad-court-told/>>.

After further investigation, management decided to disclose these issues to the Public Prosecution Service of Canada (PPSC) and Alberta Justice.<sup>146</sup>

*Griffiths Energy* was the first self-reporting case in Canada, exemplifying the benefits of adopting an effective anti-corruption compliance program, even after an offence has occurred.<sup>147</sup> The statement of facts suggests that considerations, such as self-reporting, cooperation during investigations, and implementing an effective anti-corruption program, may be important when deciding on an adequate penalty.<sup>148</sup>

### ***R v Karigar***<sup>149</sup>

On August 15, 2013, Nazir Karigar was convicted by the Ontario Superior Court of Justice under section 3(1)(b) of the *CFPOA* for “offering or agreeing to give or offer bribes to Air India officials and India’s then Minister of Civil Aviation, in order to secure a major contract from Air India for the provision of facial recognition software and related equipment.”<sup>150</sup> Since the Government of India owns and controls Air India, the company falls within the definition of a foreign public official in the *CFPOA*.<sup>151</sup>

In this decision, Hackland J expressly mentioned that no case had ever interpreted the *CFPOA* provisions.<sup>152</sup> He then analyzed the elements of the offence in section 3(1)(b). He determined that the *actus reus* of the offence is “the agreement to pursue an unlawful objective,”<sup>153</sup> and that the term “agrees” implies the idea of “conspiracy” used in the *CFPOA* and the *OECD Convention*.<sup>154</sup> Justice Hackland also highlighted that under the amended *CFPOA*, the RCMP has exclusive authority to regulate the offence.<sup>155</sup> Finally, he concluded that to satisfy the *actus reus* of section 3, the accused need only *believe* that a bribe has been paid to a foreign official, independent of whether or not the bribe was actually paid.<sup>156</sup>

After considering the facts, Hackland J held that the evidence demonstrated a sufficient connection to Canada to confer jurisdiction to Canadian courts.<sup>157</sup> Among the factors he considered were: (i) that the accused was a Canadian businessman who resided in Toronto for many years; (ii) that at all material times, the accused acted as an

---

<sup>146</sup> *Griffiths Energy*, *supra* note 141 at para 43.

<sup>147</sup> Chang, *supra* note 137.

<sup>148</sup> *Ibid.*

<sup>149</sup> 2013 ONSC 5199 [*Karigar*].

<sup>150</sup> *Ibid* at para 1.

<sup>151</sup> *Ibid* at para 3.

<sup>152</sup> *Ibid* at para 27.

<sup>153</sup> *Ibid* at para 28.

<sup>154</sup> *Ibid* at para 128.

<sup>155</sup> *Ibid* at para 32.

<sup>156</sup> *Ibid* at para 33.

<sup>157</sup> *Ibid* at para 40.

agent of a Canadian company; and (iii) that had the contract been awarded, the evidence showed that a great deal of work would have been done in Canada.<sup>158</sup>

The *Karigar* case is significant for several reasons. First, the decision resulted in the first conviction under the *CFPOA* at trial;<sup>159</sup> there were no trials in the three previous prosecutions as the accused pleaded guilty. Second, this was the first decision involving the prosecution of an individual rather than a corporation. The court convicted Nazir Karigar, even though the evidence did not reveal that financial advantages to a foreign official were actually provided. Finally, the *Karigar* case is fundamental in determining Canada's future approach to foreign bribery. It informs Canadian companies and individuals that the term "foreign public official" includes employees and representatives of state-owned or state-controlled companies, and that the interpretation of the term "agreement" has been expanded to include "conspiracy."<sup>160</sup>

On May 23, 2014, Hackland J sentenced Nazir Karigar to three years in prison for conspiring to bribe foreign public officials.<sup>161</sup> This case demonstrates the gradual evolution of Canada's approach towards the issue of foreign bribery.

### **SNC-Lavalin Group Inc**

The RCMP recently charged SNC-Lavalin Group Inc. and two of its subsidiaries (SNC-Lavalin Construction Inc. and SNC-Lavalin International Inc.) with fraud and corruption offences linked to projects in Libya occurring between 2001 and 2011.<sup>162</sup> The allegations include offering bribes worth \$47.7 million to several public officials and approximately \$129.8 million defrauded to Libyan public agencies.<sup>163</sup> These recent charges further indicate a positive shift in Canada's effort in enforcing the *CFPOA*. The charges are particularly significant because the federal government receives hundreds of millions of dollars in tax revenue from SNC-Lavalin each year.<sup>164</sup>

---

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid* at para 27.

<sup>160</sup> John W Boscarior et al, "First Trial Under Canada's Corruption of Foreign Public Officials Act Results in Conviction" *International Trade & Investment Law Group* (28 August 2013), online: McCarthy Tétrault <[http://news.mccarthy.ca/en/news\\_template.asp?news\\_code=1997&single\\_page=1](http://news.mccarthy.ca/en/news_template.asp?news_code=1997&single_page=1)>

<sup>161</sup> *R v Karigar*, 2014 ONSC 3093.

<sup>162</sup> Graeme Hamilton, "RCMP charges SNC-Lavalin with fraud and corruption linked to Libyan projects" *The Financial Post* (19 February 2015), online: The Financial Post <<http://business.financialpost.com/2015/02/19/rcmp-charges-snc-lavalin-with-fraud-and-corruption-linked-to-libyan-projects/>>.

<sup>163</sup> *Ibid.*

<sup>164</sup> Barrie McKenna, "SNC case shows downside of Ottawa's strict anti-corruption regime" *The Globe and Mail* (20 February 2015), online: The Globe and Mail <<http://www.theglobeandmail.com/report-on-business/snc-case-shows-downside-of-ottawas-strict-anti-corruption-regime/article23087586/>>.



## VI. PREDICTING THE FUTURE OF ANTI-CORRUPTION IN CANADA

In its 2013 annual progress report on the *OECD Convention*, TI once again expressed its concern regarding Canada's limited enforcement of foreign bribery. Unlike the UK and US, which remained "robust" countries in enforcing the *OECD Convention*, Canada fell in this category, from having a moderate enforcement system to a limited one.<sup>165</sup>

While TI recognized the recent improvements made to the *CFPOA*, it recommended further amendments to the Act, suggesting the adoption of a non-criminal enforcement option to permit greater flexibility and enhanced enforcement.<sup>166</sup> The current Canadian enforcement system requires a full criminal investigation and prosecution. An alternative non-criminal process would decrease the high costs to both the government and the targets of the investigation.<sup>167</sup>

The US has adopted the Voluntary Disclosure Program, where corporations that cooperate with the USSEC by self-reporting "an illicit payment problem" are less likely to face legal action.<sup>168</sup> Similar to the considerations contemplated in *Griffiths Energy*, compliance by US corporations under this program includes: (i) carrying out an independent internal investigation to determine the full extent of the company's worldwide bribery; (ii) sharing the results with the Commission, with the understanding that these results will be made public and; (iii) taking appropriate remedial steps to ensure that the problems have been addressed and would not reoccur.<sup>169</sup>

TI also criticized the RCMP for inconsistently reporting active investigations, which causes a lack of information regarding a specific investigation until the case is filed or presented in court.<sup>170</sup> As previously mentioned, the RCMP is currently involved in 34 ongoing investigations.<sup>171</sup> Through the information provided by the companies themselves, it is known that:

. . . one investigation was commenced in 2012 into alleged improper business practices to secure a mining concession in Ghana by the Cardero Resource Corp. (which was closed in January 2013) and another in 2010 into allegations of bribes offered or paid by Blackfire Exploration Ltd. to a local mayor in the state of Chiapas, Mexico where the company has a mining operation. Another investigation, reportedly initiated in 2011, relates to the abovementioned SNC-Lavalin Group Inc. and concerns allegations of bribery in connection with projects in Libya and Tunisia during the time of the Gaddafi regime. Nordion

---

<sup>165</sup> 2013 Progress Report, *supra* note 9 at 5.

<sup>166</sup> *Ibid* at 27.

<sup>167</sup> *Ibid*.

<sup>168</sup> Cleveland et al, *supra* note 6 at 213.

<sup>169</sup> *Ibid*, citing "Business without Bribes", (19 February 1979) Newsweek at 63.

<sup>170</sup> Mallory Proconier, "A Little Payment Here, A Little Gift there" (2013) 75:3 Gazette Magazine, online: <<http://www.rcmp-grc.gc.ca/gazette/vol75no3/cover-dossier/corruption-eng.htm>>.

<sup>171</sup> Tedesco, *supra* note 127.

Inc., an Ottawa-based medical isotopes provider, issued a press release in August 2012 to announce an internal investigation “of a foreign supplier and related parties focusing on compliance with the Canadian Corruption of Foreign Public Officials Act (CFPOA) and the U.S. Foreign Corrupt Practices Act (FCPA),” relating to improper payments and other financial irregularities.<sup>172</sup>

The new and expanding legal measures, and the increased enforcement actions taken by the RCMP, may finally force Canadians to effectively comply with the *CFPOA* while conducting business abroad and while working for foreign companies. The *OECD Convention*, as well as its companion instruments, will therefore provide significant guidelines for Canadian companies lacking clear anti-corruption standards.

## VII. THE *EXTRACTIVE SECTOR TRANSPARENCY MEASURES ACT*

On December 16, 2014, the *Extractive Sector Transparency Measures Act*<sup>173</sup> (*ESTMA*) received royal assent from Canada’s Parliament. Under this Act, oil, gas, and mining companies are required to disclose payments made to domestic and foreign governments.<sup>174</sup> The objective of the legislation is to improve transparency and achieve alignment with the anti-corruption measures taken by other countries with similar economies. Consequently, the *ESTMA* applies broadly to public companies listed in the Canadian stock exchange, as well as to certain private companies that have made payments to a government body, or an entity performing the functions of a government. The payments made must meet the minimum threshold of \$100,000.<sup>175</sup>

According to section 24 of the Act, non-compliance is punishable by summary conviction, with a maximum fine of \$250,000. This fine applies to any entity that fails to comply with the regulations, and to any person or entity that knowingly avoids the proper disclosure of payments.<sup>176</sup> Interestingly, the Act mandates that each additional day of non-compliance following the initial non-compliance constitutes a new offence.<sup>177</sup> Although the Canadian government is still working on the administrative tools that will implement the *ESTMA*, the enactment of the legislation has been praised by the international community as a significant “step towards improving governance in natural resource-rich countries.”<sup>178</sup> The government has expressed that provincial securities regulators would be the most suitable and cost-effective vehicle to implement

<sup>172</sup> 2013 Progress Report, *supra* note 9 at 26.

<sup>173</sup> *ESTMA*, *supra* note 10.

<sup>174</sup> “Canada Passes Oil and Mining Payment Transparency” (2014), online: Natural Resource Governance Institute <[http://www.resourcegovernance.org/news/press\\_releases/canada-passes-oil-and-mining-payment-transparency-law](http://www.resourcegovernance.org/news/press_releases/canada-passes-oil-and-mining-payment-transparency-law)>.

<sup>175</sup> *ESTMA*, *supra* note 10, s 9.

<sup>176</sup> *Ibid*, s 24.

<sup>177</sup> *Ibid*.

<sup>178</sup> *Ibid*.

the mandatory reporting standards under the *ESTMA*.<sup>179</sup> The implementation of the *ESTMA* standards is expected to take place by June 2015.<sup>180</sup>

### CONCLUSION

Due to the influence of the US, the *OECD Convention*, and the *UNCAC*, Canada has enacted recent measures that suggest it is ready to follow international leaders in enforcing foreign bribery.<sup>181</sup> This has been demonstrated by the recent cases of *Hydro-Kleen*, *Niko Resources*, *Griffiths Energy*, and *Karigar*. These precedents, as well as the recent amendments to the *CFPOA*, will significantly enhance the implementation of the *OECD Convention* and the *UNCAC*. This will result in more prosecutions of Canadian individuals and corporations. Canadian provincial securities regulators that will regulate the *ESTMA* will supplement this trend, in addition to international initiatives. It appears Canada is moving away from its traditionally passive stance on prosecuting foreign corruption.

---

<sup>179</sup> Canada, Natural Resources Canada, *Mandatory Reporting in the Canadian Extractive Sector*, online: Natural Resources Canada <<https://www.nrcan.gc.ca/media-room/backgrounder/2014/15565>>.

<sup>180</sup> *Ibid.*

<sup>181</sup> Kevin O’Callaghan & Claudia Feldkamp, “Anti-Bribery and Corruption Planning: An Ounce of Prevention Beats a Pound of Cure” (2012) 1:4 CLAR 72 at 73.