CHINA CANADA PROCURATORATE REFORM COOPERATION PROJECT

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Including Fair Investigation Practices

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TABLE OF CONTENT

INTRODUCTION

Canada is currently involved in four international agreements dealing with the criminal aspect of corruption: the OAS *Inter-American Convention against Corruption*, which came into force on March 6, 1997; the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* which came into force on February 15, 1999*;* the *United Nations Convention against Transnational Organized Crime*, which came into force on September 29, 2003; and the U.N. *Convention against Corruption*, which came into force on December 14, 2005.

Canada was involved in the negotiations of all these agreements, as well as various Council of Europe anti-corruption instruments, and is currently a Party to the OAS and OECD Conventions. Canada signed the U.N. Convention in May 2004 and is committed to becoming a Party once we are satisfied that Canada's legislation meets all the requirements of the Convention.

Except for the OECD Convention that does not specifically deal with preventive measures, these Conventions generally all require Parties to criminalize acts of corruption; to take measures to prevent public sector corruption; to provide assistance to each other for the investigation and prosecution of convention offences; and to participate in a follow-up mechanism. [1]

Since the U.N. *Convention against Corruption* (UNCAC) is the most universal and recent of these instruments, my remarks will deal mostly with Canadian laws, policies, programs and other measures that are in place to implement the UNCAC, unless otherwise specified.

I. CRIMINALIZATION OF ACTS OF CORRUPTION.

The Canadian Criminal Code has prohibited acts of corruption since its enactment in 1892. Before the enactment of the Code, corruption was prohibited by the British Common Law offence of bribery that applied in Canada.

The Canadian criminal law currently prohibits bribery of both domestic and foreign public officials; acts creating conflicts of interest, such as accepting gifts; and breach of trust. Private sector corruption is dealt with through the prohibition of secret commissions. In addition, a number of offences, not specific to corruption, can also apply to acts of corruption and embezzlement, such as breach of trust, theft, and fraud.

[1] The *Inter-American Convention against Corruption* did not provide for a follow-up mechanism, but one was subsequently created.

The U.N. Convention includes provisions concerning the criminalization of the bribery of domestic and foreign public officials and of persons who work for or direct private sector entities, and embezzlement in the public and private sectors. States Parties are also required to consider criminalizing trading in influence, abuse of functions and illicit enrichment by public officials. Except for illicit enrichment, which would create substantial problems in relation to the Canadian Charter of Rights and Freedoms, all other required Convention offences are already criminal offences in Canada.

A. Offences of bribery of domestic public officials

Different Criminal Code offences apply to different categories of Canadian officials. These offences include: bribery for judges and Members of the federal Parliament or a provincial legislature (section 119); bribery of police, court officers and anyone involved in the administration of criminal law (section 120); bribery of government officials, including trading in influence of federal and provincial officials (section 121); and bribery of a municipal official (section 123). While some offences are specific to categories of officials, the offence of section 121 has been found by the courts to apply also to members of the federal Parliament and provincial legislatures.

The offences of bribery cover both active bribery (i.e. offering or giving of a bribe) and passive bribery (i.e. demanding or accepting a bribe). The bribery of judges and legislators and the bribery of criminal law officers carry a maximum penalty of 14 years, which is the second highest penalty in Canadian law, after a life sentence. The bribery of federal and provincial public servants and municipal officials carries a maximum penalty of five years. The judge decides on the appropriate sentence based on the facts of the case, mitigating and aggravating factors and other sentencing principles applicable to the case, but the sentence cannot exceed the maximum provided for in the Criminal Code.

While the offences are drafted to cover the activities specific to each group, there are common elements to all of them.

1) What constitutes bribe

The Code does not use the word “bribe” but rather enumerates what constitutes a bribe. It is money, valuable consideration, office, place or employment for the offences applying to judges, legislators and criminal law officials; it is a loan, reward, advantage or benefit of any kind for the offences applying to federal and provincial public servants and to municipal officials.

These enumerations can be summarized by saying that they cover any valuable benefit that the official would derive from carrying out official duties, over and above the remuneration and benefits provided by law, by a contract of employment, or by the employer.

2) Received or given directly or indirectly

The offering or giving constitutes an offence when it is made either by the person who requires an official act, or through intermediaries. The same applies to the act of demanding or receiving, that constitutes an offence whether it is demanded or received by the official himself or herself, or by an intermediary.

Most Criminal Code bribery offences provide specifically that the offence can be committed directly or indirectly, but not all. However, the courts have applied general principles of interpretation of the laws to read in "directly or indirectly" when it was not specifically included.

3) Given to the official or a third party

The U.N. Convention requires that bribery offences extend to cases where the benefit was provided to a person other than the official, when the bribery is given for the purpose of making the official act or refrain from acting in official duties.

Canadian law specifies that the offence is committed when a benefit is demanded or accepted for the official or any other person, and when it is offered or given to the official or anyone for the benefit of the official. What is important is that there be a nexus between the benefit conferred on anyone, which also constitutes a benefit to the accused. For example, the designation by an official of someone else to whom the benefit should be conferred should not absolve the official of criminal liability. In the case of active bribery, it is the individual who bribes that decides who should be the recipient, thus the necessity to prove that the bribe is given for the benefit of the official. This requirement ensures that a benefit to the official is an essential element of the offence in all bribery offences.

Some, but not all, Criminal Code bribery offences provide specifically that the benefit must be demanded for anyone or given to anyone for the benefit of the official. Uniformity of wording is something that Canada could consider for future amendments, in order to create greater clarity.

4) Given for a purpose related to the official duties

To constitute bribery, the benefit must be conferred for an act or omission related to official duties. Some Canadian bribery offences provide for this in general terms (section 119) and other are more specific as to what acts constitute an official act (sections 120, 121 and 123). The offence under section 121(1)(a) specifies that the offence is committed whether or not, in fact, the official is able to do or omit to do what was proposed in exchange for the benefit that was received.

B. Offence of breach of trust

In addition to the offences of bribery of domestic public officials, section 122 of the Criminal Code makes it an offence for any official, to commit a fraud or breach of trust in connection with official duties. An act constitutes a breach of trust when an official acted, or failed to act, in a manner contrary to his or her official duties and benefited from this act or abstention. The offence of breach of trust could also apply to cases where public officials accept a bribe for acting or refraining to act in official capacity, since accepting bribery would constitute a breach of trust. A person found guilty of breach of trust is subject to a maximum penalty of five years.

C. Offences of bribery of foreign public officials

This offence was enacted in 1999 to allow Canada to ratify the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. The requirement to criminalize under this Convention is limited to active bribery in the context of international business transactions. In the case of the UN Convention, article 16 also provides that bribery be given "in order to obtain or retain business or other undue advantage in relation to the conduct of international business". It should be noted that, while Parties are required to criminalize active bribery of foreign public officials, they are asked to consider criminalizing passive bribery, i.e. acceptance of bribes by foreign public officials.

The offence of bribery of a foreign public official is not part of the *Criminal Code*, but is included in a separate criminal statute: the *Corruption of Foreign Public Officials Act.* The Act extends the definition of "foreign public official" to include officials of public international organisations, as required for the criminal offence by the OECD and UN Conventions. The offence in the *Corruption of Foreign Public Officials Act* consists in offering or giving a benefit in order to induce the official to do, or refrain from doing, an official act, or to use influence to obtain an act or decision from his organisation. It addresses cases where bribery is intended to obtain or retain an advantage in the course of business.

The maximum penalty is the same as the penalty for bribery of domestic officials, i.e. a maximum penalty of 5 years.

Canada does not criminalize the passive bribery of foreign public officials" Article 16(2) requires Parties only to consider doing covering such conduct. It should be noted that, in this respect, as Article 15 of the Convention requires States Parties to criminalize the bribery of domestic public officials, States Parties should be in a position to punish the corrupt behaviour of their own officials.

D. Offence of conflict of interest for public servants

The Canadian criminal law goes further than the requirements of the Convention by criminalizing some forms of conflict of interest. Under section 121 of the Criminal Code,

it is an offence for a person dealing with the government to give a gift or any benefit to a government employee or official, unless he has the consent in writing of the head of the department with which the person is dealing; and it is an offence for a government official, to accept a benefit from a person dealing with the government, unless the official has the consent in writing of the head of the department of which he is an official. The offence is committed even when the recipient is employed in a department different from the department with which the donor is dealing. This offence does not require the official to act, or refrain from acting, for the benefit of the donor when the gift is given. The offence is committed even when the donor expects nothing in return and the recipient has done nothing to earn the benefit given. When consent is not asked, or when it is refused, the gift should be returned.

E. Offences of trading in influence

The UN Convention requires States Parties to consider the criminalization of trading in influence, which is defined as giving or accepting an undue advantage for using real or supposed influence over a public authority in order to obtain an undue advantage from the public authority (article 18).

Section 121(1)(d) and (e) of the Criminal Code criminalize conduct where a person who has, or pretends to have, influence over a government minister or official, demands or accepts a benefit, as consideration for exercising influence in connection with government business or appointment. Offering or giving a benefit to a government minister or official for exercising influence in connection with government business or appointment is criminalized. The Code provides that the offence is committed even if the person who receives the benefit does not actually have influence on the government, but pretended, or was perceived as, having this influence.

F. Offences of theft and fraud (embezzlement)

The UN Convention also contains provisions on embezzlement of property in the public sector and in the private sector (articles 17 and 22). Canada does not have a specific offence of embezzlement, but the offences of theft and fraud cover the conduct contemplated by these articles. Other offences in the Canadian Criminal Code are also relevant.

The offence of theft in the Canadian Criminal Code consists in converting something to its own use, fraudulently and without right, with intent to deprive the owner of it. Because corporations and public entities are legal persons, they can be owners and, therefore, they can be victims of theft by their own officials.

The offence of fraud consists in defrauding the public or any person (which includes a corporation) by deceit, falsehood or other fraudulent means. For a public official, misappropriating public money or any other thing of value would constitute theft or fraud. For an employee or officer of a corporation, misappropriating money and any other thing of value belonging to the corporation could also constitute theft or fraud.

G. Offences of private sector corruption

The UN Convention does not require the criminalization of bribery in the private sector but requires States Parties to consider doing so (article 21). Bribery in the private sector is criminalized in Canada by the offence of secret commissions. Section 426 of the Canadian Criminal Code makes it an offence, for anyone, to offer or give a benefit to an agent as a consideration for the agent doing, or not doing, any act or favouring anyone in relation to the affairs of the agent's principal or employer. It is also an offence for an agent to demand or accept from anyone a benefit for consideration of doing, or not doing, any act, or favouring anyone, in relation to the affairs of the agent's principal or employer.

H. Illicit enrichment

The UN Convention requires Parties to consider criminalizing the unexplained increase in the assets of a public official, in so far as it is consistent with its Constitution and the principles of its legal system.

No such offence exists in Canada. Canada will consider the matter, in light of its Constitution, including the Canadian Charter of Rights and Freedoms, and the principles of its legal system. When presented by a similar provision in the Inter-American Convention against Corruption, Canada issued a Statement of Understanding upon ratifying the convention, which indicated that Canada would not criminalize the offence of illicit enrichment since to do so would be contrary to the presumption of innocence guaranteed by Canada's Constitution.

I. Laundering and concealment of proceeds of crime

The UN Convention requires criminalisation of the laundering of proceeds of crimes (article 23), as well as their concealment and continued retention (article 24). Laundering is defined in the article 23 of the Convention as conversion or transfer of property for the purpose of disguising the illicit origin of the property. The Convention also requires Parties to criminalize attempts, participation, aiding and abetting, counselling, and inciting laundering of proceeds from corruption offences.

The Canadian *Criminal Code* includes a whole regime that applies to proceeds from the commission of any indictable offence, including all Convention offences. This regime criminalizes the laundering of proceeds, which is defined as dealing in any manner and by any means with any proceeds with intent to conceal or convert them, knowing or believing that they were obtained or derived by the commission of an indictable offence (section 432.31). The Criminal Code provides for search, seizure, and detention of proceeds until final determination by a court of criminal jurisdiction that the property is proceeds of crime. When a person has been convicted and the court is satisfied that the property is proceeds of crime, section 462.37 provides that the judge shall order the property to be forfeited to the government that prosecuted the offender (either the federal or a provincial government), unless a third party, not involved in the offence, had a valid

and lawful interest in the property, in which case the court would order the property returned to that person (section 462.41).

The concealment of proceeds is covered in "dealing in any manner" in the definition of the offence of laundering under section 462.31. In addition, section 354 of the *Criminal Code* makes it an offence for a person to possess property or proceeds that the person knows to have been obtained by an indictable offence, which includes offences required by the Convention. Since possession is necessary to conceal, prohibiting possession would satisfy the requirement of the Convention.

The criminalisation of aiding, abetting or counselling the commission of an offence of laundering is implemented by the general provisions of the Criminal Code, which provide that aiding, abetting, counselling, or conspiring for, the commission of any offence is an offence (sections 21, 22 and 465 of the Criminal Code).

J. Obstruction of justice

Article 25 requires States Parties to criminalize bribery or intimidation of witnesses in proceedings related to Convention offences, and the intimidation of justice and law enforcement officials in relation to official duties related to Convention offences.

In Canada, the requirements of this section are met by the offences of intimidating a justice system participant under section 423.1 of the Criminal Code, which makes it an offence to use violence against a person, or to threaten or harass a person in order to impede the administration of the criminal justice system or the performance of duties by a justice system participant. As well, section 139 of the Criminal Code prohibits the obstruction of justice, including bribery to abstain from giving evidence, or to do or refrain from doing something as a juror.

K. Participation and attempt offences

The UN Convention requires Parties to criminalize participation in offences, such as an accomplice, assistant or instigator (article 27).

Canada's Criminal Code provides that a person is a party to an offence when this person aids or encourages a person to commit it (section 21), or counsels the commission of an offence that is committed (section 22). Section 464 of the Criminal Code makes it an offence to counsel the commission of an offence that is not committed. The UN Convention also invites, but does not require, Parties to criminalize attempts and preparation. Canada criminalizes attempts (section 24), but not acts of mere preparation that do not amount to an attempt. The distinction between the two is a qualitative one involving the relationship between the act that constitutes the attempt and the complete offence, with consideration being given to the proximity of the act to the completed offence. An attempt is something more than mere preparation to commit a crime.

L. Application of general principles

1. Jurisdiction

The Convention requires State Parties to establish their jurisdiction over Convention offences committed on their territory or on vessels and aircrafts registered in that State. The Convention also authorizes Parties to establish active and passive nationality jurisdiction, but does not require them to do so.

In general, Canada exercises territorial jurisdiction over Criminal Code offences, including the Convention offences. When Canada exercises nationality jurisdiction, and it does so for a very small number of offences, it is generally because nationality jurisdiction is required under an international convention. This is not the case under the U.N. Convention. When faced with the option of adopting nationality jurisdiction in respect of other corruption conventions, Canada has chosen not to do so, taking the position that it can effectively enforce Convention offences, using territorial jurisdiction.

Canada's courts have interpreted Canada's territorial jurisdiction to apply to offences committed in a foreign country when there is a "real and substantial link" between the offence and Canada. The "real and substantial link" test can have a wide scope and, in the case of the bribery of foreign public officials, could be expected to give Canada jurisdiction to prosecute where there is Canadian corporate involvement. Canada can also extradite its nationals. Canada has indicated that it would be prepared to reconsider its position if it encountered cases where territorial jurisdiction did not allow a sufficient basis for Canada to prosecute Canadian corporations involved in bribery of foreign public officials.

2. Liability of legal persons

The UN Convention requires Parties to establish criminal, civil or administrative responsibility of legal persons, without prejudice to the criminal liability of individuals, for Convention offences. Parties are also required to make legal persons subject to effective and proportionate sanctions.

Canada has a regime of corporate criminal liability that distinguishes between negligence offences and offences involving fault other than negligence. Convention offences fall under the regime applying to fault other than negligence. Under this regime (section 22.2 of the Criminal Code), a corporation can be held criminally responsible when one of its senior officers, with the intent to benefit the corporation and acting in his area or responsibility, either participated in an offence, or directed other representatives of the corporation to do so. The corporation would also incur criminal liability if a senior officer, with the intent to benefit the corporation, did not take measures to prevent other representatives from participating in an offence when this senior officer knew they were about to do so.

When a corporation is found guilty, section 735 of the Criminal Code provides that the penalty of imprisonment will be replaced by a fine of an amount in the discretion of the court.

Civil liability is within provincial jurisdiction. There are regimes of civil liability at the provincial level that would allow a person who suffered damages as a result of the illegal practices of a corporation to sue that corporation for damages.

In addition, government departments and agencies, such as Export Development Canada and the Canadian International Development Agency, could refuse to do business with corporations which are involved in corruption until these corporations can demonstrate that they have taken measures to prevent this to happen in the future.

3. Knowledge, intent and purpose

The Convention (article 28) provides that, when they are elements of the offence, knowledge, intent and purpose may be inferred from factual circumstances.

This is consistent with Canada's principles of criminal evidence.

4. Statute of limitation

The Convention requires Parties to establish a long statute of limitation period for Convention offences and a longer period when the alleged offender has evaded justice.

This is not an issue in Canada since there is no statute of limitation for indictable offences, and all Convention offences are indictable offences in Canada. As a result, an indictable offence can be prosecuted as long as the offender is alive.

5. Freezing, seizure and confiscation

Article 31 of the Convention requires Parties to provide for seizure and confiscation of proceeds of Convention offences and instrumentalities used in the commission of these offences.

The Criminal Code provides for search and seizure of proceeds of crime (section 462.32); for restraint or freezing order (section 462.33) and for forfeiture of proceeds of crime (section 462.37).

The Convention also requires Parties to establish a regime for the administration of assets seized. The Criminal Code provides for judicial management orders of seized property and the *Seized Property Management Act* provides rules for the management of property under seized or management orders.

The Criminal Code also provides for the forfeiture of offence-related property upon conviction (section 490.1). Offence-related property is defined as property by means of

which a Criminal Code indictable offence is committed, or that is used in connection with the commission of such an offence, or is intended to be used in committing such an offence.

The Convention also prevents Parties to oppose bank secrecy to the seizure of bank records. Bank secrecy is not an issue in Canada, where search and seizure of bank records are subject to the general rules applying to search and seizure, including being authorized by judicial order.

6. Protection of witnesses, experts, victims and reporters

Article 32 of the Convention requires Parties to take appropriate measures to protect witnesses and their relatives.

Section 423.1 of the Canadian Criminal Code makes it an offence to intimidate a justice system participant to impede performance of duties, to intimidate a journalist to impede transmission of information on a criminal organisation, or to intimidate the general public to impede the administration of criminal justice. A witness is a justice system participant.

In addition to the criminal law, the federal government and most provinces have legislation to protect witnesses. The federal *Witness Protection Program Act* can be found at: http://laws.justice.gc.ca/en/W-11.2/. The Act provides for the creation of a program for the protection of witnesses and prohibits disclosing information on the location or identity of a witness admitted in such a program. This program may involve creating a new identity for the person, relocation, and subsistence money. Provinces, which conduct most criminal prosecutions, have similar legislation.

7. Consequences of corruption and compensation

The Convention requires Parties to take measures to address consequences of corruption, and to ensure that legal remedies are available to compensate those who suffered damage as a result of corruption (article 34 and 35).

In Canada, contract law and civil remedies for damages are under provincial and territorial jurisdiction. The laws of all provinces and territories provide that a person who suffers damages as a result of the actions of another person may initiate proceedings to seek compensation. This principle would apply to a person who lost a contract to a competitor who obtained the contract through corrupt practices. As well, a contract obtained by corrupting an employee or an official would be considered as fraudulent, and could be nullified or rescinded at the request of the innocent party.

8. Encouraging reporting of Convention offences

The Convention requires States Parties to take measures to encourage a party to a Convention offence to provide information to authorities for investigative and evidentiary purposes.

The Canadian *Criminal Code* includes sentencing principles, which provide that a judge can reduce a sentence on account of mitigating factors. Cooperating with the investigation of an offence could be considered a mitigating factor. In practice, prosecutors sometimes agree to lay lesser charges, or seek a lesser sentence, in exchange of the accused giving evidence against an accomplice.

II. PREVENTIVE MEASURES.

The adoption of measures to prevent corruption is an important element of the Convention. These measures include codes of conduct for public officials; rules for hiring and promotions in the public service; candidature to public offices and funding of political parties; systems for government procurement and management of public finances; procedures for access to information and participation of the civil society; and measures to prevent money-laundering. Such measures have been in place in the Canadian government for a long time.

A. Codes of conduct for public officials

At Canada's federal level, there are six main codes of conduct for public officials: the *Values and Ethics Code for the Public Service,* which applies to public servants at the middle and lower levels of the public service; the *Conflict of Interest and Post-employment Code for Public Office Holders,* which applies to public servants at the highest level of the public service; the *Conflict of Interest Code for Members of the House of Commons,* which applies to Parliamentarians who are members of the House of Commons; the *Conflict of Interest Code for Senators,* which applies to Parliamentarians who are members of the Senate; *A guide for Ministers and Ministers of State,* which applies to ministers and junior ministers; and the *Ethical Principles for Judges,* which applies to the judiciary. The codes mentioned above apply at the federal government level. Similar codes govern public servants and office holders at the provincial or territorial level. A number of government agencies, generally service providers or agencies of a commercial nature, which operate at arm's length from the government, have their own codes of conduct that apply to their employees, but these codes are required to follow the same principles as the codes applying to public servants.

These codes of conduct impose obligations to prevent not only conflicts of interest, but also appearances of conflict of interest. The obligations are proportional to the level of responsibility of the officials they apply to, the heavier obligations applying to officials with the most decision-making power.

Oversight bodies oversee the application of these codes and promote the policies that underlie them: the Public Service Integrity Officer oversees the application of the *Values and Ethics Code for the Public Service;* the Ethics Commissioner oversees the application of the *Conflict of Interest and Post-employment Code for Public Office*

Holders and the *Conflict of Interest Code for Members of the House of Commons*; the Senate Ethics Officer oversees the application of the *Conflict of Interest Code for Senators;* the Prime Minister oversees the application of *A guide for Ministers and Ministers of State*; and the Canadian Judicial Council oversees the application of *Ethical Principles for Judges.* In addition, a number of departments and agencies have their own ethics advisory committees and public complaint committees.

1. *Values and Ethics Code for the Public Service*

This Code is issued by the Treasury Board Secretariat, which is the government department that acts as the employer of public servants appointed through the Public Service Commission, who constitute the majority of lower and middle level public servants. The Code is meant to guide public servants in their professional obligations and is part of the conditions of employment in the Public Service.

The Code requires public servants to avoid having private interests that would be affected by government action in which they participate, and to avoid assisting, beyond their professional duties, private interests in their dealing with the government. When such a situation arises, there is an obligation for public servants to report, in a Confidential Report to the deputy minister of their Department, outside activities or assets and liabilities that might give rise to a conflict of interest with respect to their official duties. The Code provides a list of assets that should be reported in a Confidential Report, as well as those that do not require a Confidential Report (mainly personal and domestic assets, such as residence, household goods and personal effects, automobile, bank accounts and government bonds). The Code also provides for remedies in case of conflict of interest: in some cases, disclosure will be sufficient to deal with a potential conflict of interest; in other cases, the public servant will be required to withdraw from the activity or dispose of the asset. Assets that require divestment are those that constitute a real, apparent, or potential conflict of interest in relation to a public servant duties and responsibilities, as determined by the Deputy Minister, who is the highest public servant in a department. When divestment is required, it is done by means of sale, or by placing the asset in a blind trust that meets the requirements of such trusts.

The Code also reminds public servants of the Criminal Code provisions on corruption, including those that prohibit, for a public servant, accepting or soliciting a gift from a person dealing with the government.

After they leave the Public Service of Canada, public servants remain for a year under some obligations: they cannot deal with their former department on behalf of other people (lobbying) or accept employment from an entity with which they were dealing in their official capacity in the year before leaving the Public Service.

The Code requires deputy ministers to designate a senior officer to assist public servants to resolve issues of conflict of interest. The Public Service Integrity Officer advises deputy ministers on the application of the Code, reviews Confidential Reports, and reports annually on cases of breaches of the Code. Failure to comply with the

requirements of the Code gives rise to disciplinary action, including termination of employment.

Finally, the Code encourages public servants to report wrongdoings in the workplace to the designated senior officer of their department, or to the Public Service Integrity Officer, for resolution of the issue. The *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* ensures that these reports can be made in confidence and without fear or reprisal.

2. *Conflict of Interest and Post-employment Code for Public Office Holders*

This Code applies to ministers and their staff and to the higher levels of the public service whose members are appointed to office by order of the Governor General on advice of Cabinet (Order in Council). The Code is issued by the Prime Minister and requires a higher degree of disclosure than the Code applying to the public service (in 1.). The Code establishes principles to which office holders must conform in conducting their duties, and sets out the duties of the Ethics Commissioner. The Ethics Commissioner is responsible for administering this Code and applying the conflict of interest measures of compliance. Office holders must sign an agreement to observe the Code, as a condition of their holding office.

The Code requires office holders to make a Confidential Report to the Ethics Commissioner upon appointment. In addition to assets and liabilities that might create a conflict of interest with the official's duties - assets and liabilities that must be reported by public servants at lower levels of the public service - this Confidential Report must cover all the office holder's assets and liabilities, as well as income received in the 12 months prior to assuming office and the income the office holder is entitled to receive in the next 12 months. The Report should also include outside activities, including philanthropic activities. For Ministers, the report must also include this information concerning assets, liabilities, income and activities of their spouse and dependant children. Ministers are also required to report all benefits from a government contract derived by them, their families, or private corporations in which they have an interest. On liabilities, ministers are required to include in the declaration the source and nature of all their liabilities over $10,000, but not their value.

Based on the Confidential Report, the Ethics Commissioner will prepare a Public Declaration that summarizes information included in the Confidential Report. The Public Declaration is placed in a public registry that can be consulted at the office of the Ethics Commissioner.

The Code establishes 3 categories of assets:

- declarable assets are those that require vigilance to ensure that they cannot give rise to a conflict of interest; they are the object of a public declaration;
- controlled assets are those that can be affected in their value by government decision or policy; the office holder must divest of these assets;

- exempt assets, which are for the private use of the office holder and assets that are not commercial in nature; these assets need neither be included in the public declaration nor divested.

The Code also sets rules to determine which benefits are acceptable and those that are not, and which acceptable benefits should be included in a public declaration. Benefits to be included in a public declaration include travel on a private aircraft and gifts over $200 or gifts from the same source that total $200 during a 12 month period.

The Code classifies outside activities in 3 categories:
- prohibited activities, which include the practice of a profession or business activity, and the holding of an office in a corporation or a union organisation;
- permissible activities, which have been approved by the Ethics Commissioner or, in the case of ministers, by the Prime Minister in consultation with the Ethics Commissioner;
- permissible activities, which are subject to public disclosure, including past and current directorship.

The Prime Minister is responsible for taking appropriate measures when the Ethics Commissioner advises that the office holder is not in compliance with the Code. These measures include termination of employment.

Office holders are also required to inform the Ethics Commissioner of all firm offers of outside employment that could place the office holder in conflict of interest, and to disclose immediately the acceptance of an offer to both the Ethics Commissioner and the office holder's superior.

Office holders are also subject to post-employment compliance measures. They can never act for a party they were dealing with on behalf of the government, or give advice based on information on government policies and programs that is not available to the general public. There are other restrictions that apply for a period of two years for ministers and one year for other office holders: they cannot accept employment with an entity they were dealing with in the year prior to leaving government employment, and they cannot make representations to their former department on behalf of such an entity. In the case of former ministers, the prohibition to make representations extend to their former Cabinet colleagues.

Current office holders are required to report to the Ethics Commissioner their official dealings with former office holders. They are prohibited to have official dealings with a former office holder in respect to a transaction when the Ethics Commissioner has determined that the former office holder was acting in contravention to the compliance measure with respect to this transaction.

3. *Conflict of Interest Code for Members of the House of Commons*

This Code has been adopted by the House of Commons as an Appendix to its Standing Orders and applies to all its members, including those who are also Cabinet ministers.

This Code contains a number of provisions that are similar to those applying to public office holders. Members of the House must make confidential statements to the Ethics Commissioner about all their assets, liabilities, sources of income and benefits derived from government contract, and those of their families. The Ethics Commissioner prepares a disclosure summary based on the confidential statement. Disclosure summaries are available for consultation by the public.

The Ethics Commissioner will enquire into breaches to the Code when requested to do so by another Member who has reasonable grounds to believe a Member has not complied with his or her obligations. The Ethics Commissioner must report the conclusion of the inquiry to the Speaker of the House, who shall table it. If a breach has occurred, the Ethics Commissioner may recommend appropriate sanctions, and the House will vote on the report of the Ethics Commissioner. It is the House of Commons that is responsible for the enforcement of this Code.

A Member must also disclose to the Clerk of the House, for transmittal to the Ethics Commissioner, any private interest that could be affected by a matter before the House or a Committee of which he is a member, and refrain from debating or voting on this matter.

4. *Conflict of Interest Code for Senators*

The Code for Senators includes provisions similar to those applying to Members of the House. Senators must make a confidential disclosure statement to the Senate Ethics Officer on matters such as source and nature of income; assets and liabilities other than personal property; corporations or associations the Senator is a director; and source and nature of any government contracts or business arrangement of which the Senator, or a corporation in which he or she has a significant interest, is a party. A public disclosure summary is prepared by the Senate Ethics Officer and is available for public inspection at the office of the Senate Ethics Officer.

5. *Guide for Ministers and Ministers of State*

In addition to the provisions of the *Conflict of Interest and Post-employment Code for Public Office Holders,* Ministers must also follow specific guidelines for conduct. The G*uide for Ministers and Ministers of State* is issued by the Prime Minister. It includes a chapter on Standards of Conduct, including a section on conflicts of interest. The guide reminds Ministers that they also have to comply with the codes applying to public office holders and to Parliamentarians, and that they will be held accountable to the Prime Minister and to Parliament for their compliance with these codes. The Guide prohibits ministers from intervening with a judiciary or quasi-judicial tribunals, except for seeking information on the status of a matter. It also provides guidelines on how to deal with an

agency that has an "arm's length" relationship with the government (i.e. an agency that has a large degree of independence) for Ministers who are responsible before Parliament for such an agency.

6. *Ethical Principles for Judges*

The *Ethical Principles for Judges* include rules for ensuring the impartiality of judges, and the appearance of impartiality. Judges may engage in charitable activities, provided it does not reflect adversely on their impartiality or interfere with their judicial duties, but they should not solicit funds, be involved in organisations likely to be involved in litigation, or give legal advice. They should not be engaged in any political activity or an activity that could appear as a political activity. Judges do not have to disclose their assets and liabilities, but they must disqualify themselves from cases in which they believe they are unable to judge impartially and cases where a reasonable person could suspect a conflict of interest between the judge's interest (or the interest of the judge's immediate family, close friends or associates) and the judge's duty. If the judge's interest is trifling, the judge may disclose the interest to the parties in the case, and seek their consent for hearing the case. Since the administration of justice is within provincial jurisdiction, some provinces include the obligation to disclose interests in the rules of procedure.

B. Rules for hiring and promoting public servants (article 7)

The Public Service Commission is responsible for the appointment of qualified persons. Appointment and promotion in the public service are made in accordance with the principles of the *Public Service Employment Act.* These principles include merit, non-partisanship, representativeness, and use of both official languages, i.e. French and English. The Public Service Staffing Tribunal provides recourse for contesting particular appointments. Annual reports must be tabled in Parliament on the application of the *Public Service Employment Act*.

C. Rules for the management of public money and procurement

At the federal level, there is a very specific and structured framework for controlling financial management, based on the *Financial Administration Act* and Regulations, as well as Central Financial and Accounting Policies and Departmental Financial Policies (Systems and Procedures). The framework applies to all federal Government Departments and Agencies. The *Financial Administration Act* provides for the financial administration of the Government of Canada, the establishment and maintenance of accounts, parliamentary control of all public funds, and the publication of annual Public Accounts. Provinces have similar requirements for financial administration.

The *Financial Administration Act* creates the Office of Auditor General, who oversees the government administration of public moneys. The role of the Auditor General of Canada is to audit government operations and to provide the information that helps Parliament to hold the government accountable for the administration of public funds.

The Auditor General reports annually to Parliament through the Speaker of the House of Commons. The Auditor General is independent from the government as an Officer of Parliament and is appointed for a 10-year term. The Auditor General is free to recruit staff and set the terms and conditions of their employment, and has the right to ask the government for any information required to meet the responsibilities of the position.

Strict rules also apply to government procurement. The *Contracting Policy*, established by the Treasury Board, governs the procurement of goods and services by all departments. This policy is based on a competitive process. It requires that bids be solicited from potential contractors before any contract is entered into, unless an exception is provided for in the regulations. These exceptions include: the value of the contract does not exceed $25,000; there is a pressing emergency; only one person is capable of performing the contract. The policy also provides that a person who has been convicted of fraud against the government is unable to bid for a contract, unless the person was granted a pardon.

D. Rules for the financing of political parties

The *Canada Elections Act* requires that contributions received by registered parties and expenses incurred for election and leadership campaigns be reported to the Chief Electoral Officer. Contributions can only be made by individuals and are generally subject to an aggregate annual limit of $5,000. There is a limited exception allowing for contributions of up to $1,000 from corporations and trade unions. Contribution limits are adjusted annually for inflation.

E. Rules for lobbyists

At the federal level, the Lobbyists *Registration Act* requires all those who are paid for trying to influence public office holders on behalf of another person to register with the Government. The Act also provides for a code of conduct for lobbyists. The *Code* establishes mandatory standards of conduct for all lobbyists communicating with federal public office holders. These standards are a counterpart to the obligations that federal officials must honour when they interact with the public and with lobbyists. Similar rules of conduct, either in legislation or guidelines, exist at the provincial and territorial level.

F. Rules for reporting wrongdoings in the workplace

Reporting wrongdoings is currently governed by the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace,* which applies to any wrongdoing. The definition of "wrongdoing" applies to the Criminal Code corruption offences. The policy requires deputy ministers to establish internal mechanisms to manage the disclosure of wrongdoing, including – at a minimum – a designated Senior Officer, who will be responsible for receiving and acting on such disclosures. The designated Senior Officer reports directly to the deputy minister for the application of the policy. The policy also provides for a Public Service Integrity Officer responsible for receiving and acting on disclosure from public servants of any department who believe

they cannot disclose within their own department or who believe that the disclosure to the Senior Officer was not appropriately addressed.

The Public Servants Disclosure Protection Act, was passed on November 25, 2005 but not yet in force, would legislate and strengthen the existing policy requiring internal mechanisms for disclosure. It would replace the Public Service Integrity Officer with a Public Sector Integrity Commissioner whose appointment is approved by a resolution of Parliament. The Commissioner is given investigative powers in relation to disclosure. The Commissioner's inquiries will not replace criminal investigations in the case where the wrongdoing amounts to a criminal offence, because evidence gathered by the Commissioner cannot be used in criminal proceedings, but the Commissioner's evidence can be turned over to law enforcement personnel to assist their investigation.

G. Protection for public servants who report wrongdoings in the workplace

Currently, public servants who report any wrongdoing, including an act of corruption, are protected by the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace.* This policy provides that no employee shall be subject to any reprisal for having made a good faith disclosure in accordance with this policy. Employees and managers who retaliate may be subject to administrative and disciplinary measures up to and including termination of employment. The policy also provides for a procedure for employees who believe they are subject to reprisal as a direct consequence of having made a disclosure in accordance with the policy. The Senior Officer to whom the disclosure was made, or the Public Service Integrity Officer, is responsible to protect from reprisal employees who disclose in good faith information concerning wrongdoing.

When in force, the *Public Servants Disclosure Protection Act* would make statutory the protection from reprisal for good faith disclosures, and would strenghten this protection. .

H. Access to information legislation

Public access to government information enhances government transparency and promotes the participation of the civil society in accordance with article 13 of the UN Convention. The *Access to Information Act* provides a right of access to federal government information, subject to certain exemptions and exclusions. The Act also delineates the process for making a request; it establishes the Office of the Information Commissioner to receive and investigate complaints; and it provides a further right of review by the Federal Court of Canada.

Under the Act, government institutions have 30 days to respond to access requests, with possibility to claim extended period if there are many records to examine, other government agencies to be consulted, or third parties to be notified. Applicants must pay a fee for copied information. Access rights are subject to specific and limited exemptions, when the information affects individual privacy, commercial confidentiality, national security, or the frank communications needed for effective policy-making. Such exemptions permit government agencies to withhold material. Dissatisfied applicants may turn to the Information Commissioner who investigates applicants' complaints, and

the results of the Commissioner's investigation can be reviewed by the Federal Court of Canada. . The provinces and territories have similar access to information legislation.

I. Measures to prevent money-laundering: FINTRAC

In Canada, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PC(ML)TFA), requires financial institutions, security dealers, real estate brokers, portfolio managers and other financial advisors, to keep information and records on their clients, including identification of account holders, records of large cash transactions, deposit slips, account statements, etc. The Act also requires them to take measures to ascertain the identity of their clients and determine whether clients are acting on behalf of a third party.

The Act also requires financial institutions to report suspicious transactions to the Financial Transactions and Reports Analysis Centre (FINTRAC), created by the Act, and makes it an offence not to report. A suspicious transaction is defined as a transaction in respect of which there are reasonable grounds to suspect that it is linked to a money-laundering offence or a terrorist-financing offence.

When, after analysis, FINTRAC determines that there are reasonable grounds to suspect that some information would be relevant to investigating and prosecuting a money laundering offence, the Centre must disclose this information to the appropriate police force or other law enforcement body. FINTRAC can also enter into an agreement for exchanging information with a foreign organisation with similar powers as provided under article 58 of the UN Convention.

The Act can be found at: http://laws.justice.gc.ca/en/title/A.html

III. INTERNATIONAL COOPERATION

A. Legal assistance in investigations and prosecutions

The obligations created by the Convention to provide international assistance for the investigation or prosecution of Convention offences are similar to Canada's obligations under bi-lateral Mutual Legal Assistance Treaties (MLAT). The execution of Canada's treaty obligations are governed by the *Mutual Legal Assistance in Criminal Matters Act*. The International Assistance Group (IAG), a specialized group of lawyers within the Department of Justice was designated to handle requests for assistance from foreign countries under MLAT. IAG reviews and coordinates all requests for extradition or mutual legal assistance made to or by Canada in criminal matters, with the assistance of the International Liaison Branch of the RCMP, which is the federal police force. IAG appears in court when a request for assistance requires a judicial order in Canada, such as restraint, seizure, or forfeiture of property located in Canada. Where a request for

assistance requires no judicial order in Canada for its execution, the request is generally executed entirely by law enforcement officials.

The IAG group is already handling requests for assistance under the Inter-American Convention against Corruption and is likely to be designated by Canada as central authority under article 46(13) of the UN Convention to handle requests for assistance under the Convention.

B. Extradition

Article 44 of the UN Convention deals with extradition requests. Its implementation process is similar to the implementation of mutual legal assistance requests. The same International Assistance Group handles requests for extradition, in accordance with the *Extradition Act* and various bi-lateral treaties. When an extradition request requires a judicial order in Canada for its execution, such as a warrant of arrest or a committal order, it is a lawyer from the International Assistance Group who seeks the order. The *Extradition Act* allows a person against whom an extradition order is sought to challenge the decision before the Canadian courts and to appeal the decisions.

Canada requires a treaty for accepting extradition requests, but has in the past accepted Conventions, such as the OAS *Inter-American Convention against Corruption*, as legal basis for cooperation on extradition. The same situation would likely apply to the U.N. Convention.

C. Asset recovery

The Convention requires Parties to take measures to prevent transfer of proceeds of crime (article 52). Canada satisfies this requirement with the measures outlined in Part II – I, and in particular with the responsibilities exercised by FINTRAC.

Canada's law provides for mutual legal assistance in the recovery of property confiscated by order of a court of criminal jurisdiction, when the predicate offence is an indictable offence when committed in Canada. The foreign forfeiture order must be a final order issued by a court of criminal jurisdiction in the requesting State, and not be subject to an appeal in that State. The legal assistance provided by Canada includes freezing, seizure, or forfeiture, where the information provided by the requesting State is sufficient and compelling.

The legislation provides a number of grounds that might bring the Canadian Minister of Justice to refuse to enforce a final criminal forfeiture order, such as: the request has been made for discriminatory reason; the enforcement of the order would prejudice an ongoing proceeding or investigation, would impose an excessive burden on the resources of the Canadian criminal justice system, or might prejudice Canada's security or national interest; and it is in the public interest to refuse the request.

Canada's legislation allows for the return of proceeds of crimes to an innocent third party. This innocent third party can be the requesting State in the case of corruption involving public funds.

D. Technical assistance and information exchange

Canada provides training and technical assistance under international conventions of which it is a Party, such as the Inter-American Convention against Corruption. In general, Canada provides assistance through the Canadian International Development Agency (CIDA). CIDA has a number of programming channels, which facilitate the sharing of experience in combating corruption, such as contributions to multilateral organizations that are combating corruption, to local governmental and nongovernmental partners, and, through country-to-country arrangements, direct financing support to government agencies and other public institutions, such as Auditor General's Offices, Ombudsman's Offices, Comptroller's, Finance Ministries, Government Procurement Agencies, Electoral Offices, etc.. In many countries, CIDA provides financing for Public Sector Reform, which can be used for the purposes of analysis or the identification of larger reform programs.

Other federal departments and agencies are also involved in mutual technical assistance. For example, the International Cooperation Group within the Department of Justice is active in providing support to countries to modernize their justice systems. As well, the RCMP is involved in a range of overseas training initiatives, both on its own and under the auspices of CIDA, focusing on subjects such as police management and intelligence analysis.

Canada’s current assistance policy toward the Parties to the Inter-American Convention against Corruption will likely extend to the States Parties of the UN Convention.