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Transparency International Canada:

Submission to the OECD Working Group on Bribery Phase 4 Monitoring of the Implementation of the OECD Anti-Bribery Convention in Canada

March 31, 2023

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INTRODUCTION

Transparency International Canada (TI Canada), is the Canadian chapter of Transparency International. Established in 1996, TI Canada is Canada's leading anti-corruption organization, an independent legal entity from TI, and a registered Canadian charity. This submission outlines what has taken place in Canada since the OECD's 2011 *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* and the follow-up report in 2013.

The submission covers four parts: 1) Legislative Amendments covering the *Corruption of Foreign Public Officials Ac*t (CFPOA) and the *Criminal Code*; 2) Investigations and Cases covering CFPOA and Criminal code cases, their repercussions and review of Canada's enforcement efforts; 3) Non-Criminal and Preventive Anti-Corruption Tools, which examines tools and actors outside of the CFPOA and Criminal Code that could support Canada addressing foreign corruption; and 4) TI Canada recommendations for action as they relate to the implementation of the OECD Convention.

The submission was prepared by TI Canada Legal Committee Members:

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With thanks to TI Canada Legal Committee Members Dr. Patricia Akiobe and Kenneth Jull for additional insights.

For all follow up questions and comments as part of the OECD's Phase 4 review, please write to ti-can@transaprencycanada.ca.

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1. Legislative Amendments

The domestic legislation that strives to meet Canada's obligations under the OECD Anti-Bribery Convention are the *Corruption of Foreign Public Officials Act* and the *Criminal Code*. Both have undergone amendment since the Phase III report.

A. CFPOA - Removal of Facilitation Payment exception

The *Corruption of Foreign Public Officials Act* (CFPOA)[1], Canada's main piece of legislation responding to the OECD Anti-Bribery Convention, was last amended in October 2017. Those amendments removed the exception for facilitation payments that had previously been a saving provision to acts of bribing foreign public officials.

B. Remediation Agreements (main aspect for OECD is the responsibility of legal persons)

The most significant legislative amendment that has taken place over the past 10 years is the introduction of a remediation agreement (RA) regime (or deferred prosecution agreements elsewhere) as part of the *Criminal Code.*[2]

Like deferred prosecution agreements offered in other jurisdictions, Canadian RAs are intended as an alternative to public prosecution that allow for resolution of cases of corruption and fraud in a way that balances the need for accountability with the often substantial reputational and economic consequences of a criminal trial and conviction on an organization. This is especially the case where these effects could negatively affect third parties uninvolved in the crime, like employees, pensioners, customers, local communities and shareholders.

Under the RA regime, public prosecutors can consider an RA as an alternative to prosecution where they are of the opinion that it is appropriate and in the public interest to do so.

RAs can be seen as a response to corporate wrongdoing that is aimed primarily at fostering rehabilitation and prevention of future harm through compliance measures and corporate culture change. As such, they are most likely to be considered where an organization acknowledges it has committed serious economic crimes and is prepared to cooperate with authorities as well as take serious measures to make amends, to address the situation, and to prevent future occurrences.

Enactment through Omnibus budget legislation and the associated consequences

RAs were tabled as part of an omnibus budget bill presented in Parliament in February 2018. Since budget bills are very lengthy and usually contain financial and budgetary measures, the section of the bill devoted to remediation agreements received very little scrutiny in Parliament. TI Canada did provide testimony about remediation agreements during the Standing Senate Committee on Legal and Constitutional Affairs hearing on the bill[3]. As became apparent, the decision to place an important modification to the criminal

[1] *Corruption of Foreign Public Officials Act*, C 1998, c 34.

[2] *Criminal Code,* RSC 1985, c C-46.

[3] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. Issue No. 45 - Evidence - May 30, 2018. https://sencanada.ca/en/Content/SEN/Committee/421/lcjc/45ev-54117-e

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law in a budget bill had several negative impacts on the public perception of the nascent regime as they lacked communication of a clear and coherent policy rationale for why they were being introduced. This state of affairs could constitute an obstacle in deploying RAs to deal with corporate crime, including corruption.[4]

Description of the regime

TI Canada believes it is important to highlight certain key features of this made-in-Canada version of a deferred prosecution agreement regime. Part XXII.1 of the *Criminal Code* sets out definitions, governing principles, the conditions to be met to set negotiations in motion, the steps to be followed in the negotiation process, the mandatory and optional content of an agreement, the court approval process, and enforcement of the agreement. There are also provisions governing subsequent use of information from the negotiations and from the agreement as well as the manner of publication of the agreement and the court decision.

Structurally, the design of the Canadian RA regime was inspired by, though not identical to, the UK model. As in the UK, remediation agreements are negotiated within a special legal framework and are ultimately subject to court approval. Unlike the UK, however, which has a two-stage judicial approval process, one to approve the start of negotiations and one to approve the final agreement, in Canada the decision to initiate RA negotiations lies entirely with prosecutors who must use their general discretion to make decisions about the conduct of criminal cases. Court approval is limited to the final agreement as negotiated.

Objectives

S. 715.31 of the *Criminal Code* identifies 6 objectives that are expected to plausibly flow from remediation agreements, though there is no requirement that all of them be achieved in every case, nor that any single one is more important than the other. The first five objectives all have parallels in the traditional principles of sentencing applicable to Canada (set out in Part XXIII of the *Criminal Code*): denunciation, deterrence, rehabilitation, acknowledgement of responsibility and restitution for harm done. The sixth objective found at paragraph 715.31(f) provides that RAs are meant to reduce the negative consequences of the

[4] The government did hold a public consultation in the fall of 2017 to solicit input from stakeholders about how to strengthen Canada's corporate accountability toolkit. It also sought input on the Integrity Regime, an administrative policy that sets out certain ethical conditions applicable to business bidding of federal contracts. The consultation solicited responses to a set of general questions, including one on the merits of DPAs. However, it is important to stress that the consultation questionnaire did not present a draft of proposed legislative amendments, nor did it probe respondents on specific features of the design of a DPA regime, such as eligibility criteria, the contents of a DPAs, the mechanics of the court-approval process or enforcement mechanisms in cases of breach. There was also no suggestion in the consultation that the government was planning to table a proposed RA regime in early 2018. See the report summarizing the findings from the consultation, which also includes the questionnaire: CANADA (Department of Justice), "Expanding Canada's toolkit to address corporate wrongdoing: What we heard" (2 February 2018), online (pdf) : https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/rapport-report-eng.pdf.

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wrongdoing on third parties, such as employees, customers, pensioners and others, who did not engage in the wrongdoing, while nevertheless holding responsible those who did engage in the conduct. This latter factor of taking into account the negative collateral consequences of a sanction on someone other than the offender is a departure from usual sentencing practices.

Scope

Remediation agreements are available only to organizations, be they for-profit or not-for-profit. The expression "organization" has a special meaning for the purposes of remediation agreements, that is narrower than the general definition of "organization" used elsewhere in the Criminal Code. It includes all forms of carrying on business, such as corporations and partnerships, but excludes trade unions and public entities such as municipalities.[5] Individuals are not eligible for RAs. Remediation agreements are available only for the offences listed in Schedule 1.1 of Part XXII.1 of the *Criminal Code*.[6] The list of offences includes the economic crimes of fraud, domestic and foreign corruption, bribery, money-laundering and other related offences. The cartel and bid-rigging offences set out in Canada's *Competition Act* are not included on the list.

Eligibility requirements

The RA regime sets out the steps in the process of negotiating an RA from the time that enforcement authorities are made aware of the alleged criminal conduct of the organization to the end of the agreement. It is important to note that while the regime is intended to foster voluntary disclosure of conduct before it is discovered by authorities, there is no information about how organizations should approach enforcement authorities, nor what kind of information or cooperation is expected. This is one area where further guidance is urgently needed.

Process

1. Eligibility - Definition of organisation

Determination of eligibility of organization for an RA based on if it meets definition of organization and is suspected of/charged with one of the offences in Schedule 1.1.

2. Eligibility - Prosecutorial determination of conditions

[5] In Canada all entities that meet the Criminal Code definition of "organization" can be subject to separate criminal liability under s. 22.1 and 22.1 Cr.C. The definition of "organization" is much broader than for-profit legal persons (see s. 2 of the Criminal Code), and extends to all forms of carrying on business, public bodies, municipalities and trade unions (par a of the definition) as well as non-enumerated entities that meet certain criteria (par b of the definition). However, for the purposes of Part XXII.1 of the Criminal Code a more restrictive definition of "organization" applies which excludes public bodies, municipalities and labour unions. As such, the definition in Part XXII.1 applies to private for-profit and not-for-profit entities as well as organizations that meet the generic criteria of par b) of the s. 2 definition.

[6] Canada (Department of Justice) "Remediation Agreements and Orders to Address Corporate Crime : Backgrounder" (9 September 2018), online : https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.htm

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The decision to invite an organization to negotiate an RA lies with prosecutors, whose assessment of whether an organization meets the eligibility criteria set out in the *Criminal Code* is treated as part of their normal prosecutorial discretion.[7] Cases must meet the following conditions to be eligible for an RA:

a. there is a reasonable prospect of conviction: This is the minimum standard required for a prosecutor to proceed with a case. It is applicable in all criminal matters.
b. the underlying facts of the offence do not involve bodily harm or death, national security issues or conduct done by or for the benefit of a criminal organization;
c. negotiating the RA is in the public interest and appropriate in the circumstances; and
d. the Attorney General has consented to the negotiation of the RA.

Of these elements, the weighing of the public interest factors is perhaps the most important and most contentious.

3. Negotiations:
Once negotiations commence, the prosecutor sends a formal invitation in writing to the organization outlining the terms under which the negotiation will proceed. As with any settlement negotiation, information and discussions are confidential and may not be used in subsequent proceedings in the event the negotiations fail.

4. Court approval:
Should an agreement be reached, the prosecutor has the duty to present the agreement to the court for approval. There are 10 mandatory elements that must be included in an RA agreement. Key ones include:

- a statement of the facts underlying the offence, including an undertaking by the organization not to publicly contradict those facts;
- an admission of responsibility for the acts that comprise the offence;
- the details of any financial penalties, including forfeiture of illegal gains, victim surcharge and other amounts;
- the expected ongoing and future cooperation of the organization with authorities;
- a comply or explain provision that addresses whether victims were identified and whether any restitution will be paid and reporting obligations.

There are also optional elements, such as compliance or corrective measures and the appointment of a monitor, which can be added where appropriate.

There are three conditions for court approval:

1. that the organization is charged with an offence eligible for an RA;
2. That the agreement is in the public interest; and
3. The terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

There is no guidance as to whether the public interest assessment is subject to the same criteria as that of the prosecutor and whether it is expected that courts will tend to follow the submissions of the parties on this matter, as they do in joint submissions on sentencing in guilty pleas. The third criterion is quite

[7] *SNC-Lavalin Group Inc. v Canada (Public Prosecution Service)*, 2019 FC 282, par 180.

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similar to the standard applied in sentencing decisions where courts must determine if the overall sentence is a proportionate to the gravity of the offense, taking into account all the circumstances.

5. Stay of proceedings:
If the court approves the agreement, the charges are stayed. In the event there is a breach of the agreement that cannot be remedied or otherwise addressed, the prosecutor may recommence proceedings against the organization. The RA regime does not provide for any other sanction in the event of breach of the agreement.

Publication

Under the RA regime, the principle is that all agreements, court orders and reasons for orders are to be published as soon as practicable. There is a provision for not publishing the court order and reasons approving an RA but not the agreement itself. Moreover, where a court orders non-publication, in whole or in part, its non-publication order and the reasons in support of it, must be made public.

Regulations

The RA regime expressly provides for the enactment of regulations (in s. 715.43), both generally for the purposes of implementing the regime and to address the following specific matters:

- the form of remediation agreements;
- the verification of compliance by an independent monitor, including the qualifications to be a monitor, the selection process, the form and content of conflict of interest notifications and reporting requirements.

At the time of writing, no regulations have been enacted and there is no indication of when the government plans to do so.

As mentioned in part 2E, the failure to enact these regulations is part of a broader pattern of opacity that plagues the RA regime. This deprives the general public of information that would allow them to understand how the process works and why this protects the public interest. At present, the RA regime still arouses mistrust because so little was explained when it was added to the criminal law. There is a latent perception, a legacy of the SNC-Lavalin case, that the regime was a concession to big business that lets them off too easily compared to how criminal justice is applied to individuals. Greater transparency about how the process is supposed to work and the specific conditions that apply to remediation agreements would help alleviate this perception problem and foster greater confidence in this settlement mechanism.

The enactment of the specific regulations provided for in Part XXII.1 of the *Criminal Code* is a simple first step that the government can take to build trust in the RA regime as a resolution mechanism that has a legitimate place in an overall anti-corruption enforcement strategy. Regulations to set out what the form of the RA should be, even if it requires tailoring for individual cases, would give the public an idea about the information that is typically contained in an RA and the type of language that might be used without them having to wade through the technical language in s. 715.34(1) (Mandatory contents of an RA) and 715.35(3) (Optional contents of an RA). Regulations on monitors would also reinforce confidence, particularly setting requirements for independence. In the one RA agreement approved to date, the

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monitor[8] was the same person oversaw compliance with the probation order issued against SNC-Lavalin Construction Inc[9], the subsidiary that pleaded guilty to a single fraud charge in December 2019.[10] This point is not to question the integrity of the individual, or the choice in selecting the individual, but to raise the issue of the need for transparency in the regulation of monitors, including the selection criteria.

Beyond the obvious benefits of transparency for the public, the RA regime provides very little information to organizations considering whether to engage in discussions with enforcement officials about a possible settlement. The minimal guidance issued by Canada contrasts with the extent of regulation and administrative guidance issued by the UK Serious Fraud Office at the time of enactment of its DPA legislation in 2014, legislation that was the model on which Canada built its RA regime. Though it is impossible to know precisely what impact greater information and regulations would have had, it is striking to note that in the almost 5 years since the RA regime was enacted, only one agreement has been approved (with a second one forthcoming).

C. Evolution in the Application of Remediation Agreements

Clarification re Non-Publication Orders

On December 13, 2018, the Canadian Government issued an amendment to the remediation agreement regime to clarify that any non-publication order (or related orders) could be time-limited, to allow anyone (for example, victims) to bring a court application to reconsider a non-publication decision, and to make it clear that a decision not to publish a remediation agreement (or related order) must still be published, even where the underlying agreement itself is confidential.[11]

Guidance on Remediation Agreements

On January 23, 2020 the Public Prosecution Service of Canada issued its first public guidance on remediation agreements through its Deskbook.[12]

The key elements of the guidance were:

a) emphasizing that the types of cases eligible for RAs were cases that had a strong case for prosecution;
b) the criteria applied by the Director of Public Prosecutions (DPP) in his or her capacity as Deputy Attorney General of Canada when determining whether to consent to the negotiation of a remediation agreement;
c) the procedure for Crown counsel to follow when making a recommendation for an RA to the Director of the Public Prosecutions as well as the process for the negotiation of an RA.

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[8] *R. c. SNC-Lavalin Inc.*, 2022 QCCS 1967, Annex A, par. 30. Online (Canlii): https://www.canlii.org/en/qc/qccs/doc/2022/2022qccs1967/2022qccs1967.html?resultIndex=1)
[9] https://www.snclavalin.com/en/site-services/monitor-information
[10] *R. c SNC-Lavalin Construction inc. (Socodec inc.)*, 2019 QCCQ 18961.
[11] *Budget Implementation Act, 2018, No. 2*, SC 2018, c 27, s 686 ; Canada (Global Affairs Canada), "Canada's Fight against Foreign Bribery" (2 October 2020), online : https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-20.aspx?lang=eng
[12] Canada (Public Prosecution Service of Canada), *Public Prosecution Service of Canada Deskbook*, Ottawa, ch. 3.21, online : https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html

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While helpful to have this guidance for prosecutors, it does not provide much guidance to companies looking to understand when and if RAs may apply to them.[13] Furthermore, it does not provide guidance on what measures the companies should be taking in terms of implementing ethics and compliance programs, as does the UK Bribery Act's Guidance (2010) and the US's Department of Justice Criminal Division's Evaluation of Corporation Compliance Programs (April 2019).

The primary focus of the Deskbook guidance appeared to be to illustrate the role of the Director of Public Prosecutions[14], which was the subject of much media and public interest during the SNC-Lavalin affair[15] in early 2019.

SNC Lavalin

The debate about whether an RA was in the public interest was subject to much media and national attention in 2019. The Director of Public Prosecutions concluded that in weighing the nine public interest factors set out in s. 715.32(2), it was not appropriate and not in the public interest to invite SNC-Lavalin to negotiate an RA. Many, including the Prime Minister and other politicians, felt that weight should have been given to the potential economic consequences that would be felt by employees and others who depended on the economic viability of SNC-Lavalin, even though this is not one of the explicitly mentioned public interest factors in the law.

In fact, in keeping with the requirements of Article 5 of the OECD Convention, section 715.32(3) expressly prohibits prosecutors from taking into account "the national economic interest, the potential effect on relations with another state other than Canada or the identity of the organization or individual involved" where an organization is charged with an offence under the CFPOA (foreign corruption). However, as the section merely repeats the language of Article 5, it does not provide any information about what the ambit of the prohibition is, nor what the terms mean. This is probably attributable to the fact that commentary on Article 5 of the Convention remains extremely limited, providing only general and generic statements about the importance of prosecutors being able to make decisions on the legal merits without political interference.[16] This lack of explanation about what Article 5 actually prohibits fueled some of the confusion in the context of the SNC-Lavalin case, noted above. The prohibition in s. 715.32(3) appeared to conflict with the express aim of reducing the negative economic consequences of criminal enforcement for innocent 3rd parties as set out in s. 715.31 f). To many, the potential consequences of not offering an

[13] Guy Pinsonnault and Jamieson D. Virgin, "Deferred Prosecution Agreements: Canada Provides Some Clarity, But Many Questions Remain" (February 2020), online: *McMillan* https://mcmillan.ca/insights/deferred-prosecution-agreements-canada-provides-some-clarity-but-many-questions-remain/

[14] Madeleine White "Politics Briefing : Prosecutor Kathleen Roussel on her reasoning for no deal in the SNC-Lavalin case", *The Globe and Mail* (28 February 2020), online : https://www.theglobeandmail.com/politics/article-politics-briefing-prosecutor-kathleen-roussel-on-her-reasoning-for-no/ ; Janice Dickson "Kathleen Roussel: Who is the top prosecutor pushing ahead with the SNC-Lavalin case" , *The Globe and Mail* (21 March 2019), online : https://www.theglobeandmail.com/politics/article-kathleen-roussel-the-fearless-lawyer-who-didnt-back-down-on-snc/

[15] The Globe and Mail, "SNC-Lavalin, Jody Wilson-Raybould and Trudeau's PMO: The story so far", *The Globe and Mail* (11 February 2019, updated 19 December 2019), online : https://www.theglobeandmail.com/politics/article-snc-lavalin-wilson-raybould-trudeau-pmo-explainer/

[16] See commentary 27 on the Convention: https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

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RA to SNC-Lavalin were significant enough to be seen as affecting the national economic interest and they did not see why this was not a legitimate consideration for prosecutors to weigh in their decision.

First Remediation Agreement

The first Canadian remediation agreement was concluded in May 2022 and the court promptly published its own judgement approving it, together with the full text of the agreement and related appendices, including the terms of a probation order and a slightly redacted version of the agreed statement of facts jointly prepared by the prosecution and the defence. [17] This latter document was the subject of a separate, specific ruling by the approving judge, Justice Éric Downs, on the extent of factual disclosure required.[18] The prosecution and defence had initially proposed a very abbreviated 5-paragraph version of the facts arguing it was necessary to protect the fair trial rights of individual executives involved in the offence who were still facing trial. Lawyers representing media organizations vigorously challenged this argument while lawyers for the individual defendants advocated for the abbreviated factual description. The judge ordered all sides to agree on a version of the statement of facts that balanced the public interest in transparency with the fair trial rights of individuals awaiting trial. Ultimately a 43-paragraph public version of the statement of facts, with some redactions, was approved by the judge as part of a temporary, partial non-disclosure order as set out in S. 715.42 of the *Criminal Code*. The careful non-publication orders rendered by Justice Downs underscore the vital role of the judge in ensuring that transparency considerations are taken seriously in the RA approval process.

Second Remediation Agreement (forthcoming)

In September 2022, the RCMP laid foreign bribery and fraud charges against Ultra Electronics Forensic Technology Inc (UEFTI) and four former executives.[19] The charges relate to alleged bribery of officials in the Philippines, dating to 2006, in relation to a multimillion dollar contract.[20] The Public Prosecution Service of Canada (PPSC) invited Ultra Electronics to negotiate a remediation agreement and they reached an agreement on July 27, 2022.[21] The PPSC then applied to the Superior Court of Quebec for court approval of a remediation agreement on October 4, 2022.[22]

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[17] *R c SNC-Lavalin inc.,* 2022 QCCS 1967.

[18] *R. c. SNC-Lavalin inc.*, 2022 QCCS 1967, par. 89-95, referencing : Downs, JCS, *Temporary and Partial Order for Non-publication and non-dissemination of certain information*, (12 may 2022), Montreal, QC CS, 500-36-010199-225, (Public Order No 2).

[19] Canada (Royal Canadian Mounted Police), "RCMP foreign corruption investigation results in charges against Montreal-Bases company" (21 September 2022), online *Royal Canadian Mounted Police*, https://www.rcmp-grc.gc.ca/en/news/2022/rcmp-foreign-corruption-investigation-results-charges-montreal-based-company

[20] UEFTI was acquired in 2014 by UK-based Ultra Electronics Holdings Plc. See : Quebec (Registry of Enterprises), online : https://www.registreentreprises.gouv.qc.ca/RQAnonymeGR/GR/GR03/GR03A2_19A_PIU_RechEnt_PC/PageEtatRens.aspx?T1.JetonStatic=201647d4-bcfe-4257-a5e2-83e1d87b0b61&T1.CodeService=S00436) . The parent company was recently taken private by the Cobham Group, which is owned by private equity partnership Advent International: https://www.ultra.group/about-us/acquisition-of-ultra-by-cobham-ultra-acquisitions-limited/

[21] *R. c. Ultra Electronics Forensic Technology Inc. (UEFTI)*, 2022 QCCS 4401, par. 8. Online (Canlii): https://www.canlii.org/en/qc/qccs/doc/2022/2022qccs4401/2022qccs4401.html?resultIndex=1

[22] *R. c. Ultra Electronics Forensic Technology Inc. (UEFTI)*, 2022 QCCS 4401, par. 1, 7.

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At a pre-hearing conference on October 12, the parties jointly made a motion to the court requesting that the court approval hearing be held in camera, alleging the need to protect settlement privilege. This motion was served on four individuals, all current or former employees of Ultra Electronics, who stand charged of the same offences as the company, as well as several major media organizations.[23] On November 16, 2022, Justice Marc David issued a decision denying the motion, concluding that based on the law and the circumstances of the case, there was no basis to claim settlement privilege to justify a deviation from the open court principle and the clear transparency requirements contained within the RA regime.[24] The judge held that applying a general non-publication order on documents filed at the approval hearing would likely be sufficient to protect the need for confidentiality during a public hearing but prior to the final court approval. He acknowledged, however, that this would always be dependent on the specific circumstances of a case and thus there was a need for flexibility in striking a balance that ensured each RA approval process was consistent with the proper administration of justice.[25]

At the time of writing, it was not possible to confirm if the approval hearing had taken place, though electronic court records indicate two judgments were rendered on February 28, 2023, each subject to a non-publication order (NPO). The judge also sent a letter to both parties on the same date. An official notice of judgment was issued on March 2, 2023, but it is not publicly available. Court records also indicate an application opposing the maintenance of the NPO was brought by Concept Dynamics Enterprises on March 10, 2023.

Neither the court approval judgment, if it has been granted, nor the remediation agreement itself has been made public.

D. Consideration of Victim's in Remediation Agreements

Under the remediation agreement regime, there are specific requirements that courts must verify in relation to victims, though it remains to be seen how they will be applied. The judge approving an RA must specifically examine whether the provisions of the regime that are relevant to victims have been considered.[26] This includes that the declaration prosecutors must make with regard to reasonable efforts to identify victims[27] and whether they should receive some kind of compensation and if not, to explain why no compensation was paid.[28] The Court also has the duty to consider any victim or community impact statement provided.[29]

Beyond court oversight of victim-specific terms of a particular RA, the RA regime grants victims standing to bring applications to review the merits of non-publication orders in relation to RAs that are temporarily

[23] *R. c. Ultra Electronics Forensic Technology Inc. (UEFTI)*, 2022 QCCS 4401, par. 9-12.
[24] *R. c. Ultra Electronics Forensic Technology Inc. (UEFTI)*, 2022 QCCS 4401, par. 52-77 (settlement privilege does not entitle parties to an in camera hearing) and 78-99 (The spirit and the letter of the RA regime requires a public approval hearing).
[25] *R. c. Ultra Electronics Forensic Technology Inc. (UEFTI)*, 2022 QCCS 4401, par. 100-104.
[26] ss.. 715.37(3), (4) and (5) Cr.C.
[27] s. 715.36(3) Cr.C.
[28] s. 715.34(1)(g) Cr.C.
[29] s. 715.37(3)(c) Cr.C.

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kept confidential.[30] The regime also allows for non-publication of an RA or parts of an RA where this is needed to protect the identity of any victim.[31]

In practice, however, these legal tools have not provided assistance to foreign victims. In the 2019 plea deal which settled foreign corruption and fraud charges against SNC-Lavalin Group and two of its subsidiaries, prosecutors did not explain why no provision was made for restitution to victims.[32] For its part, the defense asserted that "restitution" should encompass not just fines but apologies and that agreements concluded with the World Bank, governments, and public authorities to address issues arising from its past conduct constituted a form of "restitution"[33]. In two earlier foreign corruption cases involving Canadian companies in Bangladesh and Chad, while the corporations voluntarily agreed as part of a joint plea deal to pay victim surcharges of 15% of the fines imposed to the Alberta treasury, there was no direction to use the funds in victim assistance activities to benefit the victims of foreign bribery. Indeed, it now appears that many of the funds in question have gone unused.[34]

E. TI Canada Evaluation of Remediation Agreements

TI-Canada supported the creation of Canada's remediation agreement regime. However, the existing regime lacks elements to ensure that it will effectively achieve its goals, namely, holding companies accountable for wrongdoing while avoiding unjustifiably harsh economic and reputational consequences that may affect not only the accused but also innocent third parties.

As stated above, there are currently three main gaps in the system.

First, the convoluted legislative process that created the regime provided very little information about its goals and the mechanisms designed to achieve these goals. The lack of information created confusion, misperceptions, and misunderstandings which have deeply affected the regime's legitimacy, especially in the eyes of the general public.

Second, the regime lacks guidance regarding the circumstances under which a remediation agreement might be offered to a corporate offender, which conditions can be imposed, and how companies can cooperate with law enforcement authorities. Such a lack of guidance can reduce incentives for companies to approach authorities and creates the risk of inconsistent behaviour on the part of law enforcement officials.

Third, the system lacks transparency: it is not clear what factors must be considered in order to offer an RA to a corporation, and it is also not clear what needs to be published once an RA is validated by a court.

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[30] s. 715.42(5) Cr.C.

[31] s. 715.42(3)(ii) Cr.C.

[32] *R. c SNC-Lavalin Construction inc. (Socodec inc.)*, 2019 QCCQ 18961, par. 9.37.

[33] *R. c SNC-Lavalin Construction inc. (Socodec inc.*), 2019 QCCQ 18961, par. 10.67-10.69.

[34] Joanna Harrington, "Using the fines in corporate corruption cases to provide victim redress" (21 September 2020), online (blog) : *Dalhousie University Blogs : Dalhousie Law Journal* https://blogs.dal.ca/dlj/2020/09/21/using-the-fines-in-corporate-corruption-cases-to-provide-victim-redress/

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This lack of clarity undermines accountability in the process of entering into such agreements and is potentially damaging to victims who are deprived of relevant information about the case. Furthermore, it reduces the possibility of showcasing to the public the purposes for which such agreements are being deployed and when they might be put to use.

In light of these three gaps, Canada's key priorities regarding its RA regime should be:

1) Publicise clear information and educational materials to the general public about the purposes of the regime and how it works;
2) Provide guidance for companies with detailed information about the elements that are likely to influence an offer and the ensuing negotiation of an RA. Such guidance can be provided in the form of guidelines, memoranda, or other public documents.
3) Enact regulations, as required by the current legislation, to ensure the consistent and adequate implementation of the current regime, including:
    a. the form of remediation agreements;
    b. processes and procedures involving independent monitors.
4) Ensure, through legislative amendments or other legal mechanisms, that the process is transparent and, whenever possible that there is public information about the facts, natural and legal persons concerned, reasons to resort to an RA, sanctions imposed and their rationale, and remediation measures, such as compliance regimes and monitorships.

TI Canada believes that these measures are required to align Canada's current regime with the OECD's Anti-Bribery Convention and 2021 Anti-Bribery Recommendation, specifically Articles XVII and XVIII related to non-trial resolutions.[35]

[35] OECD/LEGAL/0378, amended on 25/11/2021: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378

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2. Investigations and Cases

Though Canada has not seen many enforcement actions over the past decade, there are a number of prosecutions that have led to either a guilty plea, a remediation agreement, or a conviction for corruption offences.

A. Ultra Electronics

On September 20, 2022, Ultra Electronics Forensic Technology Inc. (UEFTI), Robert Andrew Walsh (Montreal, QC), Philip Timothy Heaney (Montreal, QC), René Bélanger (Saint-Lambert, QC) and Michael McLean (Beaconsfield, QC) were each charged with the following criminal offences:

- Bribery of a foreign public official – *CFPOA* 3(1)a)
- Bribery of a foreign public official – *CFPOA* 3(1)b)
- Defrauding the public – *CC* 380(1)a)

It is alleged that the corporation and the accused individuals directed local agents in the Philippines to bribe foreign public officials to influence and expedite a multi-million-dollar contract.[36]

On October 4, 2022, the Applicant, the Public Prosecution Service of Canada (PPSC), filed an application seeking an approval order for a remediation agreement with the Respondent, UEFTI, negotiated pursuant to the provisions of Part XXII.1 of the Criminal Code (sections 715.3 to 715.43).[37] Both the applicant and the respondent requested that the approval hearings be held *in camera*. The Court concluded that the privilege of settlement does not entitle the parties to an *in camera* approval hearing as it would be contrary to the notion of the open court principle, which is a hallmark of a democratic justice system.[38]

As noted in Section C above, as of the time of writing, there has been no public announcement about the final resolution of the case. Court records suggest all information about the case remains subject to non-publication orders, though at least one of these appears under challenge. If the court has given its approval, neither its decision, nor the actual remediation agreement has been made public. There is no indication as to whether and when a public hearing on the remediation agreement was actually held.

B. Bebawi Case and Appeal

Sami Bebawi is a former executive of SNC-Lavalin. He was the president of SNC-Lavalin Construction Inc (SLCI - known as Socodec until July 2009) from 1999-2006. While in that capacity, he was involved in various bribery and corruption activities whereby payments were made to Saadi Gadhafi in order for him to exert influence on his father, Muammer, who was then the autocratic leader of Libya.[39] The objective

[36]Canada (Royal Canadian Mounted Police), "RCMP foreign corruption investigation results in charges against Montreal-Bases company" (21 September 2022), online *Royal Canadian Mounted Police*, https://www.rcmp-grc.gc.ca/en/news/2022/rcmp-foreign-corruption-investigation-results-charges-montreal-based-company.
[37] Only organizations are eligible for Remediation Agreements in Canada. The charges against the individuals involved remain and their hearings are scheduled at a later date.
[38] *R. c. Ultra Electronics Forensic Technology Inc. (UEFTI)* 2022 QCCS 4401.
[39] Mr. Bebawi was convicted by a jury, so there is no written record of the reasons for his conviction. His role in the scheme was described briefly in the transcription of the oral reasons for his sentence: R v Bebawi, 2020 QCCS

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was to secure contracts for the benefit of SLCI and to obtain payments on amounts owed to SCLI by a Libyan government agency, the Great Man-Made River Authority (GMMRA).

Charges: Mr. Bebawi was charged with fraud exceeding $5000 (s. 380(1)a) of the *Criminal Code*), bribing a foreign official (s. 3(1)b of the CFPOA), two counts of laundering proceeds of crime (ss. 462.31(1)a) and b), and possession of property obtained by crime (s. 354(1) Criminal Code).

Resolution of charges: Mr. Bebawi was convicted on December 15, 2019 on all counts following a jury trial. Mr. Bebawi lost an appeal challenging the verdict in January 2023.[40] Mr. Bebawi had argued that the trial judge erred in accepting the evidence obtained from an undercover operation targeting his lawyer and in dismissing his application for a directed verdict.[41]

Sanctions imposed: At trial, Mr. Bebawi was given a sentence of eight years and six months along with a fine in lieu of forfeiture of $24,690,401, payable within six months, with an additional term of imprisonment of 10 years in case of non-payment.[42] These sanctions were confirmed on appeal, save for the period for repayment of the fine in lieu of forfeiture, which was extended to two years from the date of the appeal judgment.[43]

Impact on anti-corruption enforcement: Mr. Bebawi's sentences are the harshest to be imposed on an individual for offences related to foreign corruption and bribery in Canada. In his reasons for sentence, Superior Court Justice Guy Cournoyer used strong language to denounce Bebawi's conduct and the scourge of foreign corruption in general.[44] He underscored the gravity of the underlying conduct, its serious impact on the proper functioning of markets and its significant scope (duration and monetary amounts involved).[45] Justice Cournoyer gave less weight to Mr. Bebawi's post-conviction remorse but did treat Mr. Bebawi's age at the time (73) and health as mitigating factors.[46]

C. SNC Lavalin (Montreal Bridge Remediation Agreement)

On September 23, 2021, the Crown issued a public notice inviting two Canadian subsidiaries of SNC-Lavalin Group Inc, SNC-Lavalin Inc and SNC-Lavalin International Inc (the "Organizations") to negotiate a remediation agreement. The notice contained a 15-day deadline for a response and an estimated three-

22, par 9-11. The reasons of the Quebec Court of Appeal provide a more fulsome description of the facts, though these are focused on the facts related to assessment of the admissibility of evidence obtained through an undercover operation and wiretap evidence : R c. Bebawi, 2023, QCCA 212, par. 13-37. Further facts are discussed at 83-96. Another description of Mr. Bebawi's role in the scheme can be found in the agreed statement of facts in the settlement of the charges against SNC-Lavalin, submitted after Mr. Bebawi was convicted: *R. v SNC-Lavalin Construction Inc. (Socodec Inc.)*, 2019 QCCQ 18961.

[40] R c. Bebawi, 2023, QCCA 212, par. 4.

[41] The Quebec Court of Appeal provides an English translation summary of the case: Cour d'appel du Québec, "Bebawi c. Sa Majesté le Roi" (14 February 2023), online : https://courdappelduquebec.ca/en/judgments/details/bebawi-c-sa-majeste-le-roi/

[42] R v Bebawi, 2020 QCCS 22, par. 50-55

[43] R c. Bebawi, 2023 QCCA 212, par 6-8.

[44] R v Bebawi, 2020 QCCS 22, par. 5-12.

[45] R v Bebawi, 2020 QCCS 22, par. 13-23, 41-49.

[46] R v Bebawi, 2020 QCCS 22, par. 27-40

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month deadline for the negotiation process. On March 7, 2022, the co-accused elected a joint trial by judge and jury, and the case was transferred to the commencement of the Superior Court of Quebec's warrant on March 9, 2022. On October 1, 2021, the Organizations authorized by resolution of their board of directors indicated their acceptance of the invitation to negotiate a remediation agreement. They agreed to the terms of the negotiation, which include the obligation, under subparagraph 715.33(1)(e) of the *Canadian Criminal Code*, to " provide all information requested by the prosecutor that the organization is aware of or can obtain through reasonable efforts"[47].

At the end of the three-month negotiation period, the Prosecutor agreed to extend this period by two months, following various requests from the Organizations and in order to carry out verifications that had become necessary during the negotiations.

On February 25, 2022, the parties mutually agreed on the terms of an RA within the meaning of subsection 715.37(1) of the *Criminal Code* and agreed to jointly submit the Draft Agreement for approval by this Court.

Charges: SNC-Lavalin and SNC-Lavalin International were accused of various offenses related to obtaining a contract to repair the Jacques-Cartier bridge between 1997 and 2004. The charges included fraud against the Canadian government (s. 121 Cr. C.), forgery (s. 366 Cr. C.), fraud (s. 380 Cr. C.) and their respective conspiracies (s. 465 Cr. C.).

Resolution of charges: Following a public hearing, the Court approved the amended RA under section 715.37 of the *Criminal Code* and allowed the publication of the amended Agreement.

Sanctions imposed: The Agreement includes financial obligations and compliance monitoring measures to be implemented by the Organizations. The parties agreed that the financial obligations and compliance monitoring would last for three years, after which the charges would be dropped if all obligations are met. The financial obligations include a penalty, confiscation of the profits, compensation to the victim, and a compensatory surcharge. The total amount agreed to be paid is $29,558,777[48].

Fines: The penalty amount of $18,135,135, was considered to be effective, proportionate, and dissuasive within the meaning of Section 715.31(b) of the *Criminal Code* by the parties. They stated that this amount is in accordance with both common law principles and the principles defined in Part XXIII of the Criminal Code. [715.31(b), 715.34(1)(f) Cr. C.][49]. Additionally, the accused parties must pay a compensatory surcharge of $5,440,541 to the Treasury of the Province of Quebec in six equal payments of $906,756.83 each. Within 30 days of the approval of the remediation agreement, the accused parties must remit and pay the amount of $2,490,721 to the Attorney General of Quebec, represented by the Director of Criminal and Penal Prosecutions (DCPC). They must also pay $3,492,380 as compensation to the benefit of the company *Les Ponts Jacques-Cartier et Champlain Incorporée*.

Impact on anti-corruption enforcement: In their application, the Parties proposed a two-stage procedure to the Court, consisting of a confidential stage followed by a public one. This proposal was based on the

[47] *R. c SNC-Lavalin inc.*, 2022 QCCS 1967, Par.29-37.
[48] *R. c SNC-Lavalin inc.*, 2022 QCCS 1967, Par.15.
[49] *Amendment Remediation Agreement* - Part XXII.1, Par.20.

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application of the settlement privilege, public interest considerations, and the UK Deferred Prosecution Agreement (DPA) regime, which they argued provides for such a procedure. On March 15, 2022, the Court held a closed hearing at the request of the Parties and issued orders to preserve the anonymity and confidentiality of the file, as well as to maintain closed hearings for all required dates leading up to the public presentation of the motion for approval of the remediation agreement[50]. It remains to be seen whether this process will become the norm in remediation agreement approvals, but it could be a precedent for future cases.

Indeed, the approval of Canada's first remediation agreement and the Court's detailed reasons for approving it are significant developments in Canada's approach to criminal liability. The guidance provided by the Court's decision and its emphasis on transparency and proportionality will be helpful for prosecutors and organizations considering self-disclosure.

This case and its conclusion may encourage more organizations to come forward and self-disclose potentially criminal conduct, knowing that they could negotiate a remediation agreement that is effective, proportionate, and dissuasive. But care must be taken to ensure this tool does not become a way for organizations to avoid criminal consequences for the crimes they have committed. Overall, the Court's decision provides a valuable precedent for future cases and may facilitate the resolution of criminal matters involving organizations.

D. SNC Lavalin (Libya)

By far the most significant development in anti-corruption enforcement in Canada was the conclusion, on December 19, 2019, of the high-profile SNC-Lavalin case involving corruption in Libya.

Though the case had been on-going since charges were laid in February 2015, it became the centre of a political scandal that engulfed the Canadian government for several months from February 2019 onwards.

Charges: Three entities were charged in the case: SNC-Lavalin Group Inc (SNC Group), the ultimate corporate parent, and two indirect wholly-owned subsidiaries, SNC-Lavalin International Inc (SLII), the international marketing arm of SNC Group and SNC-Lavalin Construction Inc (SLCI) - known as Socodec until July 2009. Each were charged with one count of corruption of a foreign public official under s. 3(1)a) of the CFPOA and one count of fraud over $5000 pursuant to s. 380(1)a of the *Criminal Code*.

Resolution of charges: At what was supposed to be a pre-trial facilitation conference before Justice Claude Leblond of the Court of Quebec (Criminal and Penal Division), the Crown and defence presented a joint submission in which SLCI plead guilty to the fraud charge. All other charges were stayed.

[50] *R. c SNC-Lavalin inc.*, 2022 QCCS 1967, Par.44-45.

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Sanctions imposed: In the sentencing judgment[51], Justice Leblond endorsed the Agreed Statement of Facts and the jointly submitted sentence of a monetary penalty of CDN $280 million dollars and a three-year probation order.

Fine: The fine is the largest monetary penalty for fraudulent behaviour in absolute dollar terms in Canadian history. The SNC case dwarfs all previous cases involving corruption and fraud abroad for a Canadian company. As such, the relative comparison with other cases is of limited use and may be misleading. Moreover, it is important to note that the Crown and the defence used different methodologies to calculate the fine and Justice Leblond declined to endorse either one. As such, the rationale and the justification for the final amount of the fine, which is at a substantial discount to what might have been imposed based on the gravity of the offence and the amounts involved, is ambiguous as each party characterized the mitigating and aggravating factors differently. One area of concern with the method employed by the defence was its use of the U.S. Sentencing Guidelines as a tool in determining the relative weight to accord to aggravating and mitigating factors. The US system is systematized into highly detailed sentencing rules organized by the type of offence. Applying this approach in Canada is highly problematic because it is at odds with the individualized sentencing process that is codified in the *Criminal Code*. The lack of comment by the judge on this and other aspects of the rationale for the fine calculation has muted the deterrent and denunciatory message of the fine. It also means that the SNC case will have limited value as a guide in other cases.

Probation Order: Aside from the usual obligations to keep the peace, appear when summoned and to keep the Court informed of name changes, the probation order imposes on SLCI the obligation to comply with a number of specific conditions related to corporate compliance, internal controls and the appointment of an independent monitor. The details of these obligations are set out in Appendix A to the judgment. It is important to note that the drafting of these conditions is novel and unusual. Legally, only SCLI is subject to the probation order and the threat of sanction from the Court in the event it breaches the order. However, because as a matter of internal governance, it is SNC Group that manages and controls corporate compliance, including anti-corruption policies, procedures and training, the order enjoins SCLI to "cause SNC Group" to do the items in the probation order.[52]

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[51] *R. v SNC-Lavalin Construction Inc. (Socodec Inc.)*, 2019 QCCQ 18961. Though the document setting out the agreed statement of facts, joint submissions on sentencing, the terms of the compliance order and the very brief reasons for the judicial endorsement of the sentence was made publicly available in paper form at the time of the plea, it took nearly 18 months for the judgment to be published in a publicly accessible online database (Canlii).

[52] The main obligations under the probation order are:

1) To maintain, and where required, strengthen corporate compliance and anti-corruption measures already implemented by the Group in accordance with the detailed requirements in Appendix A, including an internal review of all existing SNC Group internal controls, policies and procedures regarding compliance with the CFPOA and the Criminal Code. The Court will supervise the development and implementation of any policies in a public hearing;
2) To appoint a third-party monitor within 30 days, who will prepare an initial report within 120 days and three follow up reports (two annual reports and one final report at the end of the 3 year period); all

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Impact on anti-corruption enforcement: This case is seen as a modest win from an anti-corruption point of view, as the Crown ultimately agreed to a plea deal, with only the subsidiary being prosecuted and not the parent company, and then only for fraud against the state of Libya as all corruption charges were dropped.[53] Under the current rules governing public tenders for federal government contracts, fraud against a foreign country is not one of the offences that triggers debarment. The guilty plea, therefore, enabled SNC-Lavalin to avoid being disqualified from competing for federal contracts. It should be noted, however, that in 2015 SNC concluded an Administrative Agreement that enabled it to continue to contract with the Government of Canada pending the outcome of this prosecution.[54]

E. Barra and Govindia

The cases against Mr. Barra (US national) and Mr. Govindia (UK national) were jointly tried on one count of bribery of a foreign public official pursuant to par 3(1)b) CFPOA. Each was convicted of the foreign bribery charge on January 11, 2019 and received a sentence on March 7, 2019 to 2.5 years in prison. In imposing this sentence, the judge took into account several aggravating and mitigating factors. Also relevant was the fact that the maximum penalty at the time was five years' imprisonment (the penalty

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reports are to be provided to the PPSC and SNC Group the court 15 days prior to be filed with the Court;

3) To publish, forthwith, a press release setting out the details of the offence for which SLCI was convicted, the sentence imposed and the fact that a monitor to be named to oversee compliance with probation order;
4) To publish executive summaries of monitor reports under a special, clearly identified tab on the "Investors" page of the SNC Group's website;
5) To not take measures to recover any of the amounts paid as part of the fraud (details set out in Appendices B and C). Should any of these amounts be received by SCLI or SNC Group, they are to be forfeited to the federal Crown; and
6) To cause SNC Group to enter into an agreement whereby SNC Group acknowledges the contents of the probation order and undertakes to comply with it.

[53] Transparency Canada, "SNC-Lavalin Plea Deal - Modest Win for Canada's Anti-Corruption Regime says Transparency International Canada" (19 December 2019), online : *Transparency International Canada* http://www.transparencycanada.ca/news/press-release-snc-lavalin-plea-deal-modest-win-canadas-anti-corruption-regime-says-transparency-international-canada/ see also The Canadian Press, "SNC-Lavalin pleads guilty to fraud, will pay $280 million fine related to Libya work", *Financial Post* (18 December 2019), online : https://business.financialpost.com/news/fp-street/snc-lavalin-pleads-guilty-to-fraud-will-pay-a-280m-fine-for-libyan-work

[54] Canada (Public Services and Procurement Canada), "Status of SNC-Lavalin remains unchanged under the integrity regime" (12 January 2020), online : https://www.tpsgc-pwgsc.gc.ca/trans/pq-qp/qp36-eng.html. The Administrative Agreement was described in the following terms:
"On December 9, 2015, pursuant to the Ineligibility and Suspension Policy, PSPC entered into an administrative agreement with SNC-Lavalin with respect to the above noted charges. The agreement permits SNC-Lavalin to contract with the Government while criminal proceedings are underway and on condition that certain corporate compliance conditions are met."
Public Services and Procurement Canada, "Status of SNC-Lavalin remains unchanged under the Integrity Regime," Question Period note (last updated on Jan 12, 2020), online: https://www.tpsgc-pwgsc.gc.ca/trans/pq-qp/qp36-eng.html

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was increased to 14 years when the CFPOA was amended in 2013[55]). The main aggravating factors were the gravity of the offence, the size of the bribe ($500,000, plus a planned further $1.5 million and an equity interest) and the fact the defendants were motivated by financial gain. In Mr. Govindia's case he also benefited financially from the scheme ($650,000, which he invested in his company). The mitigating factors were the lesser degree of involvement of Mr. Barra and Mr. Govindia in the scheme and that the bribery failed to achieve its ultimate purpose (contract with Air India). The judge also considered the older age and poor health of Mr. Barra and the economic consequences (their companies went bankrupt and they have not been able to earn income since being charged) suffered by both Mr. Barra and Mr. Govindia to be mitigating factors.[56]

Both Mr. Barra and Mr. Govindia appealed their convictions and the Crown appealed Mr. Barra's sentence.[57]

Ontario Court of Appeal decision in R. v Barra and R. v. Govindia

The decision rendered by the Ontario Court of Appeal in the Barra and Govindia cases[58] is a significant development. The Court set aside the convictions and ordered a new trial, on the basis that there was a reasonable possibility that delayed disclosure of evidence by the Crown could have affected the overall fairness of the trial. This case is noteworthy beyond the result for several reasons.

First, the Court rejected a claim that the accused were not tried within a reasonable time, finding no error in the trial judge's conclusions that the net delay was below the applicable ceiling of 30 months (as established in the *Jordan* decision described below). The Court also hinted that if the net delay had exceeded 30 months, there would have been scope to justify a longer delay given the complexity of the case which required extradition from two jurisdictions. This comment may signal some recognition of the length of time required to bring foreign corruption cases. In recent years, several charges against persons accused of foreign corruption have been stayed for unreasonable delay.

In *R. v. Jordan*, the Supreme Court of Canada established an upper limit, or ceiling, on the time it should take for an accused person to be brought to trial: 18 months for provincial cases, and 30 months for superior court cases and provincial cases that follow preliminary inquiries.[59] If the delay goes beyond the ceiling, then the Crown must show that there were exceptional circumstances that led to the delay.[60] The

[55] *An Act to amend the Corruption of Foreign Public Officials Act*, SC 2013, c 26, s.3
[56] *R v Barra and Govindia*, 2019 ONSC 1786, par. 17-22
[57] There are no written reasons for the conviction of Messrs Barra and Govindia. There is a transcription of the oral reasons for sentence: R v Barra and Govindia, 2019 ONSC 1786.
For a brief description of these cases, see pages 4-6 of the 2020 Implementation Report: "Canada's Fight against Foreign Bribery" (2 October 2020), online : https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-20.aspx?lang=eng
[58] *R. v Barra, R .v Govindia*, 2021 ONCA 568.
[59] *R v Jordan* 2016 SCC 27 at para 46–49 ("*Jordan*").
[60] Ibid at 47.

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first category of exceptional circumstances is discrete events, such as foreign extradition.[61] The second category of exceptional circumstances is particularly complex cases, which may simply require more time to work through due to the complexity of the issues or evidence, or the volume of evidence and/or procedural hurdles.[62] The determination of whether the Crown's evidence does in fact demonstrate exceptional circumstances is up to the trial judge.[63]

Second, the Court did not accept Mr. Barra and Mr. Govindia's argument that the Ontario courts did not have territorial jurisdiction to try their cases (they had tried to distinguish their circumstances from those of their former colleague Mr. Karigar (separately charged and convicted in relation to the same conspiracy)). The Court held that Canada had a substantial interest in prosecuting the offences because the conspiracy involved a Canadian company, Cryptometrics Canada, trying to secure a contract from Air India by paying bribes to foreign officials. Neither the fact that Mr. Barra and Mr. Govindia were not physically in Canada when they committed the alleged offences nor the fact that the bribes flowed through the United States altered that analysis. This is an important confirmation of the basis on which foreign corruption charges may be brought in Canada against foreign nationals working on behalf of Canadian companies.

Finally, the Court of Appeal decision analysed the mens rea requirements for an offence under s. 3 of the CFPOA. The Court confirmed the trial judge's analysis that the s.3 CFPOA offence, like bribery, is a specific intent offence that requires proof the accused knew the official character of the person toward whom his corruption efforts are directed. The Court further added that where the target of foreign corruption is an employee of a corporation: "the accused must know not only that the person was employed by the corporation, but that the corporation was established to perform a duty or function on behalf of a foreign state, or is performing such a duty or function."[64] It is not necessary however, for the accused to know how the CFPOA defines a foreign public official, nor that bribery is illegal. The court's reasoning above confirms that the required evidence to establish the mental element of foreign corruption under s. 3 of the CFPOA is very high.

F. Karigar

In 2017, the Ontario Court of Appeal upheld the 2013 conviction of a Nazir Karigar for conspiring to offer bribes to Indian public officials, including a minister, in a failed bid to win a $100-million contract for Cryptometrics Canada for the provision of security-screening equipment from Air India.[65] He was the first

[61] Ibid at 72.
[62] Ibid at 77.
[63] Ibid at 71.
[64] *R. v Barra, R. v Govindia*, 2021 ONCA 568, par. 80.
[65] *R v Karigar*, 2013 ONSC 5199, (conviction); R v Karigar, 2014 ONSC 3093, (sentencing); Appeal dismissed : *R v Karigar*, 2017 ONCA 576.

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individual convicted under Canada's CFPOA and was sentenced to three years in prison. His application for leave to appeal to the Supreme Court of Canada was denied by the full Court on March 15, 2018.[66]

G. Kushnirak

Mr. Kushniruk was president of Canadian General Aircraft in Calgary. Mr. Kusniruk was charged with violating section 3(1) of the CFPOA by agreeing to offer a bribe to officials in Thailand in order to secure the sale of a commercial plane from Thai Airways, the national airline of Thailand. There was no evidence that Thai officials were parties to the conspiracy, or that they were actually bribed.[67] The RCMP began investigating in 2013 after the US Federal Bureau of Investigation informed the RCMP of the alleged irregularities they had discovered.[68] The charges against him were stayed in 2017; no public reasons were provided.[69]

H. Arakapota

On March 7, 2023, the Ontario Superior Court released the reasons for its January 16, 2023 decision finding Mr. Damodar Arapokota not guilty of one count of foreign corruption (s. 3(1)a) of the CFPOA).[70]

Mr. Arapokota was alleged to have offered benefits valued at approximately C$40,000 (family travel to Florida, shopping and other expenses) to Dr. Omoponya Coach Kereteletswe, an official with the Government of Botswana. The benefit was allegedly conferred as consideration for letters from Dr. Kereteletswe meant to provide comfort that the Government of Botswana would retain IMEX, a company founded and controlled by Mr. Arakapota (he was CEO and CTO at the time and his family trust held 100% of the shares), for a government contract valued at approximately $30 million over 3 years. The evidence established that Mr. Arakapota paid for various travel and other expenses for Dr. Kereteletswe and his family while in the US and that Dr. Kereteletswe reimbursed only some of those expenses. The travel took place shortly after the time of the government announcement. The letters were provided by Dr. Kereteletswe to M.r Arapakota after the travel had occurred. Ultimately, however, IMEX did not receive the contract. Mr. Arapakota, who was facing pressure from others at the company, resigned from his position as CEO. An investigation into the Kereteletswe family travel and expenses paid for by Mr. Arakapoka was conducted by subsequent IMEX management, who reported it to the RCMP.[71]

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[66] *Nazir Karigar v Her Majesty the Queen,* 2018 CanLII 12951 (SCC).

[67] https://icclr.org/wp-content/uploads/2019/05/Final-Paper-Corruption-20170523-1-1.pdf?x68316 at page 11, note 39.

[68] https://www.traceinternational.org/TraceCompendium/Detail/766?class=casename_searchresult&type=1. See also: https://www.cbc.ca/news/canada/calgary/rcmp-bribery-larry-kushniruk-canadian-general-aircraft-thai-airways-charge-stayed-1.4436289.

[69] For a summary of the case, see 20th Report to Parliament, p. 4: https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-20.aspx?lang=eng

[70] R. v. Arapokota, 2023 ONSC 1567.

[71] R. v. Arapakota, 2023 ONSC 1567, par. 32-39.

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The case ultimately turned on a detailed assessment of complicated facts. While the Crown did establish that Mr. Arakapota had offered Dr. Kereteletswe a benefit[72] and that Dr. Kereteletswe did provide letters to Mr. Arapakota, the judge was not convinced of the nexus between the two, nor whether the letter actually offered Mr. Arapakota a business advantage, casting doubt on whether there had been an actual quid pro quo. There was also doubt about Mr. Arapakota's real purpose in paying for Dr. Kereteletswe's travel.[73]

Independent of the verdict, the reasons of the judge do offer a rare judicial interpretation of the elements of the offence under par 3(1)a) CFPOA. Given the infrequency of decisions on foreign corruption matters, the reasoning of the judge is likely to influence future enforcement.

Comments on the proof of intention required under s. 3(1)a): In their analysis, the judge considered what were the elements of the offence under s. 3(1)a) of the CFPOA. Drawing on Article 1(1) of the OECD Convention and the elements of s. 121 of the *Criminal Code* (bribery of Canadian government officials), they confirmed that there are four material elements (actus reus) of the offence: (1) the accused directly or indirectly gives, offers or agrees to give or offer a loan, reward advantage or benefit of any kind; (2) the accused makes the offer of this benefit to a public foreign official or to someone else for the benefit of the public foreign official, (3) the accused makes the offer of the benefit in order to obtain or retain an advantage in the course of business and (4) the accused makes the offer of a benefit as consideration for an act or omission by the official in connection with the performance of their duties or functions.[74]

With regard to the mental (mens rea) element of the offence, there was a question raised by the Crown about the level of fault required under s. 3(1)a). The Crown argued that the basic level of subjective fault, recklessness, was sufficient.[75] The judge disagreed, finding that even though it was not necessary to prove that an accused intended to do something wrong in providing a benefit to a foreign public official (what the judge referred to as a "corrupt purpose"[76]), the Crown was required to prove more than the accused deliberately engaging the material acts that make up the actus reus. Drawing by analogy from the intention required to establish domestic bribery as well as the holding in the Barra and Govindia case, the judge concluded that every one of the four mental elements required proof that the accused acted with intention (a purpose) and with personal knowledge of the circumstances. This interpretation of the wording in s. 3(1)a) CFPOA sets a very high bar for proof of foreign corruption, requiring that the Crown show (1) an accused intentionally offered a benefit, (2) to a person they know is a foreign public official, (3) with the intention that the benefit serve as consideration for things done by the public official and (4) that the accused acted for the purpose of obtaining a business advantage.[77]

Beyond the elements of the offence, the judge also considered the meaning of two expressions in s. 3(1)a):

[72] The judge also held that the fact that Dr. Kereteletswe repaid a portion of the costs (about $15,000) did not alter the fact that he had received an "advantage", as the outlay of funds to cover the travel and other costs constituted a material advantage, R. v. Arapakota, 2023 ONSC 1567, par. 108-116.
[73] R. v. Arapakota, 2023 ONSC, par. 227-231.
[74] R. v. Arapakota, 2023 ONSC 1567, par. 50-56.
[75] R. v. Arapakota, 2023, ONSC 1567, par. 57-58.
[76] R. v. Arapakota, 2023, ONSC 1567, par. 60.
[77] R. v. Arapakota, 2023, ONSC 1567, par. 62-67.

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- "benefits, reward or advantage": the word "advantage" in s. 3(1)a) should be understood to refer to a material economic advantage, one that advances the recipient's position in a material way. This excludes trivial advantages.[78]
- "as consideration for": under s. 3(1)a) for a benefit to be considered as consideration for what is done by a foreign public official, there must be a quid pro quo.[79] This contrasts with the different language used in par. 3(1)b), which targets attempts to induce a foreign public official to use their position to fluence acts or decisions of the foreign state, regardless of whether the official actually does anything.[80]

I. TI-Canada's Evaluation of Enforcement Efforts

As the previous sections illustrate, prosecution is not abundant in Canada. Since the CFPOA was enacted, there have only been six convictions or guilty pleas and two remediation agreements. Cases that resulted in convictions or guilty pleas are: *Hydro Kleen Group* (2005), *Niko Resources* (2011), *Griffiths Energy* (2013), *Karigar* (2013, Appeal in 2017), *Bebawi* (2019, Appeal in 2023), *SNC-Lavalin – Libya* (2019).[81] In one case, a first instance conviction was reversed on appeal and a new trial ordered: *Barra and Govindia* (2019, Appeal in 2021). Two cases resulted in no sanctions either because charges were laid but stayed one year later (*Kushniruk* 2017), or because there was an acquittal (*Arapakota* 2023). As discussed earlier, since the last phase of the OECD's peer review process, Canada also adopted a remediation agreement regime.[82] Thus far, only one case was concluded with an RA: *SNC-Lavalin – Montreal Bridge* (2022); another is awaiting announcement of court approval: *Ultra Electronics.*

The scant number of judicial decisions, as a body of jurisprudence, provides little guidance and certainty about how existing statutory provisions will be interpreted and applied. This is further aggravated by the fact that some of these cases are now being analyzed by appeal courts, and previous interpretations have been unsettled in such appeals. In at least one case, an earlier conviction was reversed (*Barra and Govindi*a). In such a case, it was reassuring to see that the court acknowledged that the complexity of corruption trials may require longer processes than other criminal trials. However, it remains to be seen whether courts will consistently adopt this interpretation of *Jordan* moving forward, especially since several charges for corruption have been stayed in Canadian courts due to delay.

Recent interpretations of legislative provisions in the CFPOA, described in the previous section, have set the required mens rea at the highest level of fault - intention or knowledge - to obtain a conviction for foreign corruption. As the *Arapokota* case shows, it takes more than proof of what the accused did to support inferences of what he or she actually knew or intended when engaging in those actions.[83] Absent a confession or whistleblower testimony, it seems likely that gathering the evidence required to support this high fault level will be challenging for the Crown in the future.

[78] R. v. Arapakota, 2023 ONSC 1567, par. 71-74.
[79] R. v. Arakapota, 2023 ONSC 1567, par. 76-77, 83-84.
[80] R. v. Arakapota, 2023 ONSC 1567, par. 78-81, 84-85.
[81] Our summary included only details of the cases that were not included in Phase III of the OECD peer review process.
[82] For a description of this legislative amendment and TI-Canada's recommendations for improvements see section 2 and 2.E *supra*.
[83] R. v. Arapakota, 2023 ONSC 1567, par. 227-231.

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The limited use of criminal trials to prosecute corruption in Canada and the limitations associated with narrow judicial interpretations of existing legislation raise questions about the wisdom of resorting exclusively or primarily to criminal law to combat corruption. There are alternative avenues to make corporations and individuals accountable for wrongdoing and to reduce incentives to engage in corruption. In Canada, one prominent example is the case of Katanga Mining Limited (KML), a subsidiary of Glencore, with mining operations in the Democratic Republic of the Congo (DRC). KML was associated with Dan Gertler, a man who was both accused of corruption by DRC media and implicated in corruption, according to the United States Department of Justice. KML made a series of statements through its Annual Information Forms (AIFs) and other disclosures, which were, according to the Ontario Securities Commission (OSC), boilerplate and insufficient given the red flags present and the risks associated with KML's business operations in DRC. The OSC took issue with the lack of reference to the known, elevated risk of corruption in DRC, as well as the reliance on Gertler's associates. The OSC found the disclosures materially misleading and contrary to the public interest. In 2018, a CAD$28.5 million settlement was reached between KML and the OSC. There were three main violations contrary to the public interest and Ontario securities law: misleading disclosures regarding operations;[84] deficiencies in corporate governance, misleading disclosures regarding compensation, and reporting structures;[85] and failures of internal controls.[86] Furthermore, there were several individual respondents in the case who were, at the time, serving as directors and officers of KML. These individual respondents' conduct amounted to acquiescence and authorization of the above violations of law, and they were included in the settlement agreement.

[84] Ontario Securities Commission, "Settlement Agreement: In the Matter of Katanga Mining Limited, et al.," (2018) at para 35-6.
[85] Ibid at para 86.
[86] Ibid at para 92.

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3. Non-Criminal and Preventative Anti-Corruption Tools

There are a number of additional tools and partnerships within and outside formal government channels that Canada can use and engage with in order strengthen its commitment and implementation of the OECD Convention. This section covers four such possibilities: 1) beneficial ownership transparency; 2) the *Extractive Sector Transparency Measure Act*; 3) public procurement; 4) stakeholder engagement.

A. Beneficial Ownership Transparency

On March 22, 2023, the federal government introduced legislation to create a publicly accessible registry of corporate beneficial ownership information. The registry will be governed through the *Canadian Business Corporations Act*[87].
In the 2021 budget, the government set a timeline to implement the registry by the end of 2023.
The proposed legislation has a number of key elements including:

- Public accessibility
- No cost access for the registry
- Data verification and validation
- Proactive registry review of data
- Whistleblower reporting mechanism to flag data errors

The government has proposed both monetary and penal penalties for violations of data disclosure on the registry. While these are important, the registry also has preventative value, to dissuade actors from misusing Canadian corporations to hide the proceeds of crime like bribes. With transparent beneficial ownership measures in place in Canada, Canadian companies can potentially be more assertive in conducting enhanced beneficial ownership due diligence in high-risk countries. Many of these countries are also planning to adopt beneficial ownership registries as part of their association with the Extractive Industries Transparency Initiative and the Open Government Partnership. Updated recommendations by the Financial Action Task Force also call for beneficial ownership registries for its member states, though not necessarily that the registries be publicly available. The civil society organisation Open Ownership currently counts 108 countries in the process of establishing beneficial ownership registries.[88]

A weakness of the proposed registry is that it only covers federally incorporated businesses. The federal corporate registry is estimated to be only the fifth largest in Canada[89]. For beneficial ownership transparency to be truly effective, all provinces and territories need to work with the federal government to share data. The federal registry will use the beneficial ownership data standard established by Open Ownership. TI Canada recommends that the federal government strike an agreement with provinces and territories whereby all provincially and territorially registered companies would be required to upload their beneficial ownership data directly to the federal registry.

[87] Bill C-42, An Act to amend the Canadian Business Corporations Act and to make consequential and related amendments to other Acts. 2023 https://www.parl.ca/DocumentViewer/en/44-1/bill/C-42/first-reading
[88] Open Ownership, "The Open Ownership map: Worldwide commitments and actions", (accessed March 31, 2023) https://www.openownership.org/en/map/
[89] Ross, Adam, "No Reason to Hide: Unmasking the anonymous owners of Canadian companies and trusts". Transparency International Canada. (2016). p. 17.

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At the time of submission, Quebec is the only provincial or territorial jurisdiction to have passed legislation for a beneficial ownership registry. Quebec passed Bill 78 in 2021, and the registry is scheduled to come online on March 31, 2023 with a filing obligation date of March 31, 2024.

On March 29, 2023, the Government of British Columbia announced that the province will also establish a corporate beneficial ownership registry.[90] The B.C. government declared that the registry will be established by 2025 and that it will be publicly accessible and designed to share data. The statement did not explicitly say that the B.C. government will work with the federal registry. Additionally, the statement said that the B.C. corporate registry will follow the example of B.C.'s Land Ownership Transparency Registry (LOTR). This could prove problematic on the registry being truly publicly accessible as LOTR as a $5 fee per search.

B. Extractive Sector Transparency Measures Act (ESTMA)

Brought into force in 2015,[91] ESTMA requires that companies engaged in extractive industries anywhere in the world must disclose all payments to all levels of government of the countries in which they are conducting their business. This requirement applies to any entity that: (a) is publicly listed in Canada; or (b) is a private company that does business in Canada or has assets in Canada and meets two of the following requirements: (i) $20 million in assets, (ii) $40 million in revenue, or (iii) 250 employees.[92] Theoretically, ESTMA captures foreign multinationals that have a presence in Canada, as well as private equity firms that have small oil, gas, or mineral operations anywhere within their corporate structure.[93]

The reporting obligations under ESTMA are: if the total of all payments in an enumerated category to any payee is $100,000 or greater for the fiscal year, then that information must be disclosed. "Payee" is defined to include: all levels of foreign and domestic governments; any body established by two or more governments; any body established to perform government duties or functions, such as a board, corporation, or government authority. This includes aboriginal governments. The payments that are subject to the disclosure obligations are taxes, royalties, fees, bonuses, dividends (not including those issued to normal shareholders), and payments to improve infrastructure.[94] The disclosures are project-level, which aligns Canada with the international consensus, as both the United States and the European Union have the same reporting requirements.[95]

ESTMA and the CFPOA have mutually exclusive but self-reinforcing spheres of coverage. That is, ESTMA is an "extraterritorial information-forcing mechanism" that does not punish wrongdoing directly.[96] By

[90] British Columbia Ministry of Finance, "Public registry would end hidden ownership in private businesses". Wednesday, March 29, 2023, https://news.gov.bc.ca/releases/2023FIN0025-000395
[91] Extractive Sector Transparency Measures Act (S.C. 2014, c. 39, s. 376), https://laws-lois.justice.gc.ca/eng/acts/E-22.7/page-1.html.
[92] Connor Bildfell, "The Extractive Sector Transparency Measures Act: Critical Perspectives," (2016) 12:2 McGill Journal of Sustainable Development Law 231 at 247.
[93] Ibid at 247–48.
[94] Angela E. Weaver et al., "Canada" (2016) 50:The Year in Review Int'l Law 577 at 579.
[95] Bildfell at 251.
[96] Ibid at 248.

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requiring the publication of information, it aims to prevent the misconduct that leads to prosecutions under the CFPOA. If an entity does not comply with the obligations under the ESTMA, then they commit a criminal offence punishable by a fine of up to $250,000 per day that the offence has been found to continue. There is equal liability for any officer, director, or agent of the person or entity that directed, authorized, or participated in the commission of the offence. No one is liable if they can establish that they exercised due diligence to prevent the commission of the offence.[97]

While ESTMA and the CFPOA seem like two complementary sides of Canada's strategy to combat corruption, it is not entirely clear how integrated the systems are. More specifically, ESTMA reports are sent to Natural Resources Canada and then published in an open database.[98] A payment reported under ESTMA could potentially characterize a violation of the CFPOA, considering that the definition of "payee" under ESTMA partially overlaps with actors that could be categorized as "public officials" under the CFPOA. However, without a dedicated reporting system where Natural Resources Canada alerts the RCMP of any discrepancies or potential problems in the reporting, the entire reporting exercise may not operate as an effective complementary mechanism to the CFPOA.

C. Public Procurement

Canada's Integrity Regime,[99] overseen by Public Services and Procurement Canada (PSPC), is meant to ensure that the federal government only contracts with ethical suppliers. The *Ineligibility and Suspension Policy*[100] under the regime triggers an automatic 10-year debarment for suppliers who have been convicted of a listed offence, including those found under the CFPOA. The debarment period may be reduced for up to 5 years if certain conditions are met.

While administrative sanctions such as debarment align with the goals of Article 3, paragraph 4 of the OECD Convention to complement and reinforce criminal prosecutions for corruption offences, Canada's *Integrity Regime* is not well coordinated with criminal law and serves to discourage self-reporting and hinders enforcement.

Debarment in Canada is a consequence of a criminal conviction for a listed offence. There is no opportunity to weigh the circumstances of each case. The automatic administrative sanction of debarment is additional to whatever criminal sanction might be imposed for a CFPOA offence or other listed offences.

This is problematic for two main reasons:

[97] Weaver at 580.
[98] https://natural-resources.canada.ca/our-natural-resources/minerals-mining/extractive-sector-transparency-measures-act/links-estma-reports/18198
[99] https://www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html
[100] https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html

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1) The *Integrity Regime* is not in sync with Canadian criminal law. It does not consider the gravity of the offence or whether the penalty is proportionate to the infraction, which are two cornerstone elements of Canadian criminal law.
2) Because debarment is automatic, the *Integrity Regime* serves as a disincentive for companies to self-report and disclose acts of corruption once they have been identified. The automatic debarment might be a death knell for a company who is otherwise looking to make amends for past wrongs.

The rigidity of the *Integrity Regime* undermines enforcement efforts in Canada. Companies who rely on government contracts will do everything possible to avoid a criminal conviction under the CFPOA—not to protect their reputation or avoid a criminal charge, but to ensure they remain on the good suppliers list. For example, note that SNC-Lavalin plead guilty to s. 380(1)(a) of the *Criminal Code* for fraud against a foreign government, an infraction that does not trigger automatic debarment under the *Integrity Regime*.

Furthermore, under Canada's remediation agreement regime , one of the explicit purposes is to encourage voluntary self-disclosure of acts of corruption. However, more attention needs to be given to how RAs , criminal enforcement, and the *Integrity Regime* for public procurement work together. There needs to be coordination to ensure one is not undermining the other; rather, all should be working in unison to ensure Canada can effectively go after corruption offences while maintaining a healthy and ethical supplier pool.

Canada's debarment processes should take inspiration from the multilateral development banks, under which there is a maximum debarment period, but the length of each suspension will depend on the facts of the individual case. Furthermore, companies who are serving a debarment suspension may be able to reduce the period of debarment if they can show that they have adopted proper measures to limit the risk of corruption or have shown adequate remediation. In other words, debarment should be a punishment that takes account of the specific facts of the case, and other mechanisms and processes in the anti-corruption system. Exclusion from bidding on public contracts should serve as a proper disincentive to corruption, not hinder enforcement efforts to hold corrupt offenders accountable.

D. Stakeholder Engagement

While the government holds formal enforcement of the CFPOA, there are other stakeholders to support the oversight, investigations, and enforcement of the CFPOA.

Non-governmental organisations (NGOs), journalists, and academics (collectively civil society) also play a critical informal role supporting Canada's enforcement of the CFPOA. These actors can play a monitoring and reporting role, identifying trends and specific cases that can help inform the private sector and government. The private sector often relies on data Transparency International's Corruption Perception Index and Corruption Barometers. Law enforcement also often relies on reports or direct submission of evidence by civil society and journalists of corruption cases to initiate investigations.

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Additionally, just as is with the case in this submission, civil society plays a critical role in providing feedback on Canadian laws, creating advocacy to close loopholes and create new tools. In order to provide improved in feedback on OECD Convention implementation, as well as increase transparency and trust in Canada's efforts, the Government needs to provide more data on anti-corruption law enforcement, if even only at the metadata level so as not to undermine ongoing cases.

Civil society can also work with the private sector and government to address corruption risk overseas through coordinating collective action. The Maritime Anti-Corruption Network (MACN) is an example of an industry led collective action initiative that brings together companies in the shipping industry to use a collective voice for improved integrity in ports around the world.[101] The Canadian government and civil society could help incentivize and coordinate additional industries or companies working in a corruption high-risk country to work together in similar ways to the MACN.

[101] Maritime Anti-Corruption Network https://macn.dk

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4. TI-Canada recommendations for action as they relate to implementation of the OECD Convention

Based on the reviews and analysis provided in this submission, TI Canada makes the following recommendations for Canada in upholding and enforcing its implementation of the OECD Convention:

1. On anti-corruption legislation, the Government of Canada should:
    a. Publicise clear information and educational materials to the general public about the purposes of the RA regime and how it works;
    b. Develop guidance for organisations on how to approach authorities for an RA including describing circumstances under which a remediation agreement might be offered to a corporate offender, which conditions can be imposed, and how companies can cooperate with law enforcement authorities
    c. Enact regulations, as required by the current legislation, to ensure the consistent and adequate implementation of the RA regime, including:
        i. the form of remediation agreements;
        ii. processes and procedures involving independent monitors.
    d. Ensure that the RA process is transparent and, whenever possible, that there is public information about the facts, natural and legal persons concerned, reasons to resort to an RA, sanctions imposed and their rationale, and remediation measures, such as compliance regimes and monitorships.

2. On enforcement the volume of litigation in Canada is not enough to create certainty and provide guidance about how legislation will be interpreted and applied. However, more criminal litigation may not be the best avenue to be pursued in order to achieve that goal, especially considering that courts have recently interpreted legislation in restrictive ways, increasing the obstacles to successfully obtain criminal convictions. However, steps the Government of Canada can take are:
    a. Engage in strategic thinking about how to explore other avenues to combat corruption that are not entirely dependent on the criminal justice system e.g. those involving securities regulators.
    b. Increase the resources of the RCMP dedicated to corruption cases, including as part of the government's proposed Canadian Financial Crime Agency.

3. There are recommendations for government and non-government actors to consider in non-criminal and preventative anti-corruption tools, including:
    a. The federal government should strike an agreement with provinces and territories whereby all provincially and territorially registered companies would be required to upload their corporate beneficial ownership data directly to the federal corporate beneficial ownership registry;
    b. NRCAN should establish a reporting system on ESTMA violations to share data with the RCMP;

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c. The Government of Canada should amend the Integrity Regime so that debarments can weigh the severity of cases, as well as monitor companies on the debarment list in order to consider efforts by companies to reform themselves;
d. The Government of Canada and Canadian law enforcement should ensure outreach with civil society and engage them on areas of OECD Convention implementation improvement;
e. The Government of Canada should publish statistics on foreign bribery enforcement;
f. The Canadian private sector should engage the Government of Canada and civil society on how to proactively reduce corruption risk in overseas jurisdiction through methods such as collective action.