

GLOBAL CORRUPTION

**ITS REGULATION UNDER INTERNATIONAL CONVENTIONS,
US, UK, AND CANADIAN LAW AND PRACTICE**

Volume 2

Fourth Edition

Edited by

GERRY FERGUSON



**University
of Victoria**

Libraries

2022

Fourth Edition

© The Editor and The Authors 2022

Published by the University of Victoria Libraries ePublishing Services
Victoria, British Columbia V8P 5C2 Canada

press@uvic.ca

Book and cover design by Yenny Lim and Mary MacLeod, Copyright & Digital Publication Services Assistant, University of Victoria Libraries

This book is an open access publication licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License (<https://creativecommons.org/licenses/by-nc-sa/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, and you distribute your contributions under the same license as the original.

Ferguson, G. (Ed.). (2022). *Global corruption: Its regulation under international conventions, US, UK, and Canadian law and practice* (Vol. 2). University of Victoria Libraries.

Download this book at <https://dspace.library.uvic.ca/handle/1828/13759>

Excerpts in this work are printed with permission. Those wishing to reproduce such excerpts must also obtain permission.

To obtain permission for uses beyond those outlined in the Creative Commons license, please contact Gerry Ferguson at gferguso@uvic.ca.

While extensive effort has gone into ensuring the reliability of information appearing in this book, the publisher and authors make no warranty, expressed or implied, on the accuracy or reliability of the information, and do not assume and hereby disclaim any liability to any person for any loss or damage caused by errors or omissions in this publication.

Library and Archives Canada Cataloguing in Publication

Title: Global corruption : its regulation under international conventions, US, UK and Canadian law and practice / edited by Gerry Ferguson.

Other titles: Global Corruption (University of Victoria)

Names: Ferguson, Gerry A., editor. | University of Victoria (B.C.), issuing body.

Description: Fourth edition. | Originally published in a single volume as:

 Ferguson, Gerry A. Global corruption. 2015.

Identifiers: Canadiana (print) 2022015841X | Canadiana (ebook) 20220161615 |

 ISBN 9781550586886 (v. 2 ; softcover) | ISBN 9781550586909 (v. 2 ; PDF) |

 ISBN 9781550586923 (v. 2 ; EPUB)

Subjects: LCSH: Corruption—Law and legislation.

Classification: LCC K5261 .G66 2022 | DDC 364.1/323—dc23

TABLE OF CONTENTS

VOLUME 2

CHAPTER 7 | CRIMINAL AND CIVIL SANCTIONS AND REMEDIES

PART A: CRIMINAL SENTENCES AND COLLATERAL CONSEQUENCES

| | | |
|-----|--|-----|
| 1. | INTRODUCTION | 609 |
| 2. | UNCAC..... | 609 |
| 3. | OECD CONVENTION | 610 |
| 4. | US SENTENCING..... | 611 |
| 4.1 | Federal Guidelines | 611 |
| 4.2 | Procedure and Guiding Principles | 614 |
| 4.3 | Specific Corruption Related Guidelines | 615 |
| 4.4 | Imposition of Fines..... | 623 |
| 4.5 | Sentencing Corporations and Other Organizations..... | 625 |
| 4.6 | FCPA Sentencing | 627 |
| 4.7 | Comments on FCPA Enforcement..... | 632 |
| 5. | UK SENTENCING | 635 |
| 5.1 | General Principles | 635 |
| 5.2 | Sentencing before the <i>Bribery Act 2010</i> | 636 |
| 5.3 | Sentences under the <i>Bribery Act 2010</i> (Pre-Guidelines) | 637 |
| 5.4 | Guidelines for Offences by Human Offenders | 641 |
| 5.5 | Guidelines for Corporate Offenders | 646 |
| 5.6 | Deferred Prosecution Agreements | 650 |
| 6. | CANADIAN SENTENCING | 651 |
| 6.1 | General Principles | 651 |
| 6.2 | Principles for Corporations and Other Organizations | 652 |
| 6.3 | Appropriate Range of Sentencing | 654 |
| 6.4 | Domestic Corruption and Bribery..... | 655 |
| 6.5 | Corruption and Bribery of Foreign Public Officials..... | 658 |
| 6.6 | Remediation Agreements | 664 |
| 7. | CRIMINAL FORFEITURE | 667 |
| 8. | DEBARMENT AS A COLLATERAL CONSEQUENCE..... | 667 |
| 8.1 | UNCAC | 668 |
| 8.2 | OECD Convention..... | 668 |
| 8.3 | World Bank | 669 |
| 8.4 | US | 673 |
| 8.5 | UK..... | 674 |
| 8.6 | Canada | 677 |
| 9. | DISQUALIFICATION AS COMPANY DIRECTOR..... | 691 |
| 9.1 | US | 691 |
| 9.2 | UK..... | 693 |

| | | |
|--|--|------------|
| 9.3 | Canada..... | 697 |
| 10. | MONITORSHIP ORDERS | 698 |
| 10.1 | UNCAC and OECD | 698 |
| 10.2 | US..... | 698 |
| 10.3 | UK..... | 700 |
| 10.4 | Canada..... | 702 |
| PART B: CIVIL AND ADMINISTRATIVE ACTIONS AND REMEDIES | | |
| 11. | NON-CONVICTION BASED FORFEITURE..... | 703 |
| 12. | CIVIL ACTIONS AND REMEDIES | 703 |
| 13. | INTERNATIONAL INVESTMENT ARBITRATION..... | 704 |
| 13.1 | International Arbitration Explained | 705 |
| 13.2 | Why Parties Agree to Arbitrate..... | 708 |
| 13.3 | Treatment of Allegations in International Investment Arbitration | 715 |
| 13.4 | International Investment Arbitration and the Global Fight against Corruption | 729 |

CHAPTER 8 | THE LAWYER'S ETHICAL AND PROFESSIONAL DUTIES

| | | |
|-----------|--|------------|
| 1. | INTRODUCTION | 732 |
| 2. | LAWYERS AND BUSINESS CLIENTS | 732 |
| 2.1 | Multiple Roles of Lawyers..... | 732 |
| 2.2 | Who is the Client? | 733 |
| 2.3 | In-House and External Counsel | 734 |
| 2.4 | Lawyer as a Corporate Gatekeeper | 737 |
| 3. | LEGAL AND ETHICAL DUTIES..... | 740 |
| 3.1 | Duty to Avoid Conflicts of Interest | 741 |
| 3.2 | Duty to Not Advise or Assist in a Violation of the Law | 746 |
| 3.3 | Duty of Confidentiality and Lawyer/Client Privilege..... | 749 |

CHAPTER 9 | COMPLIANCE PROGRAMS, RISK ASSESSMENTS, AND DUE DILIGENCE

| | | |
|-----------|---|------------|
| 1. | INTRODUCTION | 767 |
| 2. | RELATIONSHIP BETWEEN DUE DILIGENCE, COMPLIANCE PROGRAMS, AND RISK ASSESSMENTS..... | 768 |
| 3. | COMPLIANCE PROGRAMS | 769 |
| 3.1 | International Frameworks | 771 |
| 3.2 | US Framework..... | 783 |
| 3.3 | UK Framework..... | 788 |
| 3.4 | Canadian Framework..... | 792 |
| 4. | RISK ASSESSMENTS..... | 799 |
| 4.1 | What Risk Areas Are Being Assessed?..... | 801 |
| 4.2 | Conducting an Effective Risk Assessment | 803 |
| 4.3 | US..... | 804 |
| 4.4 | UK | 804 |

| | | |
|-----------|---|------------|
| 4.5 | Canada | 805 |
| 5. | DUE DILIGENCE REQUIREMENTS | 806 |
| 5.1 | Third Party Intermediaries..... | 807 |
| 5.2 | Transparency Reporting Requirements in Extractive Industries..... | 808 |
| 5.3 | US | 810 |
| 5.4 | UK..... | 811 |
| 5.5 | Canada | 812 |
| 5.6 | Mergers and Acquisitions | 814 |
| 5.7 | Economic Sanctions and Due Diligence | 820 |
| 5.8 | Internal Investigation of Corruption..... | 823 |
| 6. | POTENTIAL LIABILITY OF LAWYERS | 824 |
| 6.1 | Criminal Liability | 824 |
| 6.2 | Accessory Liability in Civil Actions..... | 825 |
| 6.3 | Tort of Legal Malpractice | 826 |
| 6.4 | Shareholders' or Beneficial Owners' Actions Against the Corporation's Lawyer..... | 827 |
| 6.5 | Case for a New Nominate Tort..... | 830 |
| 6.6 | Lawyers' Civil Liability Under Securities Acts..... | 832 |

CHAPTER 10 | PUBLIC OFFICIALS AND CONFLICTS OF INTEREST

| | | |
|-----------|---|------------|
| 1. | INTRODUCTION | 836 |
| 1.1 | Conceptualizing Political Corruption..... | 836 |
| 1.2 | International Standards | 839 |
| 2. | COMPARING APPROACHES..... | 845 |
| 2.1 | Principles-based..... | 846 |
| 2.2 | Rules-based | 847 |
| 2.3 | Comparing the Structure of Different Regimes..... | 848 |
| 3. | CENTERING CONFLICTS OF INTEREST | 856 |
| 3.1 | Defining Private Interests..... | 857 |
| 3.2 | Improper Influence | 859 |
| 3.3 | Insider Information | 860 |
| 3.4 | Contrasting Legislative and Executive Roles..... | 861 |
| 3.5 | Recusal and Restraint on Participation..... | 861 |
| 3.6 | Disclosure of Interests..... | 862 |
| 3.7 | Seeking Advice | 867 |
| 3.8 | Post-Employment / Cooling Off | 869 |
| 4. | PUBLIC REPORTING | 870 |
| 4.1 | Complaints, Investigations, and Enforcement..... | 871 |
| 4.2 | Criminal Law | 874 |
| 5. | CONCLUSION..... | 875 |

CHAPTER 11 | REGULATION OF LOBBYING

| | |
|---|------------|
| 1. INTRODUCTION | 878 |
| 2. TERMINOLOGY | 879 |
| 2.1 Defining Lobbying..... | 879 |
| 2.2 Terminology in a Comparative Context | 881 |
| 3. LOBBYING AND DEMOCRACY..... | 882 |
| 3.1 Democracy as an Indicator of Transparency | 883 |
| 4. REGULATORY SCHEMES | 885 |
| 4.1 Lobbying and the Broader Regulatory Framework | 885 |
| 4.2 Principles..... | 885 |
| 5. COMPARATIVE SUMMARY..... | 891 |
| 6. REGULATORY FRAMEWORK AND CONTEXT | 893 |
| 6.1 US..... | 893 |
| 6.2 UK | 894 |
| 6.3 Canada..... | 897 |
| 7. ELEMENTS OF LOBBYING REGULATION | 899 |
| 7.1 Definition of Government Officials | 899 |
| 7.2 Definition of Lobbyist..... | 900 |
| 7.3 Definition of Lobbying Activity..... | 901 |
| 7.4 Exclusions from the Definitions | 904 |
| 7.5 Disclosure Requirements | 907 |
| 7.6 Codes of Conduct | 914 |
| 7.7 Compliance and Enforcement..... | 917 |
| 8. COMPARING REGULATIONS IN THE EUROPEAN UNION | 924 |
| 9. CONCLUSION..... | 925 |

CHAPTER 12 | PUBLIC PROCUREMENT

| | |
|--|------------|
| 1. INTRODUCTION | 929 |
| 1.1 Adverse Consequences of Corruption in Public Procurement | 929 |
| 1.2 How Much Money is Spent on Public Procurement? | 933 |
| 1.3 Public Procurement Corruption within Developed Countries | 934 |
| 1.4 Importance of Maintaining a Low-Risk Environment | 937 |
| 2. RISKS AND STAGES OF CORRUPTION IN PUBLIC PROCUREMENT | 937 |
| 2.1 Risk by Industry and Sector | 937 |
| 2.2 Stages and Opportunities for Procurement Corruption | 939 |
| 2.3 Procurement Offences | 945 |
| 3. TYPES OF PUBLIC PROCUREMENT..... | 947 |
| 3.1 Public-Private Partnerships..... | 947 |
| 3.2 Sole Sourcing | 951 |

| | | |
|-----------|--|------------|
| 3.3 | Competitive Bidding..... | 952 |
| 4. | HALLMARKS OF A GOOD PROCUREMENT SYSTEM..... | 954 |
| 4.1 | Transparency..... | 954 |
| 4.2 | Competition | 956 |
| 4.3 | Integrity | 956 |
| 5. | PRIVATE LAW ENFORCEMENT OF TENDERING FOR PUBLIC CONTRACTS | 958 |
| 5.1 | US | 958 |
| 5.2 | UK..... | 959 |
| 5.3 | Canada | 960 |
| 6. | PUBLIC LAW FRAMEWORK..... | 962 |
| 6.1 | International Legal Instruments..... | 962 |
| 6.2 | US | 972 |
| 6.3 | UK..... | 974 |
| 6.4 | Canada | 977 |
| 7. | EVALUATION OF PROCUREMENT LAWS AND PROCEDURES | 986 |
| 7.1 | OECD Review of Country Compliance | 986 |
| 8. | OTHER ISSUES | 991 |
| 8.1 | Role of Discretion in Public Procurement | 991 |
| 8.2 | Role of Technology in Combatting Corruption in Public Procurement..... | 991 |

CHAPTER 13 | WHISTLEBLOWER PROTECTIONS

| | | |
|-----------|---|-------------|
| 1. | INTRODUCTION | 996 |
| 2. | WHAT IS WHISTLEBLOWING?..... | 997 |
| 3. | INTERNATIONAL LEGAL FRAMEWORK | 998 |
| 3.1 | UNCAC | 998 |
| 3.2 | OECD Convention..... | 1001 |
| 3.3 | Other Regional Conventions and Agreements..... | 1004 |
| 4. | “BEST PRACTICES” IN WHISTLEBLOWER PROTECTION LEGISLATION | 1009 |
| 4.1 | Limitations of Best Practices | 1009 |
| 4.2 | Sources for Best Practices | 1011 |
| 4.3 | General Characteristics..... | 1012 |
| 5. | US: A PATCHWORK OF LEGISLATION | 1023 |
| 5.1 | Whistleblower Protection in the Public Sector | 1023 |
| 5.2 | Encouraging through Rewards: <i>False Claims Act</i> | 1028 |
| 5.3 | Federal Whistleblowing Protection in the Private Sector..... | 1030 |
| 6. | UK: PUBLIC INTEREST DISCLOSURE ACT 1998 | 1032 |
| 7. | CANADA | 1038 |
| 7.1 | Development of the Common Law Defence..... | 1038 |
| 7.2 | Federal Legislation: <i>Public Servants Disclosure Protection Act</i> | 1039 |

| | | |
|---|---|-------------|
| 7.3 | Ontario Securities Commission Whistleblower Program..... | 1066 |
| 8. | CONCLUSION: WHERE DO WE GO FROM HERE?..... | 1074 |
| CHAPTER 14 CAMPAIGN FINANCE: CONTROLLING THE RISKS OF CORRUPTION AND PUBLIC CYNICISM | | |
| 1. | INTRODUCTION..... | 1080 |
| 2. | METHODS OF FINANCING ELECTION CAMPAIGNS | 1083 |
| 2.1 | Direct Contributions or Loans to Candidates and Political Parties..... | 1083 |
| 2.2 | Public Funding..... | 1083 |
| 2.3 | Independent Expenditures by Third Parties | 1083 |
| 2.4 | Self-Funding | 1083 |
| 3. | TYPES OF CAMPAIGN FINANCE REGULATION..... | 1084 |
| 3.1 | Transparency Requirements..... | 1084 |
| 3.2 | Spending and Contribution Limits..... | 1084 |
| 3.3 | Public Funding | 1085 |
| 4. | RATIONALES FOR CAMPAIGN FINANCE REGULATION..... | 1086 |
| 4.1 | Corruption and the Appearance of Corruption..... | 1086 |
| 4.2 | Equality, Fairness, and Participation..... | 1088 |
| 4.3 | Informed Voting..... | 1090 |
| 4.4 | Public Confidence | 1090 |
| 4.5 | Other Rationales..... | 1091 |
| 5. | CHALLENGES IN REGULATING CAMPAIGN FINANCE..... | 1091 |
| 5.1 | Freedom of Expression and Association..... | 1091 |
| 5.2 | Entrenching Incumbents and Differential Impacts on Political Parties..... | 1093 |
| 5.3 | Loopholes..... | 1094 |
| 5.4 | Circumscribing the Scope of Regulated Activities | 1094 |
| 5.5 | New Campaigning Techniques..... | 1095 |
| 6. | REGULATION OF THIRD-PARTY CAMPAIGNERS..... | 1095 |
| 6.1 | The Role of Third-Party Campaigners | 1095 |
| 6.2 | Reinforcing other Campaign Finance Controls..... | 1096 |
| 6.3 | Freedom of Speech..... | 1097 |
| 6.4 | Spending and Corruption..... | 1097 |
| 6.5 | Institutional Third Parties..... | 1098 |
| 6.6 | Incidence of Third-Party Electioneering in Canada and the UK | 1100 |
| 7. | INTERNATIONAL..... | 1101 |
| 7.1 | UNCAC | 1101 |
| 7.2 | OECD..... | 1102 |
| 8. | US..... | 1103 |
| 8.1 | Constitutional Rights and Campaign Finance Regulation | 1103 |
| 8.2 | Regulatory Regime | 1114 |

| | | |
|------------|--|-------------|
| 8.3 | Criticisms of Campaign Finance Regulation | 1122 |
| 9. | UK..... | 1124 |
| 9.1 | Freedom of Expression and Campaign Finance Regulation..... | 1125 |
| 9.2 | Regulatory Regime..... | 1128 |
| 9.3 | Criticisms of Campaign Finance Regulation | 1143 |
| 10. | CANADA | 1146 |
| 10.1 | Constitutional Rights and Campaign Finance Regulation..... | 1147 |
| 10.2 | Regulatory Regime | 1152 |
| 10.3 | Criticisms of Campaign Finance Regulation | 1168 |
| 11. | CONCLUSION..... | 1173 |

CHAPTER 15 | COLLECTIVE ACTION

| | | |
|-----------|---|-------------|
| 1. | INTRODUCTION | 1177 |
| 2. | GROWTH OF COLLECTIVE ACTION IN THE PRIVATE SECTOR | 1178 |
| 3. | PUBLIC EDUCATION AND AWARENESS RAISING | 1181 |
| 3.1 | Anti-Corruption Law Program Outcomes | 1182 |
| 3.2 | Anti-Corruption Law Program: Public Education Events | 1183 |
| 4. | DEVELOPMENT AND PROMOTION OF ANTI-CORRUPTION TOOLS..... | 1184 |
| 5. | A SECTOR-WIDE INITIATIVE TO REFRAIN FROM CORRUPTION | 1189 |
| 5.1 | Case Study: The Nigerian Port Industry and the MACN | 1193 |
| 6. | SAFEGUARDING INTEGRITY IN MAJOR SPORT EVENTS | 1194 |
| 6.1 | Olympic Agenda 2020: “New Norm” of Host City Selection and Games Delivery | 1195 |
| 6.2 | Transparency and Accountability in IOC Operations and the Chief Ethics and Compliance Officer..... | 1196 |
| 6.3 | Collective Action in the MSEs Industry | 1197 |
| 7. | INTEGRITY FACTS AND MONITORS..... | 1202 |
| 7.1 | Importance of Fairness Monitors..... | 1203 |
| 8. | ACTIVE PARTICIPATION BY CIVIL SOCIETY IN GOVERNMENT PROCUREMENT | 1203 |
| 8.1 | CoST Pilot Project | 1205 |
| 8.2 | After Initial Success: CoST Approach, Development, and Toolkit | 1207 |
| 8.3 | CoST Success Stories and Results..... | 1210 |
| 8.4 | Future Projects | 1212 |
| 8.5 | Best Practice in Collective Action | 1212 |

CHAPTER 16 | THE ROLE OF NGOS

| | | |
|-----------|---|-------------|
| 1. | INTRODUCTION | 1217 |
| 2. | RELATIONSHIPS WITH GOVERNMENTS AND BUSINESSES..... | 1220 |
| 2.1 | Evolution of International Aid..... | 1221 |

| | | |
|-----------|---|-------------|
| 2.2 | Funding Systems in the US, UK, and Canada..... | 1222 |
| 2.3 | International Aid and NGO Challenges | 1224 |
| 2.4 | Method for Sustaining NGOs Worldwide..... | 1226 |
| 3. | STRATEGIES AND TACTICS..... | 1228 |
| 3.1 | Research and Disclosure | 1232 |
| 3.2 | Public Education | 1234 |
| 3.3 | Advocacy for Stronger Rules, Enforcement, and Penalties..... | 1236 |
| 4. | A CANADIAN STUDY: LONG-TERM RESISTANCE TO NGO ANTI-CORRUPTION PROPOSALS IN A SUPPOSED MATURE DEMOCRACY | 1242 |
| 5. | CONCLUSION..... | 1251 |

CHAPTER 7

CRIMINAL AND CIVIL SANCTIONS AND REMEDIES

SEAN BOYLE AND GERRY FERGUSON*

* The authors thank Connor Bilfeld for authoring Section 8 and Dmytro Galagan for authoring Section 13. The authors also wish to thank Patrick Palmer and Alison Burns, articling students at Blakes, for their invaluable assistance in updating this chapter. Parts of this chapter were drawn from the 2018 edition, which was co-written by Derek Spencer.

CONTENTS

PART A: CRIMINAL SENTENCES AND COLLATERAL CONSEQUENCES

- 1. INTRODUCTION**
- 2. UNCAC**
- 3. OECD CONVENTION**
- 4. US SENTENCING**
- 5. UK SENTENCING**
- 6. CANADIAN SENTENCING**
- 7. CRIMINAL FORFEITURE**
- 8. DEBARMENT AS A COLLATERAL CONSEQUENCE**
- 9. DISQUALIFICATION AS COMPANY DIRECTOR**
- 10. MONITORSHIP ORDERS**

PART B: CIVIL AND ADMINISTRATIVE ACTIONS AND REMEDIES

- 11. NON-CONVICTION BASED FORFEITURE**
- 12. CIVIL ACTIONS AND REMEDIES**
- 13. INTERNATIONAL INVESTMENT ARBITRATION**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

PART A: CRIMINAL SENTENCES AND COLLATERAL CONSEQUENCES

1. INTRODUCTION

In Chapter 2, the main corruption offences—both domestic and foreign—are described and the maximum punishment for those offences is set out. In this chapter, the sentencing principles which guide the selection of an appropriate sentence in individual cases are briefly described, and the actual sentences imposed in some corruption cases are provided as illustrations of how those sentencing principles are applied in practice.

2. UNCAC

The United Nations Convention Against Corruption (UNCAC) has very little in the way of requirements or specific guidance for sanctions and sentencing in corruption cases and does not set out any minimum or maximum sentences for corruption offences.¹ Article 30 contains the main provisions with respect to sanctions. The Article includes mandatory and non-mandatory provisions.

The mandatory provisions require each State Party to:

- Provide for sanctions that take into account the gravity of the offence (Article 30(1));
- Provide for an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting, and adjudicating offense established in accordance with the UNCAC (Article 30(2));
- Take appropriate measures to ensure that decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings (Article 30(4)); and
- Take into account the gravity of the offence concerned when considering the eventuality of early release or parole of persons convicted of such offences (Article 30(5)).

The non-mandatory provisions require each State Party to:

- Consider establishing procedures through which a public official accused of an offence established in accordance with the UNCAC may, where appropriate, be removed, suspended or reassigned by the appropriate authority (Article 30(6));
- Consider establishing procedures for the disqualification for a period of time determined by domestic law of persons convicted of offences established in

¹ United Nations Convention Against Corruption, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005) [UNCAC], online (pdf):

<https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

accordance with the UNCAC from (a) holding public office and (b) holding office in an enterprise owned in whole or in part by the State (Article 30(7)); and

- Endeavour to promote the reintegration into society of persons convicted for offences established pursuant to the UNCAC (Article 30(10)).

Additional guidance is provided in Articles 12(1), 26(4), 35, and 37(2).

Article 12(1) provides that “each State Party shall take measures, in accordance with ... its domestic law ... to provide effective, proportionate and dissuasive civil, administrative or criminal penalties” for violation of corruption prevention standards and offences involving the private sector.

Article 26(4) requires each State Party to “ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.”

Article 35 requires each State Party to take such measures as may be necessary to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

Article 37(2) provides that State Parties shall consider mitigation of punishment (or immunity from prosecution under Article 37(3)) for accused persons who provide “substantial cooperation” in the investigation or prosecution of corruption offences.

3. OECD CONVENTION

Like the UNCAC, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)² does not stipulate specific penalties but sets out general guidance with respect to sanctions and sentencing for bribery of foreign public officials. Article 3 of the OECD Convention comprises the main provisions on sanctions.

Paragraph 1 of Article 3 requires that bribery of foreign officials “shall be punishable by effective, proportionate and dissuasive criminal penalties” comparable to the penalties for corruption of domestic officials. Article 8(2) has a similar penalty requirement for books and records offences.

Paragraph 2 of Article 3 requires those State Parties who do not recognize the concept of “corporate criminal liability” in their legal systems to ensure that corporations are “subject

² OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, S Treaty Doc No 105-43 (entered into force 15 February 1999) [OECD Convention], online: <<http://www.oecd.org/daf/antibribery/oecdantibriberyconvention.htm>>.

to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials."

Paragraph 3 of Article 3 requires each State Party to take necessary steps for seizure and confiscation of the proceeds of bribery.

Besides those mandatory provisions, paragraph 4 requires each State Party to "consider" imposing additional civil or administrative sanctions for the bribery of a foreign public official.

4. US SENTENCING

Bribery of US officials is criminalized under both state and federal criminal law. This book only deals with corruption offenses involving US federal officials under the US *Code*³ and foreign public officials under the *Foreign Corrupt Practices Act (FCPA)*.⁴ Sentences for offenders under these laws are guided by the US Sentencing Commission's *Guidelines Manual (Guidelines)*.⁵

4.1 Federal Guidelines

The *Guidelines* were adopted in 1984 and were originally mandatory. In 2005, the US Supreme Court in *US v Booker* held that the mandatory nature of the *Guidelines* violated the US Constitution.⁶ Since that time, the sentencing range for each case set out in the *Guidelines* has been treated by sentencing courts as advisory, rather than mandatory. The *Guidelines* are designed to bring a reasonable degree of uniformity to similar offenses committed by similar offenders in similar circumstances. The recommended sentencing range (described in months of imprisonment) is determined by putting the severity of the offense on one axis (there are 43 different offense levels) and the severity of the offender's prior criminal record on the other axis (there are six categories of seriousness for the prior record). Where the two axes intersect, the *Guidelines* give a recommended advisory range of sentence in terms of months. Departures from that range are made where the circumstances of a case warrant departure. The Sentencing Table (see Table 7.1) is also divided into four zones, the effects of which are described below.

4.1.1 Offense Seriousness

In the *Guidelines*, each offense is assigned a "base level" of offense seriousness and that base level will then be increased or decreased depending on the existence of specified aggravating or mitigating circumstances. For example, for offering, giving, soliciting or receiving a bribe,

³ 18 USC.

⁴ *Foreign Corrupt Practices Act* of 1977, as amended, 15 USC §§ 78dd-1, et seq.

⁵ US, United States Sentencing Commission, *Guidelines Manual* (2018) [USSG (2018)], online (pdf): <<https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf>>.

⁶ *United States v Booker*, 125 S Ct 738 (2005).

the offense base level is 12. If the offender is a public official, the base level is 14 and if the offense involved more than one bribe, the offense level rises to 16.

4.1.2 Criminal History of the Offender

An offender can receive an elevated sentence due to their prior criminal history. They receive one point for each prior sentence,⁷ two points if the prior sentence was for a period of incarceration of at least 60 days, and three points if the prior sentence was for a period of imprisonment exceeding one year and one month.⁸

4.1.3 Zones

The Sentencing Table is also divided into four zones.⁹ Zone A (for the least serious offenses) indicates that a sentence of probation without any prison time would also be a fit sentence. Zone B indicates that the offender should serve at least a short period (no less than 30 days) in prison, while the remainder of the sentence could be served in community confinement (e.g., home detention, etc.). Zone C indicates that offenders should serve at least one half of the sentence in prison and the remainder could be served in community confinement. Zone D indicates that the minimum number of months set out in the specific recommended sentencing range (each range has a minimum and a maximum) should be served in prison.

⁷ As stated in the USSG (2018), *supra* note 5 at § 4A1.2(a)(1), “[t]he term “prior sentence” means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense” and § 4A1.2(a)(3) “[a] conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence.” Certain offenses are excluded from calculation, including offenses for which the sentence was imposed more than ten years prior to the instant offense (or five years if the prior offense was committed prior to the offender’s eighteenth birthday) and certain minor offenses such as hitchhiking and public intoxication. The offender can receive a maximum of four points for sentences that do not result in incarceration for at least 60 days, whereas two points are given for each prior sentence of at least 60 days and three points for each prior sentence exceeding one year and one month.

⁸ For a full description of the Criminal History and Criminal Livelihood score, see the USSG (2018), *supra* note 5 at c 4.

⁹ For a full description of the zones and their impact, see *ibid* at § 5C1.1 (Imposition of a Term of Imprisonment). For a full description of departures from guidelines ranges, see *ibid* at c 5, pt K (Departures).

Table 7.1 US Sentencing Table for Imprisonment¹⁰

| SENTENCING TABLE (in months of imprisonment) | | | | | | |
|--|---|----------------|------------------|-----------------|-------------------|--------------------|
| Offense Level | Criminal History Category (Criminal History Points) | | | | | |
| | I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
| Zone A | 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| | 2 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| | 3 | 0-6 | 0-6 | 0-6 | 2-8 | 3-9 |
| | 4 | 0-6 | 0-6 | 0-6 | 2-8 | 6-12 |
| | 5 | 0-6 | 0-6 | 1-7 | 4-10 | 9-15 |
| | 6 | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 |
| Zone B | 7 | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 |
| | 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 |
| | 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 |
| | 10 | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 |
| | 11 | 8-14 | 10-16 | 12-18 | 18-24 | 24-30 |
| Zone C | 12 | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 |
| | 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 |
| | 14 | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 |
| | 15 | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 |
| | 16 | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 |
| Zone D | 17 | 24-30 | 27-33 | 30-37 | 37-46 | 46-57 |
| | 18 | 27-33 | 30-37 | 33-41 | 41-51 | 51-63 |
| | 19 | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 |
| | 20 | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 |
| | 21 | 37-46 | 41-51 | 46-57 | 57-71 | 70-87 |
| Zone E | 22 | 41-51 | 46-57 | 51-63 | 63-78 | 77-96 |
| | 23 | 46-57 | 51-63 | 57-71 | 70-87 | 84-105 |
| | 24 | 51-63 | 57-71 | 63-78 | 77-96 | 92-115 |
| | 25 | 57-71 | 63-78 | 70-87 | 84-105 | 100-125 |
| | 26 | 63-78 | 70-87 | 78-97 | 92-115 | 110-137 |
| Zone F | 27 | 70-87 | 78-97 | 87-108 | 100-125 | 110-137 |
| | 28 | 78-97 | 87-108 | 97-121 | 110-137 | 120-150 |
| | 29 | 87-108 | 97-121 | 108-135 | 121-151 | 130-162 |
| | 30 | 97-121 | 108-135 | 121-151 | 135-168 | 140-175 |
| | 31 | 108-135 | 121-151 | 135-168 | 151-188 | 151-188 |
| Zone G | 32 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 |
| | 33 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 |
| | 34 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 |
| | 35 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 |
| | 36 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 |
| Zone H | 37 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 |
| | 38 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life |
| | 39 | 262-327 | 292-365 | 324-405 | 360-life | 360-life |
| | 40 | 292-365 | 324-405 | 360-life | 360-life | 360-life |
| | 41 | 324-405 | 360-life | 360-life | 360-life | 360-life |
| Zone I | 42 | 360-life | 360-life | 360-life | 360-life | 360-life |
| | 43 | life | life | life | life | life |

¹⁰ USSG (2018), *supra* note 5.

4.2 Procedure and Guiding Principles

The sentencing of a criminal offender involves three steps, which has been explained by US District Judge John Adams:

Criminal sentencing is often described as a three-step process. A district court must begin the process by calculating the advisory guideline range suggested by the United States Sentencing Commission. *Rita v. United States*, 551 U.S. 338, 351, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) ("The sentencing judge ... will normally begin by considering the presentence report and its interpretation of the Guidelines."). In so doing, the Court must determine the offense level for the crimes for which the defendant has been convicted and the defendant's criminal history. See *United States v. Boyd*, No. 3:07-CR-3, 2008 WL 4963198, at *14-16 (E.D.Tenn. Nov. 18, 2008).

Next, the Court must determine whether a variance or departure from the advisory guideline range would be appropriate. *United States v. Collington*, 461 F.3d 805, 807 (6th Cir. 2006).

Finally, a sentencing court must independently evaluate each of the factors in 18 U.S.C. § 3553(a), which details the considerations that a district court must weigh before sentencing a criminal defendant. Although the Guidelines form a starting point in the district court's analysis under 18 U.S.C. § 3553(a), a district court may not presume that the sentence suggested by the Guidelines is appropriate for an individual criminal defendant. A district court may hear arguments by prosecution or defense that the Guidelines sentence should not apply. In this way, a sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing.¹¹

Under § 3553 of Title 18 of the US Code, the factors to be considered in imposing a sentence are:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;

¹¹ *United States of America v Bernard K Watkins*, 2010 US Dist LEXIS 90133 (ND Ohio 2010).

- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines [issued by the Sentencing Commission]—
...
 - (5) any pertinent policy statement [issued by the Sentencing Commission]—
...
 - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 - (7) the need to provide restitution to any victims of the offense.¹²

4.3 Specific Corruption Related Guidelines

Chapter 2 of the *Guidelines* contains information for offenses which are either directly related to corruption or contain aspects of corruption if they are committed on or by a public official. § 2C1.1 of the *Guidelines* deals with the following offenses: Offering, Giving, Soliciting or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; and Conspiracy to Defraud by Interference with Governmental Functions. § 2C1.1 is one of the most commonly applied guidelines for corruption of a public official. As noted, the base level for this offense is 14 if the defendant is a public official, which in the Sentencing Table (see Table 7.1) corresponds to a guideline range of 15-21 months.

4.3.1 Seriousness of Offense

The following factors are also relevant in determining the offense level. Under § 2C1.1 of the *Guidelines*, the offense level can be increased in the following circumstances:

- (1) If the offense involved more than one bribe or extortion, increase by 2 levels.

¹² 18 USC § 3553.

- (2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
- (3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.
- (4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.¹³

As noted in item (2), the value of the bribe is relevant and calculated based on the greatest of the following four measures:

- a) the value of the payment;
- b) the benefit received or to be received in return for the payment;
- c) value of anything obtained or to be obtained by a public official or others acting with a public official; or
- d) the loss to the government from the offense.

Table 7.2 is a representation of how the offense level increases are calculated.

¹³ USSG (2018), *supra* note 5 at § 2C1.1(b).

Table 7.2 Specific Offense Characteristics¹⁴

| | <u>LOSS (APPLY THE GREATEST)</u> | <u>INCREASE IN LEVEL</u> |
|-----|----------------------------------|--------------------------|
| (A) | \$6,500 or less | no increase |
| (B) | More than \$6,500 | add 2 |
| (C) | More than \$15,000 | add 4 |
| (D) | More than \$40,000 | add 6 |
| (E) | More than \$95,000 | add 8 |
| (F) | More than \$150,000 | add 10 |
| (G) | More than \$250,000 | add 12 |
| (H) | More than \$550,000 | add 14 |
| (I) | More than \$1,500,000 | add 16 |
| (J) | More than \$3,500,000 | add 18 |
| (K) | More than \$9,500,000 | add 20 |
| (L) | More than \$25,000,000 | add 22 |
| (M) | More than \$65,000,000 | add 24 |
| (N) | More than \$150,000,000 | add 26 |
| (O) | More than \$250,000,000 | add 28 |
| (P) | More than \$550,000,000 | add 30 |

¹⁴ "Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States" in *ibid* at § 2B1.1.

Using the greatest of the four specified measures can lead to large increases in offense level.

In *United States of America v Jeffery Edwards*,¹⁵ an asbestos inspector, Jeffrey Edwards, was appealing his sentence of 33 months in prison for bribery and extortion. Edwards issued a permit to a contracting company to conduct asbestos abatement. He told the company that he would allow them to use a less costly abatement procedure than he believed was required by the applicable regulations if they paid him \$10,000. The FBI videotaped this exchange, and he was subsequently arrested and convicted. Before the District Court, the parties agreed that § 2C1.1 of the *Guidelines* applied but disagreed on the amount of level enhancement. Edwards argued the Court should consider the value of the bribe, \$10,000, and apply a two-level increase. The government argued that the less costly procedure made a difference of \$200,000, corresponding to a ten-level increase. The Court found the cost difference to be \$100,000 and increased the offense level by eight, making the guideline range 30-37 months. The 33-month sentence imposed by the District Court under this range was upheld on appeal.

In *United States of America v Quincy Richard Sr*,¹⁶ the offender, a former member of a school board, pledged to support an applicant for School Board Superintendent in exchange for \$5,000. A co-accused also was to receive \$5,000. The applicant for Superintendent was a government informant. Following a trial, Richard was found guilty of conspiracy to commit bribery and two counts of bribery. Richard was sentenced to 33 months in prison and three years' supervised release per count to be served concurrently. The district court increased the offense level by two levels because the two bribes totaled \$10,000. Richard appealed on various grounds, including that he should be responsible for, at most, \$5,000. The Court of Appeal upheld the entire sentence including the two-level increase, noting that the total bribe was the greatest amount of the bribe or loss to the government.

In *United States of America v Charles Gary-Don Abbey*,¹⁷ Abbey, a city administrator, accepted a free building lot from a land developer. The offender was convicted of conspiracy to bribe a public official, solicitation of a bribe, and extortion by a public official and was sentenced to 15 months imprisonment. The sentencing court applied a four-level enhancement due to the value of the lot exceeding \$20,000. Abbey argued on appeal "that the land was basically worthless because he had to pay certain assessments on it after receipt, and further that the only relevant criteria was his subjective impression of the property's value." The court rejected this argument, finding the value of loss ordinarily means fair market value, which is determined objectively. The government presented evidence of surrounding lots selling for more than \$20,000 and the bank from whom Abbey sought a mortgage estimated the lots' value at \$40,000. The district court applied the value over \$20,000 and the Court of Appeal held that value was "not clearly erroneous" and upheld the sentence.

*United States of America v William L Courtright*¹⁸ involved the former mayor of Scranton, Pennsylvania. After a multi-year undercover investigation by the FBI, in July 2019 Courtright resigned as Mayor of Scranton and pleaded guilty to three felony public

¹⁵ *United States of America v Jeffery Edwards*, 378 US App DC 86 (DC Cir 2007).

¹⁶ *United States of America v Quincy Richard Sr*, 775 F (3d) 287 (5th Cir 2014).

¹⁷ *United States of America v Charles Gary-Don Abbey*, 560 F (3d) 513 (6th Cir 2009).

¹⁸ *United States of America v William L Courtright*, 460 F Supp (3d) 545 (MD Pa 2020).

corruption offences resulting in a multi-year conspiracy to take bribes from vendors doing business with the city.¹⁹ Before sentencing, the final *Presentence Investigation Report (PSR)* prepared by the United States Probation Office determined that the base offence level for Courtright under the sentencing guidelines, as a public official, was fourteen. It then found that the following enhancements were applicable: (1) a two-level enhancement because there were multiple bribes involved; (2) a four-level enhancement because Courtright was in a “high-level decision-making or sensitive position;” (3) a four-level enhancement arising from Courtright’s role as a leader or organizer of criminal activity involving five or more participants or which was otherwise extensive. Finally, although Courtright had only collected around \$50,000 in cash payments (Courtright argued it was closer to \$18,000), the *PSR* applied a sixteen-level enhancement because the “benefit received” in exchange for illegal payments to Courtright was between \$1,500,000 and \$3,500,000. Courtright’s primary challenge was to this last enhancement. The offender was ultimately unsuccessful in a later decision, which determined that the sixteen-level enhancement had been correctly applied.²⁰ On October 2, 2020, Courtright was sentenced to seven years’ imprisonment and a \$25,000 fine,²¹ significantly less than the recommended sentencing guideline range of 292-365 months imprisonment.

4.3.2 Positions of Elevated Trust

In cases of public corruption, the position of power and degree of breach of trust is considered in sentencing. As stated, under § 2C1.1 of the *Guidelines*, a four-level increase is given if the offense involves an elected public official or high-level decision-making or sensitive position, and if the resulting offense level is less than 18, it is to be increased to level 18.

In *United States of America v Bridget McCafferty*,²² McCafferty, a former judge, was convicted of 10 counts of making false statements to FBI agents arising out of a corruption investigation of another public official. The offense level was 6, with its corresponding guideline range for sentencing from 0-6 months. The district court applied a 5-level adjustment moving the range to 8-14 months and sentenced McCafferty to 14 months. The upward departure and ultimate sentence were both upheld on appeal, with the Court stating: “For a sitting judge to knowingly lie to FBI agents after she had unethically steered negotiations in a case to benefit her associates is a shock to our system of justice and the rule of law.”²³

In one of the highest profile corruption cases in the last decade, former Illinois Governor Rod Blagojevich was sentenced to 14 years in prison following 18 corruption convictions,

¹⁹ The United States Attorney’s Office, Middle District of Pennsylvania, News Release, “Scranton Mayor Pleads Guilty to Corruption Charges” (2 July 2019), online: *Department of Justice* <<https://www.justice.gov/usao-mdpa/pr/scranton-mayor-pleads-guilty-corruption-charges>>.

²⁰ *United States of America v William L Courtright*, 2020 US Dist LEXIS 161908 (MD Pa 2020).

²¹ The United States Attorney’s Office, Middle District of Pennsylvania, News Release, “Former Scranton Mayor Sentenced to Seven Years’ Imprisonment On Public Corruption Charges” (2 October 2020), online: *Department of Justice* <<https://www.justice.gov/usao-mdpa/pr/former-scranton-mayor-sentenced-seven-years-imprisonment-public-corruption-charges>>.

²² *United States of America v Bridget McCafferty*, 2012 US App LEXIS 11247 (6th Cir 2012).

²³ *Ibid* at VIII C.

most notably his attempt to “sell or trade” the United States Senate seat that had become vacant following Barack Obama’s election in 2008. Other charges included racketeering conspiracy, wire fraud, extortion conspiracy, attempted extortion and making false statements to federal agents.²⁴ In sentencing Blagojevich to 14 years in prison, Judge James Zagel stated “[t]he harm here is not measured in the value of property or money. The harm is the erosion of public trust in government.”²⁵ On appeal, the 7th Circuit Court of Appeals vacated five of the convictions on a technicality and ordered a re-sentencing; further leave to the Supreme Court was denied. Despite the reduced number of convictions, the 14-year sentence was upheld at a re-sentencing in August 2016. Blagojevich’s lawyer further appealed the sentence,²⁶ but on April 21, 2017 the 7th Circuit Court of Appeals upheld the original sentence.²⁷

United States of America v Richard Renzi involved the trial and sentencing of a former Arizona Congressman in respect to a \$200,000 bribe payment (resulting in a 10-level enhancement).²⁸ Renzi was sentenced to 36 months imprisonment and his friend and business partner was sentenced to 18 months imprisonment. In affirming the sentences, the Court noted the substantial power granted to Renzi, stating:

The Constitution and our citizenry entrust Congressmen with immense power. Former Congressman Renzi abused the trust of this Nation, and for doing so, he was convicted by a jury of his peers. After careful consideration of the evidence and legal arguments, we affirm the convictions and sentences of both Renzi and his friend and business partner, Sandlin.²⁹

*United States of America v Richard McDonough*³⁰ involved the trial and sentencing of Richard McDonough and Salvatore DiMasi, the former Speaker of the Massachusetts House of Representatives, for bribes in relation to business transactions. DiMasi received a sentence of 96 months (8 years) imprisonment (the guideline range was 235 to 293 months) and McDonough was sentenced to 84 months (7 years) imprisonment (the guideline range was 188 to 235 months). The guideline range for DiMasi and McDonough was identical except for the enhancement given to DiMasi as a public official.

United States of America v Joseph Paulus involved the sentencing of Paulus, a former district attorney who accepted 22 bribes over the course of a two-year period for agreeing to

²⁴ For the full indictment, see: *United States of America v Rod Blagojevich et al*, Indictment No 08 CR 888 (ND Ill 2008), online (pdf): <https://www.justice.gov/archive/usao/iln/chicago/2009/pr0402_01a.pdf>.

²⁵ Monica Davey, “Blagojevich Sentenced to 14 Years in Prison”, *The New York Times* (7 December 2011), online: <http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html?_r=0>.

²⁶ “Ex-Gov Rob Blagojevich to Appeal 14-Year Prison Sentence”, *Chicago Tribune* (23 August 2016), online: <<http://www.chicagotribune.com/news/local/breaking/ct-rod-blagojevich-appeal-prison-sentence-20160823-story.html>>.

²⁷ Jason Meisner, “Ex-Gov Rob Blagojevich Loses Appeal as Judges Quickly Uphold 14-Year Prison Term”, *Chicago Tribune* (21 April 2017), online: <<https://www.chicagotribune.com/news/breaking/ct-rod-blagojevich-appeal-20170421-story.html>>.

²⁸ *United States of America v Richard G Renzi*, 769 F (3d) 731 (9th Cir 2014).

²⁹ *Ibid* at IX.

³⁰ *United States of America v Richard McDonough*, 727 F (3d) 143 (1st Cir 2013).

favourable treatment of a defence lawyer's clients.³¹ Paulus was sentenced to 58 months imprisonment (nearly 5 years), an upward departure from the guideline range of 27 to 33 months. The court justified their upward departure based on the nature of the trust breached, the number of bribes over a substantial period of time and the difficulty in detecting corruption. The Court stated:

Bribery, by its very nature, is a difficult crime to detect. Like prostitution, it occurs only between consenting parties both of whom have a strong interest in [sic] concealing their actions. And often, when it involves public corruption as in this case, one of the parties occupies a position of public trust that makes him, or her, an unlikely suspect. In light of these facts, it is unusual to uncover even one instance of bribery by a public official, let alone twenty-two. This fact takes the case outside of the heartland.... That there was interference with a government function to an unusual degree and a loss of public confidence in government as a result of his offense are facts that this court has found. But the question of how to measure such impact and assign a numeric adjustment in the applicable offense level under the Guidelines is a matter of judgment. Such matters cannot be quantified, or at least easily quantified.... For these reasons, and for the reasons set forth on the record in court, the defendant is sentenced to a term of fifty-eight months.³²

United States of America v Robert F McDonnell,³³ dealt with an appeal by McDonnell, the former Governor of Virginia, of his convictions for conspiracy to commit honest-services wire fraud, committing honest services wire fraud, and obtaining property under colour of official right. McDonnell accepted \$175,000 in loans, gifts and other benefits from Jonnie Williams (chief executive officer of Star Scientific) while in office. Williams was invited to meetings and introduced to state employees. Williams wanted to have state universities evaluate a nutritional supplement produced by a company he owned. A successful conviction required proof that McDonnell committed (or agreed to commit) an "official act" in exchange for loans and gifts. The Supreme Court of the United States overturned McDonnell's convictions, confirming that not every action taken by a public official while in office will qualify as an "official act" for the purposes of 18 USC § 201:

An "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." That question or matter must involve a formal exercise of governmental power, and must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that question or matter, or agree to do so. Setting up a meeting, talking to another official, or organizing an event—without more—does not fit that definition of "official act".... Because a typical meeting, call, or event is not of the same stripe as a lawsuit before a

³¹ *United States of America v Joseph Paulus*, 331 F Supp (2d) 727 (ED Wis 2004).

³² *Ibid* at paras 16, 24-25, 32.

³³ *United States of America v Robert F McDonnell*, 136 S Ct 2355 (2016).

court, a determination before an agency, or a hearing before a committee, it does not count as a “question” or “matter” under §201(a)(3).³⁴

The Supreme Court of the United States noted that, at trial, several of McDonnell’s subordinates testified that he had asked them to attend a meeting but not that anything more was expected. If that was truly what McDonnell had agreed to do when he accepted the loans and gifts, then the necessary decision or action was not present. McDonnell’s conviction was vacated.

*United States of America v David Johnson and Reginald T Walton*³⁵ involved an appeal of the sentences of David Johnson and Reginald T. Walton. Walton, Johnson and others orchestrated a scheme which allowed them to pocket money while selling the city of Indianapolis’ properties through a non-profit loophole. The two were indicted and found guilty of wire fraud, honest services wire fraud and conspiracy to engage in money laundering. Walton was also convicted of receiving bribes. Walton was sentenced to 108 months in prison, below the guideline range of 135-168 months. Johnson was sentenced to 66 months, which was below the guideline range of 87-108 months. On appeal, among other things, they challenged the sentencing enhancement they received because Walton was a public official in a high-level decision-making position. The Court found no clear error in the district court’s decision to apply the enhancement to both sentences. Walton, as director of the Land Bank, was in a sensitive position. He had “inordinate” discretion over transferring Land Bank properties. “Walton did not have overt influence over his superiors, but his resolutions were scarcely scrutinized, giving him de facto control over how and to whom Land Bank Properties were sold.”³⁶ The sentences imposed by the district court were upheld.

United States of America v Aniello Palmieri,³⁷ dealt with an appeal by Aniello Palmieri of his sentence after he pleaded guilty to mail fraud. Palmieri was Director of the Division of Facilities Management for Union County, New Jersey, and assisted in selecting vendors for building materials, tools, and other supplies. From 2006-2010, Palmieri participated in kickback schemes, verified false and inflated invoices and received a portion of vendors’ wrongful profits in return. On appeal, in upholding a four-level enhancement imposed by the District Court for being a public official in a high-level decision-making or sensitive position, the Court noted that Palmieri was a countywide director earning over six figures. Palmieri could not act officially on the County’s behalf, but “he exercised substantial influence through recommendations to his superiors.”³⁸

In *United States of America v Raushi J Conrad*,³⁹ the offender appealed the convictions for acceptance of bribes by a public official and conspiracy to commit bribery, as well as the sentence of 48 months in prison. Conrad, while employed at the United States Department of Commerce, had accepted hundreds of thousands of dollars in payments and renovation

³⁴ *Ibid* at paras 3-5.

³⁵ *United States of America v David Johnson and Reginald T Walton*, 874 F (3d) 990 (7th Cir 2017).

³⁶ *Ibid* at para 27.

³⁷ *United States of America v Aniello Palmieri*, 681 Fed Appx 130 (3rd Cir 2017).

³⁸ *Ibid* at I B.

³⁹ *United States of America v Raushi J Conrad*, 760 Fed Appx 199 (4th Cir 2019).

work at his home from a James Bedford. In return, he took official acts to steer government contracts to companies owned by Bedford. One of Conrad's arguments on appeal was that the District Court erred in applying the sentencing enhancement for public officials in high-level decision-making positions. Conrad felt that he did not hold a high-level decision-making position, had simply a mid-level position within the Commerce Department, and did not have direct decision-making authority. Unfortunately for Conrad, during the investigation he specifically told a special agent that the decision to hire Bedford's company was "his decision." The Court noted that "although Appellant did not have independent authority to award the contract, the record reflects that as the official leading the data migration project, Appellant's recommendation of who should win the contract was given substantial deference.... Indeed, there [was] no evidence in the record that any of the individuals who passed along Appellant's recommendation did any research into Bedford's Images whatsoever, and instead simply relied on Appellant's recommendation since he was the project manager for the data migration project."⁴⁰

*United States of America v Felipe Zamora*⁴¹ dealt with an appeal by Felipe Zamora of his sentence. In jail awaiting resentencing for past offences, Zamora began paying a guard to smuggle in contraband. When he was discovered, he pleaded guilty to bribing a public official. The district court applied a four-level enhancement because the offence involved a public official in a high-level decision-making or sensitive position. Zamora was sentenced to 60 months, which was above the guideline range whether a four-level enhancement was applied or not. On appeal, Zamora argued that a prison guard is a low-level official and that he did not hold a sensitive position, making the four-level enhancement inappropriate. The Court noted that the *Guidelines'* commentary, which generally binds on issues of interpretation, indicated that those who are "similarly situated" to law enforcement officers are in a sensitive position. The Court determined that prison guards are similarly situated to law enforcement officers for the purposes of § 2C1.1 and upheld Zamora's sentence.

While § 2C1.1 deals with one of the most common corruption offenses, there are other guidelines which apply to offenses which are either directly related to corruption or have an element of corruption if they are committed by a public official.⁴²

4.4 Imposition of Fines

Criminal offenders can also be fined as part of their sentence. Under 18 USC § 3571, fines for individual offenders may be no more than the greatest of:

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section [not more than the greater of twice the value of the loss caused to another by the offense or twice the value of the defendant's gain from their criminal behaviour,

⁴⁰ *Ibid* at para 27.

⁴¹ *United States of America v Felipe Zamora*, 982 F (3d) 1080 (7th Cir 2020).

⁴² For the full guideline text of these provisions, see "Offense Conduct" in USSG (2018), *supra* note 5 at 50.

unless this option would unduly complicate or lengthen the sentencing process];

- (3) for a felony, not more than \$250,000.⁴³

The factors governing the imposition of a fine are found in 18 USC § 3572:

- (a) **Factors To Be Considered** — In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553 (a)—
 - (1) the defendant's income, earning capacity, and financial resources;
 - (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
 - (3) any pecuniary loss inflicted upon others as a result of the offense;
 - (4) whether restitution is ordered or made and the amount of such restitution;
 - (5) the need to deprive the defendant of illegally obtained gains from the offense;
 - (6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;
 - (7) whether the defendant can pass on to consumers or other persons the expense of the fine; and
 - (8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.
- (b) **Fine Not to Impair Ability to Make Restitution** — If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.⁴⁴

⁴³ 18 USC § 3571 (Sentence of fine).

⁴⁴ 18 USC § 3572 (Imposition of sentence of fine and related matters), online: <<http://www.law.cornell.edu/uscode/text/18/3572>>.

For the offense of bribery of domestic public officials and witnesses in 18 USC § 201, fines are determined by the above sections or may be up to three times the value of the thing given or offered to the official. This applies to both the bribe payer and the bribe receiver, meaning the penalty for both may be based on the amount of the bribe. Rose-Ackerman notes that this symmetry in the maximum fine fails to reflect the “asymmetries in gains between bribe payers and recipients.”⁴⁵ Under subsection (2) above, the bribe payer’s gains may be taken into account; however, Rose-Ackerman argues that gains should be multiplied to reflect the probability of detection in order to effectively deter bribery.

4.5 Sentencing Corporations and Other Organizations

The *Guidelines* provide the following general principles for the sentencing of organizations:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.

Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will

⁴⁵ Susan Rose-Ackerman, “The Law and Economics of Bribery and Extortion” (2010) 6 Annual Rev L & Soc Sci 217 at 225.

assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.⁴⁶

The *Guidelines* set out the base fine for an organization:

- (a) The base fine is the greatest of:
 - (1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or
 - (2) the pecuniary gain to the organization from the offense;⁴⁷ or
 - (3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.⁴⁸

The *Guidelines* set out a fine of \$8,500 for an offense level of 6 or less, which gradually rises to \$150 million for an offense level of 38 or more. Each offense level increases the amount of the fine. For example:

Table 7.3 Offense Level Fine Table⁴⁹

| Offense Level | Amount |
|---------------|---------------|
| 6 or less | \$8,500 |
| 8 | \$15,000 |
| 15 | \$200,000 |
| 22 | \$2,000,000 |
| 30 | \$20,000,000 |
| 36 | \$80,000,000 |
| 38 or more | \$150,000,000 |

Fines are also multiplied based on the organization's culpability score. The culpability score is based on a number of factors including prior criminal history, involvement of high-level

⁴⁶ "Sentencing of Organizations, Introductory Commentary" in USSG (2018), *supra* note 5 at 509.

⁴⁷ Rose-Ackerman argues that fines should be a multiple of the gain to the organization, since the chances of being caught are far below 100%. See Rose-Ackerman, *supra* note 45 at 225.

⁴⁸ USSG (2018), *supra* note 5 at § 8C2.4.

⁴⁹ *Ibid* at § 8C2.4.

officials, whether the organization had a pre-existing compliance program, and voluntary disclosure and cooperation:

Table 7.4 Minimum and Maximum Multipliers⁵⁰

| <u>Culpability Score</u> | <u>Minimum Multiplier</u> | <u>Maximum Multiplier</u> |
|--------------------------|---------------------------|---------------------------|
| 10 or more | 2.00 | 4.00 |
| 9 | 1.80 | 3.60 |
| 8 | 1.60 | 3.20 |
| 7 | 1.40 | 2.80 |
| 6 | 1.20 | 2.40 |
| 5 | 1.00 | 2.00 |
| 4 | 0.80 | 1.60 |
| 3 | 0.60 | 1.20 |
| 2 | 0.40 | 0.80 |
| 1 | 0.20 | 0.40 |
| 0 or less | 0.05 | 0.20 |

4.6 FCPA Sentencing

The FCPA sets out the criminal penalties for corruption offenses. All FCPA criminal offenses are prosecuted by the Department of Justice (DOJ). The *Resource Guide to the FCPA* (DJSEC Resource Guide), produced by the DOJ and the Securities Exchange Commission (SEC), sets out ten factors relevant in determining whether to seek indictment or an NPA, DPA or SEC civil settlement, and in determining the terms of those dispositions. The DJSEC Resource Guide repeatedly emphasizes that voluntary early disclosure of possible FCPA violations and

⁵⁰ *Ibid*, § 8C2.7. For a full description of the sentencing guidelines for organizations (including a discussion of restitution, effective compliance and ethics programs, determination of fines including departures from guideline fine ranges, organizational probation, and violations of probation), see *ibid*.

GLOBAL CORRUPTION

cooperation in the investigation of those violations will be key factors in obtaining more lenient treatment from the DOJ or SEC. Ten factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating pleas or other agreements:

- the nature and seriousness of the offense, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation's willingness to cooperate with the government's investigation, including as to potential wrongdoing by the corporation's agents;
- the adequacy and effectiveness of the corporation's compliance program at the time of the offence, as well as at the time of a charging or resolution decision;
- the corporation's timely and voluntary disclosure of wrongdoing;
- the corporation's remedial actions, including any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution;
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
- the adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.⁵¹

The following excerpt from the DJSEC *Resource Guide* discusses penalties:⁵²

⁵¹ Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act*, 2nd ed (2020), at 51 online (pdf): <<https://www.justice.gov/criminal-fraud/fcpa-resource-guide>>.

⁵² *Ibid* at 69-71.

BEGINNING OF EXCERPT

What Are the Potential Consequences for Violations of the FCPA?

The FCPA provides for different criminal and civil penalties for companies and individuals.

Criminal Penalties

For each violation of the anti-bribery provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to \$2 million. Individuals, including officers, directors, stockholders, and agents of companies, are subject to a fine of up to \$250,000 and imprisonment for up to five years.

For each violation of the accounting provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to \$25 million. Individuals are subject to a fine of up to \$5 million and imprisonment for up to 20 years. Under the Alternative Fines Act, 18 U.S.C. § 3571(d), courts may impose significantly higher fines than those provided by the FCPA—up to twice the benefit that the defendant obtained by making the corrupt payment, as long as the facts supporting the increased fines are included in the indictment and either proved to the jury beyond a reasonable doubt or admitted in a guilty plea proceeding. Fines imposed on individuals may not be paid by their employer or principal.

U.S. Sentencing Guidelines

When calculating penalties for violations of the FCPA, DOJ focuses its analysis on the U.S. Sentencing Guidelines (Guidelines) in all of its resolutions, including guilty pleas, DPAs, and NPAs. The Guidelines provide a very detailed and predictable structure for calculating penalties for all federal crimes, including violations of the FCPA. To determine the appropriate penalty, the “offense level” is first calculated by examining both the severity of the crime and facts specific to the crime, with appropriate reductions for cooperation and acceptance of responsibility, and, for business entities, additional factors such as voluntary disclosure, pre-existing compliance programs, and remediation.

The Guidelines provide different penalties for the different provisions of the FCPA. The initial offense level for violations of the anti-bribery provisions is determined under § 2C1.1, while violations of the accounting provisions are assessed under § 2B1.1. For individuals, the initial offense level is modified by factors set forth in Chapters 3, 4, and 5 of the Guidelines to identify a final offense level. This final offense level, combined with other factors, is used to determine whether the Guidelines would recommend that incarceration is appropriate, the length of any term of incarceration, and the appropriate amount of any fine. For corporations, the offense level is modified by factors particular to organizations as described in Chapter 8 to determine the applicable organizational penalty.... For violations of the accounting provisions assessed under § 2B1.1, the procedure is generally the same, except that the specific offense characteristics differ. For instance, for violations of the FCPA’s accounting provisions, the offense level may be increased if a substantial part of the scheme occurred outside the United States or if the

defendant was an officer or director of a publicly traded company at the time of the offense. For companies, the offense level is calculated pursuant to §§ 2C1.1 or 2B1.1 in the same way as for an individual—by starting with the base offense level and increasing it as warranted by any applicable specific offense characteristics. The organizational guidelines found in Chapter 8, however, provide the structure for determining the final advisory guideline fine range for organizations.

...

Civil Penalties

Although only DOJ has the authority to pursue criminal actions, both DOJ and SEC have civil enforcement authority under the FCPA. DOJ may pursue civil actions for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders) and foreign nationals and companies for violations while in the United States, while SEC may pursue civil actions against issuers and their officers, directors, employees, agents, or stockholders for violations of the anti-bribery and the accounting provisions.

For violations of the anti-bribery provisions, corporations and other business entities are subject to a civil penalty of up to \$21,410 per violation. Individuals, including officers, directors, stockholders, and agents of companies, are similarly subject to a civil penalty of up to \$21,410 per violation, which may not be paid by their employer or principal.

For violations of the accounting provisions in district court actions, SEC may obtain a civil penalty not to exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation. The specified dollar limitations are based on the nature of the violation and potential risk to investors, ranging from \$9,639 to \$192,768 for an individual and \$96,384 to \$963,837 for a company. SEC may obtain civil penalties both in actions filed in federal court and in administrative proceedings. [footnotes omitted]

END OF EXCERPT

The size of penalties for *FCPA* cases has continued to increase. Eight of the ten largest penalties have been imposed since 2017. Harry Cassin lists the top ten largest combined DOJ and SEC penalties as of October 2020 in Table 7.5:

Table 7.5 Top Ten Largest FCPA Penalties⁵³

| Company | Amount | Year |
|---------------------------------|---|------|
| Goldman Sachs | \$3.3 billion (DOJ - \$2.3 billion) (SEC - \$1.0063 billion) | 2020 |
| Airbus SE | \$2.09 billion (DOJ – \$2.09 billion) | 2020 |
| Petróleo Brasileiro S.A. | \$1.78 billion (DOJ - \$853.2 million) (SEC - \$933.5 million) | 2018 |
| Telefonaktiebolaget LM Ericsson | \$1.06 billion (DOJ - \$520 million) (SEC - \$540 million) | 2019 |
| Telia Company AB | \$1.01 billion (DOJ – \$548.6 million) (SEC – \$457 million) | 2017 |
| MTS | \$850 million (DOJ - \$750 million) (SEC - \$100 million) | 2019 |
| Siemens | \$800 million (DOJ - \$450 million) (SEC - \$350 million) | 2008 |
| VimpelCom | \$795 million (DOJ - \$230.1 million) (SEC - \$167.5 million) (Dutch prosecutors – \$397.5 million) | 2016 |
| Alstom | \$772 million (DOJ - \$772 million) | 2014 |
| Société Générale S.A. | \$585 million (DOJ - \$585 million) | 2018 |

⁵³ Harry Cassin, “Wall Street Bank Earns Top Spot on FCPA Blog Top Ten List” (26 October 2020), online (blog): *The FCPA Blog* <<https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/>>. The list remains the same as of May 2021: Harry Cassin, “What’s New of the FCPA Top Ten List?” (26 May 2021), online (blog): *The FCPA Blog* <<https://fcpablog.com/2021/05/26/whats-new-on-the-fcpa-top-ten-list/>>. At the time of final editing (October 5, 2021), the list has not changed.

Several of these mega-corruption cases have also led to additional penalties imposed by foreign jurisdictions. The Airbus SE case, currently ranked as the second largest *FCPA* settlement, is one example. After four years of investigation, Airbus agreed to pay \$4 billion in fines to settle a four-year corruption investigation that spanned the globe. From 2004 to 2016, Airbus had bribed public officials in a number of countries to buy its satellites and planes. In addition to penalties paid to the DOJ, Airbus agreed to pay €2.1 billion to French authorities, as well a €991 million to the UK's Serious Fraud Office, to settle charges of bribery. That said, the DOJ did agree to credit Airbus anything it paid to French authorities (up to a total of \$1.8 billion).⁵⁴ Concurrent enforcement and carbon copy prosecutions are discussed in Chapter 6, Section 7.

4.7 Comments on *FCPA* Enforcement

Bribery under the *FCPA* differs from bribery under 18 USC § 201, as confirmed recently in *United States of America v Ng Lap Seng*.⁵⁵ Ng Lap Seng paid two UN ambassadors in excess of \$1 million to secure a UN commitment to use his real estate development site for an annual conference. The defendant was convicted of paying and conspiring to pay bribes and gratuities in violation of 18 USC §§ 371, 666 and *FCPA* §§ 78dd-2, 78dd-3, along with related money laundering charges. The District Court sentenced Seng to serve concurrent 48-month prison terms on each of the six counts and had to forfeit \$1.5 million along with paying a \$1 million fine. Seng was also ordered to pay \$302,977.20 in restitution to the UN. Seng appealed the conviction based, in part, on an argument that jury instructions as to both § 666 and the *FCPA* were deficient after *McDonnell*. Seng argued that *FCPA* bribery and § 666 bribery require proof of an official act satisfying the *McDonnell* standard. The United States Court of Appeals for the Second Circuit disagreed. It distinguished the decision in *McDonnell*, holding that the *FCPA*, unlike 18 USC § 201, does not require any kind of “official act.”

It is also notable that *FCPA* enforcement typically takes a different form from enforcement under the US Code. Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) have become the dominant method for resolving *FCPA* enforcement actions, despite the fact that “such resolution vehicles are not subjected to any meaningful judicial scrutiny.”⁵⁶ Almost all *FCPA* resolutions involve a DPA or NPA. Koehler states that “nearly all corporate *FCPA* enforcement actions in this new era are negotiated behind closed doors in the absence of meaningful judicial scrutiny.”⁵⁷ With DPAs, the DOJ calculates the

⁵⁴ Liz Alderman, “Airbus to Pay \$4 Billion to Settle Corruption Inquiry”, *The New York Times* (31 January 2020), online: <[https://fcpablog.com/2020/01/31/airbus-pays-4-billion-to-settle-global-bribery-and-trade-offenses/](https://www.nytimes.com/2020/01/31/business/airbus-corruption-settlement.html#:~:text=Still%20the%20Friday%20settlement%20clears,the%20French%20prosecutor%20said%20Friday>; Harry Cassin, “Airbus Pays $4 Billion to Settle Global Bribery and Trade Offenses” (31 January 2020), online (blog): <i>The FCPA Blog</i> <.

⁵⁵ *United States of America v NG Lap Seng*, 934 F (3d) 110 (2nd Cir 2019).

⁵⁶ Mike Koehler, *The Foreign Corrupt Practices Act Jurisprudence of Shira Scheindlin*, (2019) 69:3 Syracuse L Rev 543 at 550, online (pdf): <<https://lawreview.syr.edu/wp-content/uploads/2020/01/L-Koehler-Article-Final-Draft.pdf>>.

⁵⁷ Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Cheltenham; Northampton: Edward Elgar Publishing, 2014) at 195.

value of the benefit allegedly received in a non-transparent way, and when resolution is via an NPA, the calculation of the fine amount is not transparent.⁵⁸

*Dylan Tokar v US Department of Justice*⁵⁹ evidences how difficult it can be to obtain a clear view of the larger picture when a DPA is used. Dylan Tokar, a reporter for an anti-corruption publication, sought records regarding the selection of corporate compliance monitors for fifteen corporations who entered into DPAs with the DOJ to resolve *FCPA* cases. After narrowing his request following discussions with the DOJ and even submitting a second FOIA request for any objection letters filed by the relevant corporations, Mr. Tokar still had not received any productions and filed a lawsuit. The DOJ eventually provided a table with the information sought in his first response and the letters he had requested in his second, but they contained redactions. The DOJ moved for summary judgement and Tokar cross-moved for summary judgment challenging the redactions. The Court found that Mr. Tokar was entitled not only to a table containing the information he had requested, but to the relevant documents themselves. It also determined that the redaction of names/related personal identifying information of individuals nominated but not selected to be monitors, as well as their firms when those firms were small, was impermissible under either FOIA exemption 6 or 7(c). The Court held:

The Court concludes that while DOJ has demonstrated that these individuals have more than a *de minimis* privacy interest in their anonymity, the public interest in learning these individuals' identities outweighs that privacy interest, and therefore, the individuals' names and firms must be released.⁶⁰

In its analysis, the Court commented:

It is true, as DOJ points out, that Mr. Tokar would have had a much easier time learning about the inner workings of the monitor selection process if DOJ had simply responded to his initial FOIA request, rather than encouraging him to narrow its scope. However, the D.C. Circuit has recognized that "a relevant public interest could exist where [a list of names] might provide leads for an investigative reporter seeking to ferret out what government is up to".... This sort of aggregating, for the purpose of discovering what the government is up to, is precisely what Mr. Tokar intends to do here. Because Mr. Tokar has demonstrated that the release of even this small amount of information will serve the public interest, to an extent that outweighs the candidates for these lucrative positions' interest in keeping their identities secret, the Court finds the unselected candidates' names cannot be properly withheld pursuant to Exemption 6.⁶¹

In 2016 the DOJ introduced another form of enforcement under the *FCPA*, declination with disgorgement letter agreements. Under these agreements, the resolving company agrees

⁵⁸ *Ibid* at 183.

⁵⁹ *Dylan Tokar v US Department of Justice*, 304 F Supp (3d) 81 (D DC 2018).

⁶⁰ *Ibid* at para 25.

⁶¹ *Ibid* at paras 31-33.

that they will disgorge money to the DOJ and in exchange, the DOJ agrees to drop its investigation of the alleged *FCPA* violations.⁶² While the introduction of such declination agreements began as a pilot program, in November 2017, the DOJ announced it would add a revised *FCPA* Corporate Enforcement Policy to the US Attorney's Manual that would codify and expand on the pilot program.⁶³ Under this policy, if a company voluntarily self-discloses misconduct in an *FCPA* matter, fully cooperates, and remediates in a timely and appropriate manner, the 'presumption' is that the company will receive a declination, unless aggravating circumstances respecting the nature of the offence or offender come to light. The policy, updated in November 2019, clarifies what companies need to disclose and when. Among other changes, the policy now requires that a company disclose "all relevant facts known to it *at the time of the disclosure*,"⁶⁴ recognizing that a company may not know all relevant facts when it first discloses.

Koehler suggests these declinations make "the chance of judicial scrutiny of *FCPA* enforcement theories ... even more remote." Namely, he expresses concern that such agreements are informal, and "are even more bare-bones and replete with legal conclusions compared to NPAs and DPAs as the substantive allegations are often just one paragraph."⁶⁵

Despite these concerns, the DOJ continues to make use of declinations. On September 19, 2019, the DOJ declined to prosecute Quad/Graphics Inc. (Quad) for violations of §§ 78dd-1, *et seq.*, of the *FCPA* for bribery committed by employees of Quad's subsidiaries in China and Peru. From 2011 until January 2016, Quad's Peruvian subsidiary paid or promised over \$1,000,000 to third party intermediaries in order to bribe government officials to secure printing contracts and minimize penalty payments. From 2010 to 2015, Quad's subsidiary in China also paid bribes to state-owned entities to obtain printing business. The DOJ declined to prosecute based on Quad's prompt and voluntary self-disclosure, its thorough investigation, its cooperation, the nature and seriousness of the offence, Quad's lack of prior criminal history, its full remediation, including terminating the individuals involved and enhancing its compliance program, and Quad's termination of its relationship with the relevant third parties in Latin America and China. Finally, Quad had agreed to disgorge all gains to the US Securities and Exchange Commission.⁶⁶

In August 2020, the DOJ declined to prosecute World Acceptance Corporation (World) for violations of §§ 78dd-1, *et seq.*, of the *FCPA* related to bribery committed by World's employees and subsidiaries in Mexico. From 2010 until 2017, World's subsidiary paid over \$4,000,000 to an intermediary to bribe Mexican union and government officials to obtain

⁶² Koehler, *supra* note 56 at 550.

⁶³ "New FCPA Enforcement Policy Provides Additional Certainty, but Risk Remains" (March 2018), online: *Norton Rose Fulbright*

<<https://www.nortonrosefulbright.com/en/knowledge/publications/70aea4c1/new-fcpa-enforcement-policy-provides-additional-certainty-but-risks-remain>>.

⁶⁴ "DOJ Updates FCPA Corporate Enforcement Policy" (25 November 2019), online: *Ropes & Gray* <<https://www.roopesgray.com/en/newsroom/alerts/2019/11/DOJ-Updates-FCPA-Corporate-Enforcement-Policy>>.

⁶⁵ Koehler, *supra* note 56 at 550.

⁶⁶ Declination Letter from US Department of Justice Criminal Division Re Quad/Graphics Inc (19 September 2019), online (pdf): <<https://www.justice.gov/criminal-fraud/file/1205341/download>>.

contracts that allowed World to make loans to union members. Loan repayments came directly from the unions, which withheld the amount from paychecks of union members. In deciding not to prosecute, the DOJ took into account a number of factors: World's prompt and voluntary self-disclosure, its full and proactive cooperation, the nature and seriousness of the offence, World's full remediation, including additional training added to its compliance program, the fact that World discontinued relationships with the Mexican third parties, and the fact that World had agreed to disgorge to the US Securities and Exchange Commission the full amount of its gains.⁶⁷

5. UK SENTENCING

5.1 General Principles

Sentencing in the UK recently went through significant changes aimed at consolidating all sentencing law into a single piece of legislation, the outcome of which was the *Sentencing Act 2020*.⁶⁸ The *Sentencing Act* came into force on December 1, 2020 and, with some exceptions, applies to all defendants convicted after that date. It is made up of 14 Parts and 29 Schedules. Parts 2 to 13 set out the Sentencing Code, a set of procedural and sentencing principles and disposals. Importantly, the Sentencing Code does not affect statutory maximum sentences, does not allow a penalty greater than what could have been imposed at the time the offence was committed, and does not extend minimum sentence provisions. The Sentencing Council's sentencing guidelines also remain largely unaffected.⁶⁹

Chapter 1 of Part 4 of the *Sentencing Act* sets out the purposes of sentencing. Section 57(2) lists five purposes, which a court must consider, namely, punishment, reduction of crime, reform and rehabilitation, protection of the public, and reparation. Chapter 3 of Part 4 deals with the seriousness of an offence. Section 63 provides that in determining an offence's seriousness, a court must consider both the offender's culpability and the harm or risk of harm which the offence caused. Chapter 1 of Part 7 deals with the imposition of fines. Section 124 states that, before deciding on the amount of a fine, the court must inquire into the financial circumstances of the offender. Section 125 further clarifies that a fine must reflect the seriousness of the offence and take into account the circumstances of the case.

The sentencing structure for corruption-related offences specifically has also been modified significantly in recent years. The *Bribery Act 2010* introduced new penalties for corruption-related offences. As the *Bribery Act 2010* is not applied retrospectively, there are still numerous cases before the courts that fall under a previous statute. The UK Sentencing

⁶⁷ Declination Letter from US Department of Justice Criminal Division Re World Acceptance Corporation (5 August 2020), online (pdf): <<https://www.justice.gov/criminal-fraud/file/1301826/download>>.

⁶⁸ *Sentencing Act 2020* (UK), c 17.

⁶⁹ Clea Topolski & Libby Anderson, "The Sentencing Act 2020" (18 December 2020), online: *Crucible* <<https://crucible.law/insights/the-sentencing-act-2020>>.

Council also introduced sentencing guidelines for corruption-related offences.⁷⁰ These guidelines are applicable to sentences imposed on or after October 1, 2014, regardless of when the offences occurred. The UK also introduced deferred prosecution agreements (DPAs) as an alternative disposition in corruption cases.

5.2 Sentencing before the *Bribery Act 2010*

Nicholls et al. described the sentences imposed in a number of corruption cases before the enactment of the *Bribery Act 2010*. First, they summarize the sentences imposed on officials such as police, prison, and immigration officers as follows:

In those corruption cases involving public officials such as police or prison officers, it has been difficult to discern guidance on sentencing. In *R v Donald* a total sentence of eleven years (the court having imposed consecutive sentences) was upheld in the case of a detective constable who pleaded guilty late to four counts of corruption for agreeing to accept £50,000 (he only received £18,000) from a defendant for disclosing confidential information and destroying surveillance logs. In *R v McGovern* a defendant charged with burglary who offered a £200 bribe to a police officer had his sentence reduced by the Court of Appeal to nine months. In *R v Oxdemir* an offender who offered a free meal or £50 to a police officer for not reporting a driving offence had his sentence reduced to three months' imprisonment. In *R v Garner* the Court of Appeal upheld sentences of eighteen months and twelve months respectively imposed on prison officers who pleaded guilty to providing luxury items to a prisoner. A sentence of two years' imprisonment was imposed in a similar case. In *R v Patel* an immigration administrator was sentenced to two years' imprisonment for accepting a £500 bribe to stamp a passport granting leave to remain, and ordered to forfeit the bribe.

In *R v Hardy: Attorney General's Reference (No 1 of 2007)* the defendant, a serving police officer, pleaded guilty to misfeasance in a public office after he befriended a known criminal and despite warnings from his superiors continued to associate with him and to pass on sensitive information about two individuals whom the criminal wanted to speak with over a drugs and assault matter. A sentence of eighteen months' custody was initially imposed but this was reduced to nine months suspended for two years plus community service due to time served on remand, service of unpaid work, and other factors. [footnotes omitted]⁷¹

⁷⁰ UK, Sentencing Council, *Fraud, Bribery and Money Laundering Offences* (2014), online: <<https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/about-published-guidelines/fraud-bribery-and-money-laundering/>>.

⁷¹ Colin Nicholls et al, *Corruption and Misuse of Public Office*, 3rd ed (Oxford: Oxford University Press, 2021) at 253-254.

Second, Nicholls et al. describe a number of sentences imposed in regard to corruption involving public procurement:

In other public official cases similar variations exist. In 1974, when the maximum sentence for an offence under the 1889 and 1906 Acts was two years, the architect, John Poulson, was sentenced to a total of seven years' imprisonment for paying bribes to members of Parliament, police officers, and health authorities to obtain building contracts. Dan Smith, the Labour leader of Newcastle-upon-Tyne, was sentenced to a total of six years' imprisonment and William Pottinger, a senior civil servant in the Scottish Office, was sentenced to a total of five years' imprisonment. In *R v Foxley* a 71-year-old Ministry of Defence employee, convicted of four counts of corruption under the 1906 Act, was sentenced to four years' imprisonment for receiving over £2 million in the placing of defence contracts. A confiscation order was made for £1,503.901.08. In *R v Dearnley and Threapleton* a council employee and supplier of security services who was convicted of misrepresenting a loan to pay off a personal debt, had his sentence reduced to twelve months' imprisonment because of strong mitigation. In *R v Allday*, a case under the 1889 Act, council employees accepted bribes from waste contractors to tip waste. They were sentenced to eight and six months' imprisonment each and the contractors were sentenced to three months each. [footnotes omitted]⁷²

5.3 Sentences under the *Bribery Act 2010* (Pre-Guidelines)

The *Bribery Act 2010* came into force on July 1, 2011. The Act sets out the general offences of offering a bribe (section 1), being bribed (section 2) and bribery of foreign public officials (section 6). Commercial organizations may also commit an offence under section 7 of the Act if they fail to prevent bribery. Section 11 sets out maximum penalties for the offences:

11 Penalties

- (1) An individual guilty of an offence under section 1, 2 or 6 is liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
- (2) Any other person guilty of an offence under section 1, 2 or 6 is liable—
 - (a) on summary conviction, to a fine not exceeding the statutory maximum,
 - (b) on conviction on indictment, to a fine.

⁷² *Ibid* at 254-255.

- (3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.
 - (4) The reference in subsection (1)(a) to 12 months is to be read—
 - (a) in its application to England and Wales in relation to an offence committed before the commencement of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020, and
 - (b) in its application to Northern Ireland,
- as a reference to 6 months.⁷³

The maximum term of imprisonment for a summary conviction offence is twelve months in England and Wales, and six months in Northern Ireland. The maximum statutory fine for a summary conviction offence is £5,000 in England and Wales or Northern Ireland, and £10,000 in Scotland. The maximum fine for an indictable offence is unlimited.

One of the first cases under the *Bribery Act 2010* stemmed from an investigation into Associated Octel Corporation, which subsequently changed its name to Innospec. As stated by the Serious Fraud Office (SFO), “Innospec itself pleaded guilty in March 2010 to bribing state officials in Indonesia and was fined \$12.7 million in England with additional penalties being imposed in the USA.”⁷⁴ Subsequently, in 2014, four individuals were sentenced for their role in the corruption in both Indonesia and Iraq. Two of the defendants pled guilty and two were tried and found guilty. The sentencing decision for these four individuals was released on August 4, 2014, before the sentencing guidelines on bribery came into force on October 1, 2014. The individuals and sentences were:

- Dennis Kerrison, 69, of Chertsey, Surrey, was sentenced to 4 years in prison.
- Paul Jennings, 57, of Neston, Cheshire, was sentenced to 2 years in prison.
- Miltiades Papachristos, 51 of Thessaloniki, Greece, was sentenced to 18 months in prison.
- David Turner, 59, of Newmarket, Suffolk, was sentenced to a 16-month suspended sentence with 300 hours unpaid work.⁷⁵

In a case concerning Sustainable Agroenergy PLC, individuals received prison sentences ranging from 6-13 years. The company operated a Ponzi scheme. Charges fell under multiple statutes, including the *Bribery Act 2010*. The longest sentence was given to Chief Commercial Officer, Gary West, who was convicted by a jury of bribery under the *Bribery Act 2010* as well as offences under the *Criminal Law Act 1977* and the *Companies Act 2006*. West received

⁷³ *Bribery Act 2010* (UK), c 23.

⁷⁴ Serious Fraud Office (SFO), News Release, “Four Sentenced for Role in Innospec Corruption” (4 August 2014), online: <<https://www.sfo.gov.uk/2014/08/04/four-sentenced-role-innospec-corruption/>>.

⁷⁵ *Ibid.*

13 years imprisonment, a £52,805 confiscation order and a 15-year disqualification from acting as a company director.⁷⁶

David Lufkin was the Global Head of Sales at Petrofac International Limited (Petrofac), which provides various services to the oil and gas production and processing industry. In this role Lufkin made significant bribes to influence contracts awarded between 2012 and 2015. The UK's SFO began investigations in 2017 and eventually charged Lufkin with 11 counts of bribery. The charges included paying \$6,200,000 in bribes to secure two contracts in Iraq worth a combined \$729,700,000 and paying \$91,000,000 to secure contracts worth around \$3,723,000,000 in Saudi Arabia.⁷⁷ Lufkin pleaded guilty to these 11 counts, but the SFO had not concluded its investigation. In January 2021, Lufkin pleaded guilty to three more counts of bribery relating to corrupt offers and payments made between 2012 and 2018 to obtain contracts in the United Arab Emirates worth around \$3,300,000,000. On October 4, 2021, Lufkin was sentenced to a suspended two year jail sentence. Petrofac was charged with seven bribery-related offences and entered into a plea agreement with the SFO involving a \$64 million fine and a \$31 million confiscation order. As of October 22, 2021, the SFO stated that the case is still under investigation.⁷⁸

In June 2019, Carole Hodson was sentenced to two years imprisonment, was disqualified as a director for seven years, had a confiscation order of £4,494,541.46 imposed, and was ordered to pay £478,351 in costs to the SFO. Hodson operated and was the majority owner of ALCA Fasteners Ltd. In her capacity as Managing Director, Hodson paid nearly £300,000 in bribes between 2011 and 2016 in respect of a contract worth around £12,000,000.⁷⁹

Mr. Wylie was the Director for Lakehouse, a housing services firm that installed fire alarms in Grenfell tower. Wylie was in charge of fire safety contracts and, in that capacity, told various subcontractors that they needed to pay him bribes to secure work. In total, these bribes amounted to around £800,000. Wylie was sentenced to six years imprisonment for

⁷⁶ "Sustainable Agroenergy Plc and Sustainable Wealth Investments UK Ltd" (last modified 17 May 2021), online: SFO <<https://www.sfo.gov.uk/cases/sustainable-agroenergy-plc-sustainable-wealth-investments-uk-ltd/>>.

⁷⁷ Jonathan Middup, David Lister & Richard Abbey, *UK Bribery Digest Edition 14* (EY, 14 September 2020) [UK Bribery Digest], online (pdf): <https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/topics/forensic-integrity-services/uk-bribery-digest-edition-14.pdf> at 26; SFO, Case Update, "Former Senior Executive Convicted in Petrofac Investigation" (7 February 2019), online: <<https://www.sfo.gov.uk/2019/02/07/former-senior-executive-convicted-in-petrofac-investigation/>>.

⁷⁸ Kate Beiley & Jane Croft, "Petrofac Ordered to Pay \$95m After Admitting Middle East Bribery", *The Financial Times* (4 October 2021), online: <<https://www.ft.com/content/553f0f64-6f54-4ec9-92e4-a69ad9490cf9>>; SFO, Statement, "SFO Statement on Petrofac Charged with Seven Separate Offences between 2011 and 2017" (24 September 2021), online: <<https://www.sfo.gov.uk/2021/09/24/sfo-charges-petrofac-with-failure-to-prevent-bribery-offences/>>. For updates related to the status of the case, see the SFO's case information page: "Petrofac Ltd" (last modified 22 October 2021), online: SFO <<https://www.sfo.gov.uk/cases/petrofac/>>.

⁷⁹ SFO, Case Update, "Former Company Director Sentenced for £12 Million Bribery Scheme" (27 June 2019), online: <<https://www.sfo.gov.uk/2019/06/27/former-company-director-sentenced-for-12-million-bribery-scheme/>>.

bribery while the various contractors who paid him bribes were sentenced to suspended sentences and ordered to pay costs.⁸⁰

The majority of convictions under the *Bribery Act 2010* have been of individuals, rather than companies. Sweett Group PLC was the first company convicted under section 7. Media allegations led to an internal investigation, which discovered that a subsidiary made corrupt payments to help secure a contract in Abu Dhabi. The company admitted to failing to prevent bribery and was sentenced to a fine of £1.4 million, a confiscation order of £850,000 and £95,000 in costs.⁸¹

More recently, the prosecution of Skansen Interiors Ltd. (Skansen) represents the first contested prosecution under section 7. Skansen was a small British interior design company. As part of a tender process, Skansen paid bribes totalling £39,000 to a former project manager at a real estate company to secure an office refurbishment contract. Skansen defended itself by referring to the policies and procedures it had before the bribes occurred. These policies, one was even placed on the wall at the company's premises, made clear that staff should be open and honest. Thanks to a newly-appointed CEO, Skansen caught the final payment of £29,000 before it was paid. Skansen promptly fired the individual at fault and then reported to the police, whose investigation it complied with fully. The jury was not convinced Skansen had adequate procedures and delivered a guilty verdict. However, Skansen had been dormant since mid-2014 and had no assets, so the judge was forced to impose an absolute discharge.⁸²

In February 2020, Kevin Herbert received a suspended sentence of two years imprisonment. Herbert pleaded guilty to three offences under the *Bribery Act 2010* after receiving and soliciting bribes in a former role as purchasing and supply chain manager at Williams Hybrid Power Ltd. between 2011 and 2013. Charges were also brought against two other individuals who offered bribes and Williams Hybrid Power Ltd. itself (the third prosecution for a section 7 offence). However, charges against the company and the two individuals were stayed for lack of evidence.⁸³

⁸⁰ UK Bribery Digest, *supra* note 77 at 18.

⁸¹ Emma Gordon, Saira Choonka & Phil Taylor, "Sweett Group Sentenced After First Ever Corporate Conviction for Failing to Prevent Bribery" (2 February 2016), online: *Eversheds Sutherland* <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Fraud_and_financial_crime/Sweett_group_sentenced>. See also SFO, News Release, "Sweett Group PLC Sentenced and Ordered to Pay £2.25 Million After Bribery Act Conviction" (19 February 2016), online: <<https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>>.

⁸² Maurice Burke, Crispin Rapinet & Khushaal Ved, *Delusions of Adequacy: The Belated Tale of Adequate Procedures*, (Hogan Lovells, 2018), online (pdf): <https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2018/2018_05_10_investigations_white_collar_and_fraud_alert_delusions_of_inadequacy_the_belated_tale_of_inadequate_procedures.pdf?la=en>; David Hamilton & Stephenson Harwood, "First Contested Prosecution Under Section 7 Bribery Act 2010", *International Bar Association* (20 August 2018), previously online at online: <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=7637F4B0-D9FE-49B6-9770-B157C6C38A6C>>.

⁸³ UK Bribery Digest, *supra* note 77 at 16.

5.4 Guidelines for Offences by Human Offenders

The Sentencing Council published guidelines for fraud,⁸⁴ bribery⁸⁵ and money laundering⁸⁶ offences (the *Guidelines*). These guidelines are applicable to sentences imposed on or after October 1, 2014. For bribery offences, the *Guidelines* dictate sentences can range from a discharge to eight years imprisonment.⁸⁷ Money laundering offences are punishable by up to 14 years imprisonment.⁸⁸

Each of the guidelines lays out an eight-step process for determining the sentence for human offenders:

- 1) Step One – Determining the Offence Category
- 2) Starting Point and Category Range
- 3) Consider any factors which indicate a reduction such as assistance to the prosecution
- 4) Reduction for guilty pleas
- 5) Totality Principle
- 6) Confiscation, compensation and ancillary orders
- 7) Reasons
- 8) Consideration for time spent on bail.

Note: Guidelines for corporate offenders are set out in Section 5.5.

Each of the guidelines sets out a grid for determining a sentencing range based on a combination of culpability and harm. Culpability is to be determined “by weighing up all the factors of the case to determine the offender’s role and the extent to which the offending was planned and the sophistication with which it was carried out.” Culpability is measured in three levels: A (high culpability), B (medium culpability), and C (lesser culpability).

For bribery-related offences, harm is to be “assessed in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender. Harm is measured in four levels, listed as categories 1 (most serious) to 4 (least serious).⁸⁹

⁸⁴ UK, Sentencing Council, *Fraud* (effective from 1 October 2014), online:

<<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/>>.

⁸⁵ UK, Sentencing Council, *Bribery* (effective from 1 October 2014) [*Bribery Guideline*], online:

<<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/bribery/>>.

⁸⁶ UK, Sentencing Council, *Money Laundering* (effective from 1 October 2014) [*Money Laundering Guideline*], online: <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/money-laundering/>>.

⁸⁷ *Bribery Guideline*, *supra* note 85.

⁸⁸ *Money Laundering Guideline*, *supra* note 86.

⁸⁹ *Bribery Guideline*, *supra* note 85.

GLOBAL CORRUPTION

The following excerpts from the *Bribery Guideline* demonstrate how sentences are calculated for natural persons:⁹⁰

BEGINNING OF EXCERPT

Step 1- Determining the offence category

The court should determine the offence category with reference to the tables below. In order to determine the category the court should assess culpability and harm.

The level of culpability is determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out.

Culpability demonstrated by one or more of the following

A – High culpability

- A leading role where offending is part of a group activity
- Involvement of others through pressure, influence
- Abuse of position of significant power or trust or responsibility
- Intended corruption (directly or indirectly) of a senior official performing a public function
- Intended corruption (directly or indirectly) of a law enforcement officer
- Sophisticated nature of offence/significant planning
- Offending conducted over sustained period of time
- Motivated by expectation of substantial financial, commercial or political gain

B – Medium culpability

- A significant role where offending is part of a group activity
- Other cases that fall between categories A or C because:
 - Factors are present in A and C which balance each other out and/or
 - The offender's culpability falls between the factors as described in A and C

C – Lesser culpability

- Involved through coercion, intimidation or exploitation
- Not motivated by personal gain
- Peripheral role in organised activity
- Opportunistic 'one-off' offence: very little or no planning
- Limited awareness or understanding of extent of corrupt activity

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

⁹⁰ *Ibid.*

Harm is assessed in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender.

| Harm |
|--|
| demonstrated by one or more of the following factors: |
| Category 1 |
| <ul style="list-style-type: none"> • Serious detrimental effect on individuals (for example by provision of substandard goods or services resulting from the corrupt behaviour) • Serious environmental impact • Serious undermining of the proper function of local or national government, business or public services • Substantial actual or intended financial gain to offender or another or loss caused to others |
| Category 2 |
| <ul style="list-style-type: none"> • Significant detrimental effect on individuals • Significant environmental impact • Significant undermining of the proper function of local or national government, business or public services • Significant actual or intended financial gain to offender or another or loss caused to others • Risk of category 1 harm |
| Category 3 |
| <ul style="list-style-type: none"> • Limited detrimental impact on individuals, the environment, government, business or public services • Risk of category 2 harm |
| Category 4 |
| <ul style="list-style-type: none"> • Risk of category 3 harm |

Risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or much less) actual harm, the normal approach is to move to the next category of harm down. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.

Step 2 – Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Section 1 Bribery Act 2010: Bribing another person

Section 2 Bribery Act 2010: Being bribed

Section 6 Bribery Act 2010: Bribery of foreign public officials

Maximum: 10 years' custody

| Culpability | | | |
|-------------|--|--|--|
| Harm | A | B | C |
| Category 1 | Starting point 7 years' custody | Starting point 5 years' custody | Starting point 3 years' custody |
| | Category range 5 – 8 years' custody | Category range 3 – 6 years' custody | Category range 18 months' – 4 years' custody |
| Category 2 | Starting point 5 years' custody | Starting point 3 years' custody | Starting point 18 months' custody |
| | Category range 3 – 6 years' custody | Category range 18 months' – 4 years' custody | Category range 26 weeks' – 3 years' custody |
| Category 3 | Starting point 3 years' custody | Starting point 18 months' custody | Starting point 26 weeks' custody |
| | Category range 18 months' – 4 years' custody | Category range 26 weeks' – 3 years' custody | Category range Medium level community order – 1 year's custody |
| Category 4 | Starting point 18 months' custody | Starting point 26 weeks' custody | Starting point Medium level community order |
| | Category range 26 weeks' – 3 years' custody | Category range Medium level community order – 1 year's custody | Category range Band B fine – High level community order |

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these or other relevant factors should result in an upward or downward adjustment from the starting point.

Consecutive sentences for multiple offences may be appropriate where large sums are involved.

Factors increasing seriousness

Statutory aggravating factors:

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors:

- Steps taken to prevent victims reporting or obtaining assistance and/or from assisting or supporting the prosecution
- Attempts to conceal/dispose of evidence
- Established evidence of community/wider impact
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Offences taken into consideration
- Failure to respond to warnings about behaviour
- Offences committed across borders
- Blame wrongly placed on others
- Pressure exerted on another party
- Offence committed to facilitate other criminal activity

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Little or no prospect of success
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Lapse of time since apprehension where this does not arise from the conduct of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender co-operated with investigation, made early admissions and/or voluntarily reported offending

Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account [section 74 of the Sentencing Code](#) (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 4 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with [section 73 of the Sentencing Code](#) and the [Reduction in Sentence for a Guilty Plea](#) guideline.

Step 5 – Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour. See [Totality](#) guideline.

Step 6 – Confiscation, compensation and ancillary orders

The court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so.

Where the offence has resulted in loss or damage the court must consider whether to make a compensation order.

If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

The court may also consider whether to make ancillary orders. These may include a deprivation order, a financial reporting order, a serious crime prevention order and disqualification from acting as a company director.

- [Ancillary orders – Magistrates' Court](#)
- [Ancillary orders – Crown Court Compendium, Part II Sentencing, s7](#)

Step 7 – Reasons

[Section 52 of the Sentencing Code](#) imposes a duty to give reasons for, and explain the effect of, the sentence.

Step 8 – Consideration for time spent on bail (tagged curfew)

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and [section 325 of the Sentencing Code](#).

END OF EXCERPT

On February 12, 2015, Nicholas and Christopher Smith, a father and son involved in a printing business, were sentenced for corruption relating to bribery of officials in Kenya.⁹¹ The offenders were convicted under the *Prevention of Corruption Act 1906*, as the offences pre-dated the *Bribery Act 2010*. However, since the sentencing post-dated October 1, 2014, the Sentencing Council's new *Guidelines* applied. The sentencing decision provides one of the first applications of the *Guidelines*.

Nicolas Smith received three years imprisonment, while Christopher Smith received 18 months imprisonment, which was suspended for two years on condition that he commit no further offences. The suspended sentence was characterized by Higgins J as "an act of mercy."⁹² Christopher was also sentenced to 250 hours unpaid work and a three-month curfew. Both offenders were disqualified from being the director of a company for six years.

⁹¹ Barry Vitou & Richard Kovalevsky, "Opinion: It was so Easy to Avoid: Chickengate: Smith & Ouzman Sentencing Remarks in Full Under New Sentencing Guidelines" (15 February 2014), online (blog): *thebriberyact.com* <<http://thebriberyact.com/2015/02/15/opinion-it-was-so-easy-to-avoid-chickengate-smith-ouzman-sentencing-remarks-in-full-under-new-sentencing-guidelines/>>.

⁹² *Ibid.*

Later, the company received a fine of £2.2 million. Additionally, Nicholas and Christopher were ordered to pay a confiscation order of £18,693 and £4,500 and each was ordered to pay costs of £75,000.

The Smiths' corrupt activities followed a decision to expand their business into Africa. Between 2006 and 2010, bribes were "routine and common place."⁹³ The bribes included a payment of £5,000 to a Kenyan government official, which was a large bribe in light of the official's salary of £40,000. Other bribes included payments of just under £400,000 to receive contracts worth £2 million. The pricing of the product was not elevated aside from the bribery uplift. However, as the product included electoral ballot papers, the bribe risked undermining the integrity of and confidence in the electoral system.

Using the Sentencing Council's *Guidelines*, Higgins J found that the level of culpability was high based on four factors:

1. A leading role was played
2. There was intended corruption of a public official
3. The offences were of a sophisticated nature
4. The motive was for substantial financial gain⁹⁴

Examining harm, Higgins J considered the fact that governance in Kenya and Mauritania was undermined and financial gain for the Smiths was substantial, while a loss was incurred by Kenya and Mauritania due to the inclusion of bribes in the price of products sold to those countries. Higgins J found that the harm caused placed the offence in category 2, meaning the offence fell under A(2) in the *Guidelines*. A(2) has a starting point of five years custody and a range of three to six years custody (see the above excerpt from the *Guidelines*).

Based on the aggravating factors, which included negative impacts on good governance, the cross-border nature of the offence, and the mitigating factors, which included good character and Christopher Smith's health and age, Higgins J found that the "terms of A(2) should be reduced."⁹⁵ Nicholas Smith's sentence of three years imprisonment fell at the bottom end of the range, while Christopher Smith's sentence fell below that range.

5.5 Guidelines for Corporate Offenders

The Sentencing Council's *Guidelines* are also used for sentencing corporations in respect to the offences of fraud, bribery, and money laundering. The *Guidelines* are as follows:⁹⁶

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ UK, Sentencing Council, Corporate Offenders: Fraud, Bribery and Money Laundering (effective from 1 October 2014), online: <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/corporate-offenders-fraud-bribery-and-money-laundering/>>.

BEGINNING OF EXCERPT

Step 1 – Compensation

The court must consider making a compensation order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence in such an amount as the court considers appropriate, having regard to the evidence and to the means of the offender.

Where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty.

Reasons should be given if a compensation order is not made. (See sections [55](#) and [133-135](#) of the Sentencing Code)

Step 2 – Confiscation

Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate. Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation). (See Proceeds of Crime Act 2002 sections 6 and 13)

Step 3 – Determining the offence category

The court should determine the offence category with reference to **culpability** and **harm**.

Culpability

The sentencer should weigh up all the factors of the case to determine culpability. Where there are characteristics present which fall under different categories, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Culpability demonstrated by the offending corporation's role and motivation

May be demonstrated by one or more of the following non-exhaustive characteristics.

A – High culpability

- Corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others)
- Wilful obstruction of detection (for example destruction of evidence, misleading investigators, suborning employees)
- Involving others through pressure or coercion (for example employees or suppliers)
- Targeting of vulnerable victims or a large number of victims
- Corruption of local or national government officials or ministers
- Corruption of officials performing a law enforcement role
- Abuse of dominant market position or position of trust or responsibility
- Offending committed over a sustained period of time
- Culture of wilful disregard of commission of offences by employees or agents with no effort to put effective systems in place (section 7 Bribery Act only)

B – Medium culpability

- Corporation plays a significant role in unlawful activity organised by others
- Activity not unlawful from the outset
- Corporation reckless in making false statement (section 72 VAT Act 1994)
- Other cases that fall between categories A or C because:
 - Factors are present in A and C which balance each other out and/or
 - The offending corporation's culpability falls between the factors as described in A and C

C – Lesser culpability

- Corporation plays a minor, peripheral role in unlawful activity organised by others
- Some effort made to put bribery prevention measures in place but insufficient to amount to a defence (section 7 Bribery Act only)
- Involvement through coercion, intimidation or exploitation

Harm

Harm is represented by a financial sum calculated by reference to the table below

| Amount obtained or intended to be obtained (or loss avoided or intended to be avoided) | | |
|--|--|--|
| Fraud | | |
| For offences of fraud, conspiracy to defraud, cheating the Revenue and fraudulent evasion of duty or VAT, harm will normally be the actual or intended gross gain to the offender. | | |
| Bribery | | |
| For offences under the Bribery Act the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure for offences under section 7 may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery. | | |
| Money laundering | | |
| For offences of money laundering the appropriate figure will normally be the amount laundered or, alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering programme if this is higher. | | |
| General | | |
| Where the actual or intended gain cannot be established, the appropriate measure will be the amount that the court considers was likely to be achieved in all the circumstances. In the absence of sufficient evidence of the amount that was likely to be obtained, 10–20 per cent of the relevant revenue (for instance between 10 and 20 per cent of the worldwide revenue derived from the product or business area to which the offence relates for the period of the offending) may be an appropriate measure. There may be large cases of fraud or bribery in which the true harm is to commerce or markets generally. That may justify adopting a harm figure beyond the normal measures here set out. | | |

Step 4 – Starting point and category range

Having determined the culpability level at step three, the court should use the table below to determine the starting point within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

The harm figure at step three is multiplied by the relevant percentage figure representing culpability.

| Harm figure multiplier | Culpability Level | | |
|-----------------------------|-----------------------------|----------------------------|----------------------------|
| | A | B | C |
| | Starting point 300% | Starting point 200% | Starting point 100% |
| Category range 250% to 400% | Category range 100% to 300% | Category range 20% to 150% | Category range 20% to 150% |

Having determined the appropriate starting point, the court should then consider adjustment within the category range for aggravating or mitigating features. In some cases, having considered these factors, it may be appropriate to move outside the identified category range. (See below for a non-exhaustive list of aggravating and mitigating factors.)

Factors increasing seriousness

- Previous relevant convictions or subject to previous relevant civil or regulatory enforcement action
- Corporation or subsidiary set up to commit fraudulent activity
- Fraudulent activity endemic within corporation
- Attempts made to conceal misconduct
- Substantial harm (whether financial or otherwise) suffered by victims of offending or by third parties affected by offending
- Risk of harm greater than actual or intended harm (for example in banking/credit fraud)
- Substantial harm caused to integrity or confidence of markets
- Substantial harm caused to integrity of local or national governments
- Serious nature of underlying criminal activity (money laundering offences)
- Offence committed across borders or jurisdictions

Factors reducing seriousness or reflecting mitigation

- No previous relevant convictions or previous relevant civil or regulatory enforcement action
- Victims voluntarily reimbursed/compensated
- No actual loss to victims
- Corporation co-operated with investigation, made early admissions and/or voluntarily reported offending
- Offending committed under previous director(s)/manager(s)
- Little or no actual gain to corporation from offending

General principles to follow in setting a fine The court should determine the appropriate level of fine in accordance with [section 125 of the Sentencing Code](#), which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.

Obtaining financial information

Companies and bodies delivering public or charitable services

Where the offender is a company or a body which delivers a public or charitable service, it is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

1. *For companies:* annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.
2. *For partnerships:* annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. If adequate accounts are not produced on request, see paragraph 1.
3. *For local authorities, fire authorities and similar public bodies:* the Annual Revenue Budget ("ARB") is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.
4. *For health trusts:* the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.
5. *For charities:* it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

Step 5 – Adjustment of fine

Having arrived at a fine level, the court should consider whether there are any further factors which indicate an adjustment in the level of the fine. The court should 'step back' and consider the overall effect of its orders. The combination of orders made, compensation, confiscation and fine ought to achieve:

- the removal of all gain
- appropriate additional punishment, and
- deterrence

The fine may be adjusted to ensure that these objectives are met in a fair way. The court should consider any further factors relevant to the setting of the level of the fine to ensure that the fine is proportionate, having regard to the size and financial position of the offending organisation and the seriousness of the offence.

The fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty the court can take into account the power to allow time for payment or to order that the amount be paid in instalments.

The court should consider whether the level of fine would otherwise cause unacceptable harm to third parties. In doing so the court should bear in mind that the payment of any compensation determined at step one should take priority over the payment of any fine.

The table below contains a non-exhaustive list of additional factual elements for the court to consider. The Court should identify whether any combination of these, or other relevant factors, should result in a proportionate increase or reduction in the level of fine.

Factors to consider in adjusting the level of fine

- Fine fulfils the objectives of punishment, deterrence and removal of gain
- The value, worth or available means of the offender
- Fine impairs offender's ability to make restitution to victims
- Impact of fine on offender's ability to implement effective compliance programmes
- Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)
- Impact of fine on performance of public or charitable function

Step 6 – Consider any factors which would indicate a reduction, such as assistance to the prosecution

The court should take into account [section 74 of the Sentencing Code](#) (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 7 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with [section 73 of the Sentencing Code](#) and the [Reduction in Sentence for a Guilty Plea](#) guideline.

Step 8 – Ancillary orders

In all cases the court must consider whether to make any ancillary orders.

- [Ancillary orders – Magistrates' Court](#)
- [Ancillary orders – Crown Court Compendium, Part II Sentencing, s7](#)

Step 9 – Totality principle

If sentencing an offender for more than one offence, consider whether the total sentence is just and proportionate to the offending behaviour. See [Totality](#) guideline.

Step 10 – Reasons

[Section 52 of the Sentencing Code](#) imposes a duty to give reasons for, and explain the effect of, the sentence.

END OF EXCERPT

5.6 Deferred Prosecution Agreements

Like the US, the UK has begun utilizing DPAs as a method of disposition in corruption cases. The first DPA was entered into with Standard Bank PLC, which was indicted for failing to prevent corruption. Standard Bank agreed to pay \$25.2 million to the UK and a further \$7 million in compensation to the Government of Tanzania, as well as costs of £330,000.⁹⁷ The UK's second corruption-related DPA was entered into by a company that, at the time, could not be named due to ongoing related prosecutions. This second DPA involved financial orders of £6.5 million.⁹⁸ In July 2019, this company was revealed to be Sarclad Ltd., a technology company based in Rotherham.⁹⁹ For further discussion of DPAs in the US and UK, see Chapter 6, Sections 6.1 and 6.2 respectively.

⁹⁷ SFO, News Release, "SFO Agrees First UK DPA with Standard Bank" (30 November 2015), online: <<https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>>.

⁹⁸ SFO, News Release, "SFO Secures Second DPA" (8 July 2016), online: <<https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>>.

⁹⁹ Neil Blundell & Max Hobbs, "The Subject of the UK's Second DPA is Revealed" (18 July 2019), online: *Macfarlanes LLP* <<https://blog.macfarlanes.com/post/102fo29/the-subject-of-the-uks-second-dpa-is-revealed>>.

6. CANADIAN SENTENCING

6.1 General Principles

The purpose and principles of sentencing are codified in sections 718-718.2 of the Canadian *Criminal Code*.

Under section 718, the fundamental purpose of sentencing is to protect society and promote respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions. The objectives of such sanctions include:

- (a) denouncing unlawful conduct and the harm done to victims and the community;
- (b) deterring the offender and other persons from committing offences;
- (c) separating offenders from society, where necessary;
- (d) rehabilitating offenders;
- (e) providing reparations for harm done to victims or to the community; and
- (f) promoting a sense of responsibility in offenders, and acknowledgement of the harm done to the victims and to the community.¹⁰⁰

Section 718.1 sets out the fundamental principle of sentencing, namely, proportionality:

718.1 A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.¹⁰¹

Section 718.2 sets out several other sentencing principles:

- (1) aggravating and mitigating factors – sentences should be increased or decreased to account for aggravating or mitigating factors related to the offence or the offender;
- (2) parity – similar sentences for similar cases;
- (3) totality – where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (4) restraint – use least restrictive sanction that is reasonable and appropriate in the circumstances.¹⁰²

The courts have indicated that the objectives of denunciation and deterrence are usually primary in sentencing bribery and corruption-related offences. The courts have remarked

¹⁰⁰ *Criminal Code*, RSC 1985, c C-46, s 718.

¹⁰¹ *Ibid* at s 718.1.

¹⁰² *Ibid* at s 718.2(a)-(d).

that “[a]ll Canadians, and our society as a whole, are victims when public officials breach the trust placed in them.”¹⁰³ In the context of bribery of a foreign official, our courts have further observed that “bribes, besides being an embarrassment to all Canadians, prejudice Canada’s efforts to foster and promote effective governmental and commercial relations with other countries.”¹⁰⁴

While the effectiveness of general deterrence is seriously questioned in the literature on sentencing, courts nonetheless give considerable weight to deterrence on the basis of the choice and risk-reward calculations that corruption offences frequently embody.¹⁰⁵

6.2 Principles for Corporations and Other Organizations

Section 718.21 of the *Criminal Code* sets out additional factors to be considered when a court is sentencing a corporation:

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not about to pay a fine or make restitution;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to the public authorities of the investigation and prosecution of the offence;
- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of conduct that formed the basis of the offence;
- (g) whether the organization was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

¹⁰³ *R v Serre*, 2013 ONSC 1732 at paras 28–29.

¹⁰⁴ *R v Griffiths Energy International*, [2013] AJ No 412 (QB).

¹⁰⁵ See, e.g., *R v Drabinsky*, 2011 ONCA 582 at para 158.

- (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.¹⁰⁶

Corporations can be fined, placed on probation, or both, following a conviction. Section 732.1(3.1) sets out optional conditions that courts may incorporate into a probation order:

- (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;
- (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- (f) provide, in the manner specified by the court, the following information to the public, namely,
 - (i) the offence of which the organization was convicted,
 - (ii) the sentence imposed by the court, and
 - (iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
- (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

(3.2) Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.¹⁰⁷

The Supreme Court of Canada recently affirmed that the constitutional protection against cruel and unusual punishment does not apply to corporations.¹⁰⁸ In *Quebec v 9147-0732 Québec Inc*, the accused corporation challenged the constitutionality of the mandatory minimum fine imposed against it. The corporation argued that the fine contravened the right “not to be subjected to any cruel and unusual treatment or punishment” guaranteed by section 12 of the Canadian *Charter of Rights and Freedoms*.

¹⁰⁶ *Criminal Code*, *supra* note 100, s 718.21.

¹⁰⁷ *Ibid*, ss 732.1(3.1)-732(3.2).

¹⁰⁸ *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32.

The Supreme Court of Canada unanimously rejected the argument.¹⁰⁹ The majority and concurring opinions all observed that the jurisprudence relates section 12 to “human dignity”¹¹⁰ and, therefore, human beings. The majority and concurring opinions also held that the existence of individuals behind the corporate veil is insufficient to allow a corporation to claim section 12 protection, pointing to the concept of “separate legal personality”¹¹¹ in corporate law.

The decision is significant for at least two reasons. It adds some measure of certainty to the sentencing of corporations, which relies on the imposition of fines as the primary sanction. Additionally, it preserves the fundamental corporate law principle of separate legal personality and, in doing so, removes “collateral consequences” as grounds for a corporation to challenge a sentence.

6.3 Appropriate Range of Sentencing

Unlike the US or the UK, Canada does not have a sentencing commission or sentencing guidelines. The type of sentence available is constrained only by statutory provisions and the “appropriate range of sentencing” established through case law. The *Criminal Code* sets out the maximum sentence for each offence. For some offences, a mandatory minimum is prescribed. Common law may also define an “appropriate range of sentencing” for some offences. These sentencing ranges are only guidelines and do not bind the court.¹¹²

For corruption offences, courts usually consider large bribes, bribes occurring over long periods of time, and previous related convictions as aggravating factors. The courts typically consider a guilty plea as a mitigating factor. Self-reporting, cooperating with authorities and remorse are also frequently cited as mitigating factors in corruption cases.

Corruption cases are often settled through a guilty plea. It is common for the Crown prosecutor and defence counsel to then make a joint submission on sentencing. The Supreme Court of Canada has held that sentencing judges should not depart from a joint sentencing submission “unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.”¹¹³ While this does not completely constrain judicial discretion, the sentencing judge must give counsel the opportunity to make further submissions if the judge has concerns about the joint submission.¹¹⁴

¹⁰⁹ *Ibid.* The majority differed from the two concurring opinions on the proper approach to constitutional interpretation in the case.

¹¹⁰ *Ibid* at paras 2, 51, 140.

¹¹¹ *Ibid* at paras 2, 129. The company had argued the fine was cruel because it would bankrupt the company, and the bankruptcy would have a significant negative impact on its shareholders and employees.

¹¹² *R v Lacasse*, 2015 SCC 64 at para 60; *R v Nasogaluak*, 2010 SCC 6 at para 44.

¹¹³ *R v Anthony-Cook*, 2016 SCC 43 at para 32.

¹¹⁴ *Ibid* at para 58.

6.4 Domestic Corruption and Bribery

As discussed in Chapter 2, the *Criminal Code* establishes several offences for domestic corruption and bribery, including bribery of officers, frauds on the government, breach of trust by a public officer, and accepting secret commissions.

Criminal Code bribery offences are punishable by fines at the discretion of the court and maximum terms of imprisonment range from five to fourteen years. Bribery of judges, politicians, and police officers is treated as the most serious type of offence and is punishable by a maximum term of 14 years' imprisonment.¹¹⁵ The other bribery and corruption offences are punishable by a maximum of five years' imprisonment.¹¹⁶

The court enjoys considerable discretion on sentencing. As discussed earlier, the court is constrained only by the statute and the general principles of sentencing. Currently, domestic bribery and corruption offences do not carry mandatory minimum penalties. There is also no defined range of sentencing established in the jurisprudence. The sentencing judge may order, with few exceptions, any sanction permitted under the *Criminal Code*.¹¹⁷

The sentencing jurisprudence is limited. However, as the cases reviewed below illustrate, these offences are invariably treated as serious and substantial penalties are imposed.

6.4.1 Bribery of Public Officers

In sentencing offences for the bribery of public officials, the courts have observed the significant societal consequences of such wrongdoing. As stated by the Quebec Court of Appeal, “[a]ny attempt to corrupt a police officer amounts to an attack on the integrity of an important social institution. Where the purpose of the bribe is to pervert the course of justice, especially in relation to a serious crime, the offenders must be severely punished.”¹¹⁸

Bribery and attempted bribery of an officer is extremely serious, and general deterrence is paramount in sentencing.¹¹⁹ A sentence of imprisonment often follows.

In *R v Kozitsyn*, the offender was found guilty of attempting to bribe a police officer. The accused had twice offered bribes to a police officer in exchange for his forbearance from issuing tickets to a massage parlour she had planned to purchase. Kozitsyn first offered to make a charitable donation on the officer's behalf, and later offered the officer a portion of the business revenues. Justice Bourque sentenced Kozitsyn to five months imprisonment, followed by a period of 24 months of probation. The judge determined a prison sentence

¹¹⁵ *Criminal Code*, *supra* note 100, ss 119-20.

¹¹⁶ *Ibid*, ss 121-25, 426.

¹¹⁷ The exception is for convictions of bribery of judicial officers and bribery of officers. A conditional sentencing order (i.e., house arrest) is not available for either of these offences. See *Criminal Code*, *supra* note 100, s 742.1(c).

¹¹⁸ *R v De Francesco* (1998), 131 CCC (3d) 221 (Que CA) at para 42.

¹¹⁹ *R v Kozitsyn*, 2009 ONCJ 455 [*Kozitsyn*]; *R v Lam*, 2014 ONSC 5355.

was required because of the nature of the offence and its “extremely significant effects on our society.”¹²⁰

Conversely, when the accused is the officer who accepts or solicits a bribe, the breach of trust is considered highly aggravating.¹²¹

In *R v Morency*,¹²² the accused, a Crown prosecutor, pled guilty to bribery of a judicial officer and breach of trust by a public official. The accused accepted cash bribes in exchange for dropping criminal charges. Justice Morand sentenced the accused to concurrent sentences of three years imprisonment.

Justice Morand distilled the following principles from his review of 62 corruption-related cases in which the offender was a public official such as a prosecutor, police officer or politician:

- Except in rare cases, the objectives of general deterrence and societal condemnation are predominant;
- In nearly a third of the decisions, the courts imposed conditional sentence orders for periods varying between twelve months and two years less one day, the average being around eighteen months;
- In a majority of cases, the courts ordered prison sentences ranging between three months and six years; the average was between two and a half and three years, notwithstanding the presence of numerous mitigating circumstances;
- In most cases involving attorneys practising their profession, judges insisted on the importance of using the prison sentence to clearly express the seriousness of the offence when an officer of the court who owes a duty of candour commits it.¹²³

6.4.2 Breach of Trust by a Public Officer

The range of sentencing for breach of trust by a public officer is broad. This breadth owes to the different types of trust positions that an offender may hold and the different forms of offending conduct.

Police officers are viewed as occupying a special position of trust in the community and the administration of justice. In the absence of an exceptional mitigating factor, severe sentences are justified to honour the primary principles of denunciation and general deterrence.¹²⁴

¹²⁰ *Kozitsyn*, *supra* note 119 at paras 22-23.

¹²¹ *R c Morency*, 2012 QCCQ 4556 [*Morency*], aff’d 2012 QCCA 1836; *R v David*, 2013 NSSC 83; *R v Ticne*, 2009 BCCA 191.

¹²² *Morency*, *supra* note 121.

¹²³ *Ibid* at para 72.

¹²⁴ *R v Cook*, 2010 ONSC 5016 at paras 29, 38.

In *R c Applebaum*,¹²⁵ the accused was the interim mayor of Montréal. He accepted payments from real estate developers and engineering firms in return for political influence and favours while serving as borough mayor for a Montréal borough. He was sentenced to one year in jail and two years' probation for accepting a bribe, breach of trust by a public officer, and conspiring to commit a breach of trust by a public officer. The sentencing judge remarked that an abuse of trust by a person in authority is reprehensible behaviour which violates fundamental societal values.¹²⁶

In *R v Granger*, the accused was sentenced to three years' imprisonment after pleading guilty to breach of trust by a public officer, accepting a secret commission, and defrauding the government.¹²⁷ The accused was an Audit Team Leader with the Canada Revenue Agency. The accused abused their position by illegally accessing tax records, generating a false audit, reporting false information to police, facilitating an improper audit, and receiving over CDN\$1 million in secret commissions. The sentencing judge emphasized the need for deterrence in the circumstances.¹²⁸

6.4.3 Corruptly Defrauding the Government

One form that fraud against the government can take is conferring benefits on government employees. This was the case in *R v Murray*.¹²⁹ Murray was the Director of Financial Services for the Legislature in Newfoundland and Labrador. Murray falsified expense claims for his benefit and for the benefit of certain legislators. The sentencing judge considered, as aggravating factors, that the offender had breached a high level of trust and the offence continued over a long period of time. While acknowledging "no sentence will fully satisfy the debate generated by offences of this kind,"¹³⁰ the judge accepted the joint submission on sentencing of two years imprisonment, plus a two-year probation order and a restitution order.

An example of a massive and sophisticated fraud against the government is the well-known "federal sponsorship scandal," in Canada. In 1996, the Canadian federal government established the sponsorship program, an initiative to promote federalism in the Province of Quebec. The program existed until 2004 when widespread corruption was discovered. The illicit activities included the misuse and misdirection of public funds, which were intended for government advertising in Quebec. Several individuals were charged and convicted.¹³¹

¹²⁵ *R c Applebaum*, 2017 QCCQ 2522 [*Applebaum*]; *R c Béchard*, 2011 QCCQ 15649.

¹²⁶ *Applebaum*, *supra* note 125.

¹²⁷ *R v Granger*, 2014 ONCJ 408.

¹²⁸ *Ibid* at para 32.

¹²⁹ *R v Murray*, 2010 NLTD 44. See also *R v Collins*, 2010 NLTD 7. The offender pled guilty to defrauding the government and conferring a benefit on a public officer. The sentencing judge determined that the offences involved a serious breach of trust and that denunciation and deterrence required a custodial sentence. The offender was sentenced to 21 months' imprisonment for the fraud and 18 months' imprisonment for conferring a benefit on a public official, to be served concurrently. He was also ordered to pay restitution.

¹³⁰ *Ibid* at para 26.

¹³¹ Among these individuals were Jean Lafleur, Charles Guité, Paul Coffin, and Jacques Corriveau. See *R v Lafleur*, 2007 QCCQ 6652 (guilty plea to 28 fraud charges against the federal government

On a sentencing appeal for one of the offenders, the Quebec Court of Appeal reversed the trial judge's decision and substituted a sentence of 18 months' imprisonment.¹³² The Court explained the severity of the offence by remarking that the "fallacious argument that 'stealing from the government is not really stealing' cannot be used to downplay the significance of this crime.... Defrauding the government is equivalent to stealing from one's fellow citizens."¹³³

6.5 Corruption and Bribery of Foreign Public Officials

The CFPOA prohibits the bribery of foreign officials. As stated in Chapter 2, amendments to the CFPOA in 2013 increased the maximum penalty for bribery of foreign officials from five years imprisonment to fourteen years. As a result, conditional sentence orders and conditional or absolute discharges are no longer available for the offences.¹³⁴ At present, fines for organizations convicted under the CFPOA have no upper limit.

To date, three corporations and four individuals have been sentenced for CFPOA offences. As the case law remains limited, these early decisions could be foundational in shaping later jurisprudence. Each case is briefly reviewed below.

R v Watts (Hydro Kleen)

The first corporation to be charged and convicted of a crime under the CFPOA was Hydro Kleen.¹³⁵ The company pled guilty to bribing a foreign official and was sentenced to pay a fine of CDN\$25,000.¹³⁶

As part of the bribery scheme, Hydro Kleen hired an American immigration officer as a "consultant" to facilitate easier passage of their employees into the US. Unbeknownst to the company, the officer also made it more difficult for employees of its competitors to enter the US. Under the scheme, Hydro Kleen paid CDN\$28,299.98 to the officer.

The fine applied to Hydro Kleen was less than the bribe that the company paid, a point that has subjected the decision to some criticism. Commentators have criticized the decision for

totalling over CDN\$1.5 million and was sentenced to 42 months' imprisonment plus restitution); *R v Guité*, 2006 QCCS 3927 (42 months' imprisonment after being convicted after trial by jury); *R v Coffin*, 2006 QCCA 471 (pled guilty to 15 counts and sentenced to 18 months' imprisonment); and *R c Corriveau*, 2017 QCCS 173 (4 years' imprisonment and CDN\$1.5 million fine).

¹³² *R v Coffin*, *supra* note 131.

¹³³ *Ibid* at para 46.

¹³⁴ Transparency International Canada has noted that this lack of availability of conditional sentences or discharges is problematic for the prosecution of less severe violations of the CFPOA: Transparency International Canada, *UNCAC Implementation Review: Civil Society Organization Report*, (October 2013) at 9, online (pdf): <https://transparencycanada.ca/s/20131219-UNCAC_Review_TI-Canada.pdf>.

¹³⁵ Norm Keith, *Canadian Anti-Corruption Law and Compliance*, 2nd ed (Toronto: LexisNexis Canada, 2017) at 180.

¹³⁶ *R v Watts / R v Hydro Kleen*, [2005] AJ No 568 (QB).

failing to advance the objective of general deterrence. These commentators expressed skepticism that the fine could serve as a general or specific deterrent.¹³⁷

Hydro Kleen has not received much more favourable treatment by the courts. Only two other corporations have been convicted under the *CFPOA* following Hydro Kleen.¹³⁸ In both cases, the sentencing court alludes to Hydro Kleen but declines to consider it in any depth.¹³⁹

R v Niko Resources Ltd.

The first significant *CFPOA* conviction was in *R v Niko Resources Ltd.*¹⁴⁰ Niko Resources pled guilty to providing improper benefits to a foreign public official in Bangladesh. Niko Bangladesh, a wholly owned subsidiary of Niko Resources, paid for and delivered a motor vehicle worth CDN\$190,948 and approximately CDN\$5,000 in travel expenses to Bangladesh's State Minister for Energy and Mineral Resources.

Justice Brooker accepted the joint submission and sentenced Niko Resources to pay a fine and a victim surcharge¹⁴¹ totalling CDN\$9.49 million.¹⁴² In addition, Niko Resources was placed on probation for three years and was to bear the costs of the probation order.¹⁴³ In doing so, Justice Brooker expressed the gravity of the offence as follows:

¹³⁷ OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, (OECD, 2011) at para 58, online (pdf): <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf>>.

¹³⁸ *R v Niko Resources Ltd* (2011), 101 WCB (2d) 118 (Alta QB) [Niko Resources]; *R v Griffiths Energy International*, [2013] AJ No 412 (QB) [Griffiths Energy]. For more discussion on Niko Resources, see Chapters 2, 6, and 9. For further discussion of Griffiths Energy, see Chapter 6.

¹³⁹ That said, the same judge presided over sentencing in both cases. It remains to be seen whether the treatment of *Hydro Kleen* reflects the predilections of that particular sentencing judge or portends a general trend of dismissing *Hydro Kleen* as unpersuasive. The latter is more likely, given the broader critique of the decision.

¹⁴⁰ *Niko Resources*, *supra* note 138.

¹⁴¹ Note that the victim surcharge contributes to provincial victim services rather than the victims of a particular offence (which, in cases of foreign corrupt practices, would be citizens of the bribed official's country).

¹⁴² Professor Poonam Puri notes that this sentence, when compared with *R v Watts*, is evidence of a "troubling lack of consistency" in enforcement of the *CFPOA*. Hydro Kleen's fine was roughly equal to the amount of its bribe, whereas Niko Resources was required to pay a \$9.5 million fine for a \$200,000 bribe. See Jennifer Brown, "Are Anti-Corruption Laws Really Tackling the Problem?", *Canadian Lawyer* (10 November 2014), online:

<<https://www.canadianlawyermag.com/news/general/are-anti-corruption-laws-really-tackling-the-problem/269591>>. On the other hand, the same judge a year later in *Griffiths Energy* (discussed below) imposed a fine of approximately \$10 million for a \$2 million bribe.

¹⁴³ Niko Resources was required to adhere to compliance requirements in the probation order. Under s 32.1 of the *Criminal Code*, courts may order implementation of policies or procedures to prevent future crimes. Boisvert et al point out that such probation orders are underused and could provide a valuable tool in foreign bribery cases: Anne-Marie Lynda Boisvert, Peter Dent & Ophelie Brunelle Quraishi (Deloitte LLP), *Corruption in Canada: Definitions and Enforcement*, Report No 46 (Her Majesty the Queen in Right of Canada, 2014) at 47, online (pdf):

<https://publications.gc.ca/site/archivearchived.html?url=https://publications.gc.ca/collections/collection_2015/sp-ps/PS18-10-2014-eng.pdf>.

The bribing of a foreign public official by a Canadian public corporation is a very serious crime.... It is an insult to its shareholders and it besmirches the reputation of that Canadian corporation. It tarnishes the reputation of Alberta and of Canada ... [and] is an embarrassment to all Canadians.... It prejudices Canada's efforts to foster and promote effective governmental and commercial business relations with other countries.¹⁴⁴

R v Griffiths Energy International

The second significant CFPOA conviction is *R v Griffiths Energy International*.¹⁴⁵ Griffiths Energy pled guilty to paying a bribe of over CDN\$2 million to the wife of Chad's ambassador to Canada. Griffiths Energy was sentenced to pay a CDN\$9,000,000 fine plus a 15% victim surcharge for a total penalty of CDN\$10,350,000.

Justice Brooker, who sentenced Niko Resources Ltd., was the sentencing judge in *Griffiths Energy*. As in *Niko Resources*, he accepted the joint submission on sentencing and reiterated the severity of the offence, as well as the primary objectives of denunciation and deterrence.¹⁴⁶

Griffiths Energy is notable for being the first case of self-reporting leading to a conviction, which was a particularly salient feature in the sentencing decision. While the size of the bribe was an aggravating factor, Justice Brooker noted "significant" countervailing mitigating circumstances.¹⁴⁷ The company had a new management team and when they discovered the bribe, they acted quickly and decisively to investigate the matter. They subsequently self-reported the crime.¹⁴⁸

Less salient in the sentencing decision was the American authorities' submission to the court. Justice Brooker declined to give much weight to this submission despite acknowledging the lack of Canadian jurisprudence. In his view, the American authorities were not helpful "given that the sentencing regime in the U.S. is quite different and involves grids, offence levels, culpability scores and advisory ranges."¹⁴⁹ However, Justice Brooker took from the American authorities that self-reporting and cooperation should result in a significant reduction in penalty.¹⁵⁰ He concluded the proposed fine was appropriate.

¹⁴⁴ *Niko Resources*, *supra* note 138 at paras 10-17.

¹⁴⁵ *Griffiths Energy*, *supra* note 138.

¹⁴⁶ *Ibid* at paras 8-9.

¹⁴⁷ *Ibid* at paras 14-15.

¹⁴⁸ *Ibid* at paras 15-20.

¹⁴⁹ *Ibid* at para 23.

¹⁵⁰ *Ibid*.

R v Karigar

R v Karigar was the first conviction of an individual under the *CFPOA* and the first conviction following a trial.¹⁵¹ The accused was sentenced to three years imprisonment for conspiring to bribe foreign public officials.¹⁵²

While acting as an agent for a Canadian company, Karigar, the accused conspired to offer bribes to Air India officials and the Indian Minister of Civil Aviation to secure a multi-million-dollar contract with Air India. Since Air India was an Indian state-owned corporation, the targeted officials were “foreign public officials” for the purposes of the *CFPOA*.

Justice Hackland recognized the limited jurisprudence under the *CFPOA*. Based on his review of the previous *CFPOA* decisions, he held that bribery of foreign officials must be viewed as a serious crime and the primary objectives of sentencing must be denunciation and deterrence.¹⁵³ He specifically cited *Griffiths Energy* and *Niko Resources* as establishing that a “substantial” penalty must be imposed for the offence.¹⁵⁴

To fill the jurisprudential gap, Justice Hackland relied on the text of the OECD Convention. He referred to Article 3(1) of the OECD Convention to conclude that bribery of foreign public officials should be subject to similar sanctions as domestic bribery offences.¹⁵⁵

Justice Hackland found evidence from the OECD Working Group on Bribery (WGB) and the US Sentencing Commission’s *Guidelines* to be less helpful. The WGB’s concerns about Canada’s enforcement leniency in *Hydro Kleen*, while helpful background, were not directly relevant to sentencing.¹⁵⁶ Furthermore, “the evidence of U.S. sentencing guidelines based on tariffs and somewhat similar British guidelines are simply inapplicable in Canada.”¹⁵⁷

Justice Hackland reiterated the severity of the offence as reflected in its maximum penalty. At the time, the amendments to the *CFPOA* increasing the maximum penalty were not in force. Although the penalty could not be retroactively applied, it illustrated “Parliament’s recognition of the seriousness of this offence and of Canada’s obligation to implement appropriate sanctions.”¹⁵⁸

¹⁵¹ *R v Karigar*, 2013 ONSC 5199.

¹⁵² *R v Karigar*, 2014 ONSC 3093 [*Karigar*], aff’d 2017 ONCA 576; leave to appeal to SCC refused, 37784 (15 March 2018).

¹⁵³ *Karigar*, *supra* note 152 at para 19.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid* at para 5. On appeal, Mr. Karigar argued the trial judge erred in using the OECD Convention as a guide to the interpretation of the *CFPOA*. The Court of Appeal concluded the trial judge was “clearly entitled to look to the *Convention* and the anti-corruption policy it represents as part of the context for the interpretation of the [CFPOA]” (*R v Karigar*, 2017 ONCA 576 at para 41).

¹⁵⁶ *Ibid* at para 8.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid* at para 6.

R v Barra and Govindia

R v Barra and Govindia arose out of the same bribery scheme in *Karigar*.¹⁵⁹ The offenders were each convicted of agreeing to bribe the Indian Minister of Civil Aviation.¹⁶⁰ Justice Smith sentenced each offender to 30 months' imprisonment.

Justice Smith accepted that the *Karigar* decision was the "benchmark" for sentencing Barra and Govindia.¹⁶¹ However, he considered the offenders to have less moral blameworthiness than *Karigar*. For instance, while Barra authorized substantial bribes, "he did not conceive of or orchestrate the bribery and did not act with a complete sense of entitlement like Mr. Karigar."¹⁶² While Govindia was an agent who agreed to pay substantial bribes to the Minister, "he did not conceive of or orchestrate the bribery scheme like Mr. Karigar."¹⁶³

In addition to denunciation and deterrence, the principles of parity, proportionality, and restraint were applicable since the offenders had no criminal records.¹⁶⁴ Aggravating factors included the substantial amount of the bribe, the seriousness of the offence, and the offenders' motivation of financial gain.¹⁶⁵ Mitigating factors included that the offenders lacked criminal records, cooperated with the Crown, and suffered adverse financial consequences following the charges.¹⁶⁶ In all the circumstances, Justice Smith concluded that a sentence of 30 months' imprisonment was appropriate for Barra and Govindia.

R c Bebawi

R c Bebawi is the most recent conviction under the CFPOA.¹⁶⁷ The accused was found guilty following trial by jury on five counts relating to fraud, corruption of foreign officials, and laundering the proceeds of crime in relation to SNC Lavalin Inc.'s activities in Libya. Bebawi was sentenced to a concurrent sentence of eight years and six months' imprisonment.

Justice Cournoyer explained a severe penalty was required due to the presence of several aggravating factors—the sophisticated nature of the fraud, the level of premeditation required to execute it, as well as attempts to cover up sums of money from the RCMP. The judge also cited a Supreme Court of Canada decision for the proposition that the criminal law is a "system of values" and a "sentence which expresses denunciation is simply the means by which these values are communicated."¹⁶⁸

¹⁵⁹ *R v Barra and Govindia*, 2019 ONSC 1786 [*Barra and Govindia*].

¹⁶⁰ The trial judge had acquitted the offenders for the charges relating to bribing the Air India officials. The trial judge found the offenders lacked the requisite intent or knowledge for the offence. He was unable to find that the defendants knew that the Air India employees were "foreign public officials." See *R v Barra and Govindia*, 2018 ONSC 57.

¹⁶¹ *Barra and Govindia*, *supra* note 159 at para 13.

¹⁶² *Ibid* at para 18.

¹⁶³ *Ibid* at para 20.

¹⁶⁴ *Ibid* at para 12.

¹⁶⁵ *Ibid* at paras 10-11.

¹⁶⁶ *Ibid* at paras 8-9.

¹⁶⁷ *R c Bebawi*, 2020 QCCS 22.

¹⁶⁸ *Ibid*, at paras 45-47. *R v M (CA)*, [1996] 1 SCR 500 at para 81.

Conclusion

The limited jurisprudence under the *CFPOA* makes it difficult to predict how sentencing will be determined as more convictions are obtained.¹⁶⁹ However, there appears to be a trend of increased enforcement and several principles are emerging.

As substantial penalties become the norm, *Hydro Kleen* will likely be treated as an outlier. Notwithstanding that, it was the first conviction under the *CFPOA*, *Hydro Kleen* has not been regarded as persuasive in later cases. There is a manifest distinction between the level of enforcement in *Hydro Kleen* and in subsequent decisions. The more recent authorities illustrate a trend of increased enforcement and substantial sanctions for foreign bribery.

UK and American authorities are not persuasive in Canadian sentencing law. Sentencing in Canada involves an exercise of greater discretion than in either the US or the UK. Sentencing in the US and the UK requires an application of sentencing guidelines. For that reason, authorities from those jurisdictions lack much relevance in the Canadian context.¹⁷⁰

The gravity of the offence is the paramount consideration in sentencing and the principles of denunciation and deterrence are primary. Given the dearth of sentencing authorities under the *CFPOA*, Canadian sentencing judges have had to rely chiefly on first principles. In doing so, the nascent jurisprudence has been guided by the seriousness of the offence and the primary sentencing objectives of denunciation and general deterrence.

For individual offenders, the severity of the offence militates in favour of imprisonment. Far from being a “victimless” crime, the courts view the victim of bribery and corruption to be Canadian society as a whole. The courts recognize bribery offences undermine the strength and legitimacy of public institutions, which has adverse consequences. On the other hand, these crimes may not have a specific victim in a material sense. Perhaps the starker example of this is *R v Barra and Govindia*. In that case, the bribery attempt failed, and the company went bankrupt after the unsuccessful bid. On the facts, Barra suffered the largest financial loss. That Justice Smith would sentence Barra to 30 months’ imprisonment suggests the gravity of the offence is primary in sentencing this type of offence.

Canadian sentencing judges accept guilty pleas, cooperation, and subsequent measures to improve *CFPOA* compliance as significant mitigating factors. This mirrors the approaches taken in the US and UK. All three jurisdictions have recognized that the complexity of corruption leads to difficulty in uncovering corruption offences, as well as difficulties and costs in prosecuting these crimes.

¹⁶⁹ As of writing, the RCMP recently announced charges had been laid against Damodar Arapakota for bribing a public official from Botswana. It is alleged that Arapakota, a former executive from IMEX Systems Inc., provided financial benefit for a Botswanan public official and his family. See Royal Canadian Mounted Police, News Release, “RCMP Lays Charges Under the Corruption of Foreign Public Officials Act” (12 November 2020), online: <<https://www.rcmp-grc.gc.ca/en/news/2020/rcmp-lays-charges-the-corruption-foreign-public-officials-act>>.

¹⁷⁰ *Griffiths Energy*, *supra* note 138 at para 23; *Karigar*, *supra* note 152 at para 8.

However, as discussed by Wendy Berman and Jonathan Wansbrough, the benefits of self-reporting potential violations of the *CFPOA* are unclear due to limited jurisprudence and the lack of formal guidelines on leniency and immunity for self-reporting companies and individuals.¹⁷¹ Griffiths Energy self-reported and received a smaller fine in relation to its bribe than Niko Resources, which cooperated, but did not self-report. However, other mitigating factors were at play in *Griffiths Energy*, such as the company's contribution to investigation costs. In *Karigar*, the mitigating effect of self-reporting was lessened by other aggravating factors. This indicates that the benefit of self-reporting depends on the facts of each case. Because of this uncertainty and lack of assurance, companies may be reluctant to self-report breaches of the *CFPOA*. As mentioned in Section 8.6, some critics argue that the appeal of self-reporting is further reduced by Canada's relatively harsh debarment regime.¹⁷²

6.6 Remediation Agreements

In 2018, amendments to the *Criminal Code* came into force establishing a DPA regime for corporate wrongdoing in Canada.¹⁷³ The Canadian legislation refers to DPAs as "remediation agreements."

To be eligible for a remediation agreement, the accused must be an organization. A remediation agreement may only be entered into for certain prescribed offences, including bribery and fraud and *CFPOA* offences.

Crown prosecutors are responsible for negotiating remediation agreements, but several preconditions must be met before doing so. As a threshold requirement, the Crown prosecutor must be satisfied that there is a reasonable prospect of conviction.¹⁷⁴ The Crown prosecutor must be further satisfied that (1) the impugned conduct did not cause serious bodily harm or death or injury to national defence or national security and was not committed in association with a criminal organization or terrorist group, and (2) negotiating a remediation agreement is in the public interest.¹⁷⁵ If the Crown prosecutor is so satisfied,

¹⁷¹ Wendy Berman & Jonathan Wansbrough, *Risky Business: A Primer on Canada's Foreign Anti-Corruption Enforcement Regime*, (Toronto; Vancouver, BC: Cassells Brock & Blackwell LLP, 2014) at 25, online: <<https://studylib.net/doc/11485412/risky-business-a-primer-on-canada%E2%80%99s-foreign-anti-corrupti>>.

¹⁷² John Manley, "Canada Needs New Tools to Fight Corporate Wrongdoing", *The Globe and Mail* (29 May 2015), online: <<https://www.theglobeandmail.com/report-on-business/rob-commentary/canada-needs-new-tools-to-fight-corporate-wrongdoing/article24675411/>>.

¹⁷³ *Criminal Code*, *supra* note 100, Part XXII.1.

¹⁷⁴ *Ibid*, s 715.32(1)(a).

¹⁷⁵ *Ibid*, s 715.32(1)(b)-(c).

they recommend to the Chief Federal Prosecutor that consent of the Attorney General be sought.¹⁷⁶

The heart of the remediation agreement regime is consent from the Attorney General.¹⁷⁷ The Director of Public Prosecutions, on behalf of the Attorney General, makes the final decision on whether to consent to invite an organization to negotiate a remediation agreement. The decision of whether to enter settlement discussions falls within the ambit of prosecutorial discretion.¹⁷⁸ Where the Attorney General consents, the Director of Public Prosecutions designates a Crown prosecutor for the purpose of negotiating the remediation agreement.¹⁷⁹

Negotiated remediation agreements are subject to court approval.¹⁸⁰ The court must approve the agreement if it is satisfied that the agreement is in the public interest and the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.¹⁸¹

Upon receiving court approval, prosecution against the accused organization is stayed, subject to satisfaction of the terms of the remediation agreement. Approved remediation agreements, including the statement of facts and admission of responsibility, are publicly available, subject to a court sealing the record, and may be admissible as evidence in other matters related to the underlying misconduct.

Most commentators and practitioners saw the introduction of a DPA regime as a welcome development in Canada. However, to date, no remediation agreements have been announced.

SNC-Lavalin Group Inc.

In 2019, the remediation agreement regime came under scrutiny when the efforts of SNC-Lavalin Group Inc. (SNC) to seek a remediation agreement were made public. The Canadian Director of Public Prosecutions declined to invite SNC to negotiate a remediation agreement due to its ongoing connection with the foreign bribery and fraud charges. The then-Attorney General alleged that the Prime Minister's Office attempted to interfere in the exercise of their prosecutorial discretion by advocating that they reconsider the Director of Public Prosecution's decision.

SNC-Lavalin and two of its subsidiaries, SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. (SLCI), were charged with one count each of a violation of section 3(1)(b)

¹⁷⁶ The Chief Federal Prosecutor conducts their own assessment and makes a recommendation to the Deputy Director of Public Prosecutions. The Deputy Director of Public Prosecutions conducts an objective assessment of the request to determine whether negotiation of a remediation agreement will be recommended. In this role, the Deputy Director of Public Prosecutions exercises a challenge function. See "Public Prosecution Service of Canada Deskbook: 3.21 Remediation Agreements" (23 January 2020) [3.21 Remediation Agreements], online: *Public Prosecution Service of Canada* <<https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html>>.

¹⁷⁷ *Criminal Code*, *supra* note 100, s 715.32(1)(d).

¹⁷⁸ *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FC 282.

¹⁷⁹ 3.21 Remediation Agreements, *supra* note 176.

¹⁸⁰ *Criminal Code*, *supra* note 100, s 715.37(1).

¹⁸¹ *Ibid*, s 715.37(6).

of the *CFPOA* and one count each of fraud contrary to section 380(1)(a) of the *Code*. The charges arose out of the company's dealings in Libya from 2001 until 2011 during the Gaddafi regime.

After being denied a remediation agreement, SNC settled the criminal corruption charges when its subsidiary, SLCI, pled guilty to a single charge of defrauding Libya contrary to section 380 of the *Code*. As part of the settlement, SLCI was required to pay a CDN\$280 million fine over five years and to comply with a three-year probation order.

The structure of the SNC plea agreement is noteworthy for several reasons:

- SLCI pled guilty to the charge of defrauding Libya contrary to section 380 of the *Code*. A violation of section 3 of the *CFPOA* results in a mandatory debarment of at least five, and up to ten, years. In contrast, a conviction for fraud contrary to section 380 will result in debarment only if the fraud is committed against Canada. By pleading guilty to defrauding Libya, SLCI was not subject to debarment.
- SLCI, as a *subsidiary* of SNC, entered into the guilty plea and thus sanctions were imposed only on SLCI. In theory, the benefit of a subsidiary entering the guilty plea is that the parent avoids sanctions related to debarment, preserving their ability to bid on government contracts. However, as noted, the charge for which SLCI pled guilty did not result in debarment.
- The term of the probation order requires that SLCI "shall cause" SNC to maintain, and as required, further strengthen its compliance program, record keeping, and internal control standards and procedures. The legal effect of the words "shall cause," and how a subsidiary can cause their parent to maintain and strengthen its compliance program, is uncertain.
- Finally, the fine imposed on SLCI is much larger than any fine imposed under the *CFPOA* or any other domestic bribery offence, adding to the trend of increased enforcement in Canada.

Several questions arise out of the SNC plea agreement, particularly with respect to what it portends for future plea deals or the nascent remediation agreement regime. Subsidiaries entering guilty pleas on behalf of parents could become common. Subsidiaries could also enter into remediation agreements on behalf of parent companies. Neither the *Code* nor any Department of Justice policy suggests that a subsidiary is precluded from entering into a remediation agreement on behalf of a parent company. As such, one could reasonably expect that some future remediation agreements will be modelled on the SNC plea arrangement.

Current State of Remediation Agreements

As of writing, no remediation agreements have been concluded in Canada. Kathleen Roussel, the current Director of Public Prosecutions, nevertheless provided comments in an

interview, suggesting how remediation agreements may be utilized in the future.¹⁸² Roussel remarked that Canada is not likely to grant remediation agreements to repeat offenders, noting it would be “very unusual” for a company to benefit twice from a remediation agreement. Instead, she viewed the prosecutorial tool as a “one-time thing,” notwithstanding that such a limitation is not prescribed in the legislation. The Director of Public Prosecutions was cognizant that the first remediation agreement would inevitably be a precedent. Roussel suggested that it was not in the public interest to enter a remediation agreement with SNC given the severity and breadth of their conduct.

7. CRIMINAL FORFEITURE

Criminal forfeiture is introduced in a general way in Chapter 5, Section 2.4.1. The laws and procedures for criminal forfeiture under UNCAC and the OECD Convention and in the US, UK and Canada are discussed in Chapter 5, Sections 3.1, 3.2, 5.1, 5.2, and 5.3 respectively.

8. DEBARMENT AS A COLLATERAL CONSEQUENCE

Debarment is a sanctioning tool by which an individual or corporation convicted of a corruption offence may face a period of ineligibility from bidding on government contracts. For companies that rely on public contracts and tenders as a large portion of their business, the prospect of debarment is a significant deterrent and punishment.¹⁸³ For example, after debarment, a company may lose clients, suffer reputational damage, face insolvency or even go out of business.¹⁸⁴ The debarment process can be complex and multiple variables must be considered, such as the length of the debarment, whether it is automatic or discretionary, and the jurisdictions and organizations where the debarment applies.¹⁸⁵ Moreover, the impact of debarment can be multiplied by cross-debarment whereby departments, governments or other institutions or organizations agree to mutually enforce each other’s debarment actions. One such example is a cross-debarment agreement between the Multilateral Development Banks (MDBs), consisting of the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and the World Bank Group. As stated by the MDBs, “cross debarment creates a formidable additional deterrent to firms and individuals

¹⁸² Robert Fife, “Prosecutor Says No Deal was Offered to SNC-Lavalin Due to Severity of Charges and Past Behaviour,” *The Globe and Mail* (28 February 2020), online: <<https://www.theglobeandmail.com/politics/article-top-federal-prosecutor-says-she-felt-no-political-pressure-on-snc/>>.

¹⁸³ Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany* (Farnham; Burlington: Ashgate, 2014) at 113.

¹⁸⁴ *Ibid* at 113.

¹⁸⁵ *Ibid* at 113.

engaged in fraud and corruption in MDB-financed development projects, and possibly provides an incentive for firms to clean up their operations.”¹⁸⁶

8.1 UNCAC

Article 34 of UNCAC provides as follows:

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.¹⁸⁷

The reference in Article 34 to “any other remedial action” is broad enough to include debarment of offenders from participation in public procurement.

8.2 OECD Convention

Article 3 of the OECD Convention provides in part:

Sanctions

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

The commentary on this section reads:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; *temporary or permanent disqualification from participation in public procurement* or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order. [emphasis added]¹⁸⁸

¹⁸⁶ “Cross Debarment – Agreement for Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks” (last visited 28 September 2021), online: *Asian Development Bank* <<http://lnadbg4.adb.org/oai001p.nsf/>>.

¹⁸⁷ UNCAC, *supra* note 1, art 34.

¹⁸⁸ OECD Convention, *supra* note 2, art 3.

8.3 World Bank

The World Bank, a supra-national organization set up by member states, is composed of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The World Bank Group consists of the World Bank and three other supra-national agencies: the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID).

The World Bank and the World Bank Group provide billions of dollars in loans to developing countries every year, funding large-scale infrastructure projects throughout the developing world. To preserve the integrity of these projects, the World Bank has developed its own sanctions system. Although the World Bank cannot impose criminal sanctions, debarment from bidding on World Bank-financed projects provides a powerful policy tool and is the World Bank's "baseline" sanction.¹⁸⁹ Such sanctions have been applied with considerable frequency. For example, between 2007 and 2017, the World Bank debarred or otherwise sanctioned 489 firms and individuals.¹⁹⁰ In the World Bank president's 2011 address, then-president Robert B. Zoellick emphasized the important role that debarment and other sanctions play in deterring fraud, collusion and corruption:

For more than 10 years, our sanctions system has played a crucial role within the Bank Group's anticorruption efforts. Sanctions protect Bank Group funds and member countries' development projects by excluding proven wrongdoers from our operations and financing. Sanctions also deter other participants or potential bidders in Bank Group-financed operations from engaging in fraud, collusion, or corruption. By holding companies and individuals accountable through a fair and robust process, the Bank Group's sanctions system promotes integrity and levels the playing field for those committed to clean business practices.

Being in the forefront of antifraud and anticorruption efforts among multilateral development institutions, the Bank Group has continually explored new structures and strategies to deal most effectively with allegations of fraud and corruption. These efforts led, for instance, to the

¹⁸⁹ Graham Steele, *Quebec's Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (LLM Thesis, Dalhousie University Faculty of Law, 2015) [unpublished] at 54, online: <<http://dalspace.library.dal.ca/handle/10222/56272>>; World Bank Group, *World Bank Group Sanctions System Annual Report FY19*, (Washington, DC: World Bank Group, 2019) at 6, online (pdf): <<http://documents1.worldbank.org/curated/en/782941570732184391/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY19.pdf>>.

¹⁹⁰ The World Bank, The World Bank Office of Suspension and Debarment, *10-Year Update on Case Data & Metrics (2007–2017) – Addendum to the Second Edition*, (Washington, DC: International Bank for Reconstruction and Development/The World Bank, 2017) at 5, online (pdf): <<https://www.worldbank.org/content/dam/documents/sanctions/office-of-suspension-and-debarment/2019/may/OSDReport10YearUpdate.pdf>>. The World Bank maintains a comprehensive list of ineligible firms and individuals: "Procurement – World Bank Listing of Ineligible Firms and Individuals" (last visited 28 September 2021, the list is updated every three hours), online: *The World Bank* <<https://www.worldbank.org/en/projects-operations/procurement/debarred-firms>>.

establishment of the Sanctions Board in 2007 as a new and independent body providing final appellate review. Composed of a majority of external members since its establishment, the Sanctions Board has also been led by an external Chair since 2009. The Bank Group worked with the regional multilateral development banks to reach a groundbreaking agreement on cross-debarment in 2010. Those who cheat and steal from one will be debarred by all. Most recently, the Bank Group took a major step toward greater transparency and accountability by authorizing the publication of decisions in new sanctions cases initiated in 2011 and onward.¹⁹¹

The World Bank summarizes its sanctions process as follows:

One way that the World Bank Group combats corruption is through the use of **administrative sanctions** against firms or individuals who have engaged in fraud, corruption, coercion, collusion or obstruction (referred to collectively as Sanctionable Practices) in connection with World Bank-financed projects. The sanctions regime is designed to protect the funds entrusted to the World Bank, while offering the firms and individuals involved an opportunity to respond to the allegations against them.

...

Allegations that a firm or individual engaged in a Sanctionable Practice are investigated by the **World Bank Group's Integrity Vice Presidency (INT)**. If INT believes there is sufficient evidence to substantiate the allegations, the case is referred to the **Office of Suspension and Debarment (OSD)***—the first tier of the Bank's two-tier administrative sanctions process.

The SDO reviews the evidence submitted by INT and determines if the evidence is sufficient to support a finding that the alleged Sanctionable Practice occurred. If so, the SDO issues a Notice of Sanctions Proceedings to the firm or individual alleged to have engaged in the Sanctionable Practice (the respondent). The Notice includes the allegations, the evidence as submitted by INT, and a recommended sanction. The SDO may also recommend the imposition of sanctions on affiliates of the respondent. Upon issuance of the Notice, the SDO temporarily suspends the respondent from eligibility for new World Bank-financed contracts, pending the final outcome of the sanctions process.

The respondent can choose not to contest the allegations or the recommended sanction, in which case the sanction recommended by the SDO is imposed. If the firm or individual contests the allegations or the recommended sanction, the case is referred to the **World Bank Group**

¹⁹¹ The World Bank Group Sanctions Board, *Law Digest – Upholding the Rule of Law in the Fights Against Corruption and Poverty*, (Washington, DC: The World Bank, 2011) at 5, online (pdf): <<https://web.archive.org/web/20170304082301/http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1342729035803/SanctionsBoardLawDigest.pdf>>.

Sanctions Board—the second tier of the Bank's two-tier administrative sanctions process.

The Sanctions Board carries out a full *de novo* review in each contested case. It is not bound by the SDO's/EO's recommendation. An administrative hearing may be held by the Sanctions Board either upon a party's request or at the discretion of the Sanctions Board Chair. In its deliberations, the Sanctions Board considers INT's allegations and evidence as attached to the Notice of Sanctions Proceedings; the respondent's arguments and evidence submitted in response to INT's allegations and evidence; INT's reply brief; the parties' presentations at a hearing, if applicable; and any other materials contained in the record.

After completing its review, the Sanctions Board determines whether it is “more likely than not” that the respondent engaged in a sanctionable practice. If so, the Sanctions Board imposes one or more ... sanctions, which may extend to a respondent's affiliates, successors and assigns. The decisions of the Sanctions Board are final and non-appealable.¹⁹²

The Sanctions Board exercises discretion in determining an appropriate sanction. The available sanctions are described in the *World Bank Sanctioning Guidelines*:

I. Base Sanction: The base sanction for all misconduct is 3 year debarment with conditional release.

II. Range of Sanction

A. Debarment with Conditional Release: Debarment with conditional release is the ‘baseline’ sanction which should normally be applied absent the considerations that would justify another sanction as outlined in paragraphs B though F below. The purpose of the conditional release is to encourage the respondent’s rehabilitation, to mitigate further risk to Bank-financed activities. Accordingly, the respondent will only be released from debarment after (i) the defined debarment period lapses, and (ii) the respondent has demonstrated that it has met the conditions set by the EO or Sanctions Board and detailed by the Integrity Compliance Officer.

...

Conditions imposed may include:

- i) Implementation or improvement of an integrity compliance program; and
- ii) Remedial measures to address the misconduct for which the respondent was sanctioned, including disciplinary action or termination of employee(s)/officer(s) responsible for the misconduct.

¹⁹² “The World Bank Group’s Sanctions System — Tackling Corruption Through a Two-Tier Administrative Sanctions Process” (last visited 28 September 2021), online: *The World Bank* <<https://www.worldbank.org/en/about/unit/sanctions-system#2>>.

The Integrity Compliance Officer verifies whether conditions have been met. Determinations of compliance by the Compliance Officer are subject to appeal to the Sanctions Board in accordance with the Sanctions Procedures.

B. Debarment: The Bank may apply this sanction if there would be no reasonable purpose served by imposing conditions. This would occur, for example, in cases where a sanctioned firm has already in place a robust corporate compliance program, the Sanctionable Practice involved the isolated acts of an employee or employees who have already been terminated, and the proposed debarment is for a relative short period of time (e.g., one year or less).

C. Conditional Non-Debarment: Generally, the Bank may apply this sanction, consistent with the Bank's fiduciary obligations and the goals of specific and general deterrence, to:

- i) sanctioned parties affiliated with the respondent that are not directly involved in the Sanctionable Practice in which the respondent has engaged, but which bear some responsibility thereof, through, for example, a systemic lack of oversight; or
- ii) respondents that have demonstrated that they have taken comprehensive corrective measures and that such other mitigating factors apply ... so as to justify non-debarment.

The conditions imposed will likely be similar to those imposed under debarment with conditional release. In the event that the sanctioned party fails to demonstrate compliance with the conditions within the time periods established by the Sanctions Board, a debarment would automatically become effective for a period of time established by the EO and/or Sanctions Board.

D. Letter of Reprimand: A Letter of Reprimand should most often be used to sanction an affiliate of the Respondent that was only guilty of an isolated incident of lack of oversight.

E. Permanent Debarment: Permanent debarment is generally only appropriate in cases where it is believed that there are no reasonable grounds for thinking that the respondent can be rehabilitated through compliance or other conditionalities. It is anticipated that permanent debarment would most commonly be applied to natural persons, closely held companies by such persons and shell companies.

F. Restitution and other Remedies: Restitution, as well as financial and other remedies, may be used in exceptional circumstances, including those

involving fraud in contract execution where there is a quantifiable amount to be restored to the client country or project.¹⁹³

In light of the gravity of the consequences of a World Bank debarment, some lawyers, particularly defence counsel in the US, are wary of the fact that the World Bank is not required to follow any country's rules of procedure or to subscribe to American concepts of due process.¹⁹⁴ However, it may fairly be said that the World Bank's procedures do contain a healthy dose of due process.

8.4 US

Under the US *Federal Acquisition Regulations*, an individual or corporation can be debarred from federal contracts for a number of reasons, including bribery or the commission of an offence indicating a lack of business integrity. Debarment from one government agency typically results in debarment from other agencies.¹⁹⁵ In May 2014, the Government Accountability Office reported a dramatic increase in suspension and debarment actions, increasing from 19 in 2009 to 271 in 2013.¹⁹⁶ The Interagency Suspension and Debarment Committee's Fiscal Year (FY) 2019 Report noted that "the total number of suspensions, proposed debarments, and debarments in FY 2019 represents nearly double the activity level reported in FY 2009."¹⁹⁷

The decision to debar is not made by the DOJ or SEC, but rather designated officials in other affected agencies. The decision to debar is always discretionary. As the US debarment regulations state:

It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness

¹⁹³ The World Bank Group, *World Bank Sanctioning Guidelines*, (The World Bank Group, 2011) at 1-2, online (pdf):
<https://web.archive.org/web/20170304135341/https://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf>.

¹⁹⁴ Julie DiMauro, "World Bank Combats Corruption – but Questions Linger About Process" (22 May 2014), online: *The FCPA Blog* <<http://www.fcpablog.com/blog/2014/5/22/world-bank-combats-corruption-but-questions-linger-about-pro.html>>.

¹⁹⁵ United States Federal Register, "Executive Order 12549 – Debarment and Suspension" (last reviewed 15 August 2016), online: <<http://www.archives.gov/federal-register/codification/executive-order/12549.html>>.

¹⁹⁶ US, Government Accountability Office (GAO), *Federal Contracts and Grants – Agencies Have Taken Steps to Improve Suspension and Debarment Programs* (GAO-14-513) (Washington, DC: GAO, 2014), online (pdf): <<http://www.gao.gov/assets/670/663359.pdf>>.

¹⁹⁷ US, Interagency Suspension and Debarment Committee (ISDC), *FY 2019 Report on Federal Agency Suspension and Debarment Activities* (Washington, DC: ISDC, 2021) at 4, online (pdf):
https://www.acquisition.gov/sites/default/files/page_file_uploads/ISDC%20FY19%20873%20Report.pdf.

of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.¹⁹⁸

Causes for debarment include a conviction or civil judgment for commission of fraud or a criminal offence in conjunction with obtaining, attempting to obtain or performing a public contract or sub-contract; commission of an offence indicating a lack of business integrity; and violating federal criminal law involving fraud, conflict of interest or gratuity violations.¹⁹⁹

Factors considered by the debarment official include standards of conduct and internal controls, self-reporting in a timely manner, internal investigation, cooperation with external investigation, payment of any fines, disciplinary actions, and remedial measures.²⁰⁰

The regulations state that the period of debarment shall be commensurate with the seriousness of the cause(s) and generally should not exceed three years. The period can be extended if necessary to protect government interests. Contractors can request a reduction based on reasons including a reversal of a conviction or civil judgment, a bona fide change in ownership or management and elimination of other causes for which debarment was imposed.²⁰¹

In addition to public procurement debarment, FCPA violations may lead to ineligibility to receive export licenses, SEC suspension, and debarment from the securities industry.²⁰²

8.5 UK

The UK "exclusion" (i.e., debarment) regime is contained in the *Public Contracts Regulations 2015*.²⁰³ This regime includes both mandatory and discretionary exclusions, as well as "self-cleaning" provisions designed to encourage companies to take proactive measures to remedy past wrongdoings and prevent future wrongdoing.

Beginning with mandatory exclusions, Regulation 57(1) provides that contracting authorities shall exclude an "economic operator" from participation in a procurement procedure where they have established that the economic operator has been convicted of any listed offence. These include certain forms of conspiracy, corruption, bribery, fraud, money laundering, terrorism offences, drug offences, child labour and human trafficking offences, and other offences. Regulation 57(3) provides that an economic operator shall be

¹⁹⁸ *Debarment – General*, 48 CFR § 9.406-1.

¹⁹⁹ *Causes for Debarment*, 48 CFR § 9.406-2.

²⁰⁰ *Debarment – General*, *supra* note 198.

²⁰¹ *Period of Debarment*, 48 CFR § 9.406-4.

²⁰² See Robert W Tarun & Peter P Tomczak, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 5th ed (Chicago: American Bar Association, 2018) at 59. For the full list of the United States Federal Acquisition Regulations, see: "FAR" (last visited 29 September 2021), online: ACQUISITION.GOV <<http://www.acquisition.gov/far/>>.

²⁰³ *The Public Contracts Regulations 2015* (UK), SI 2015/102.

excluded when they are in breach of their obligations relating to the payment of taxes or social security contributions and that breach has been proven by a judicial or administrative decision. However, Regulation 57(6) provides that a contracting authority may disregard a mandatory exclusion “for overriding reasons relating to the public interest such as public health or protection of the environment.” This exclusion might be invoked, for example, where medical supplies are required on an urgent basis, and the economic operator in question is the only one capable of providing those supplies.

Regulation 57(8) sets out discretionary exclusions, including:

- where the economic operator is bankrupt;
- where the contracting authority considers the economic operator to be guilty of “grave professional misconduct” that “renders its integrity questionable;”
- where the contracting authority has “sufficiently plausible” indications to conclude that the economic operator has entered into agreements with others aimed at distorting competition;
- where the economic operator has shown “significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract” that “led to early termination … damages or other comparable sanctions;”
- where the economic operator has been guilty of serious misrepresentation or has withheld information; or
- where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority.²⁰⁴

Some of these discretionary exclusions may be criticized as being too subjective or ambiguous (e.g., the exclusion relating to “grave professional misconduct” that “renders [the economic operator’s] integrity questionable,” and the exclusion relating to “sufficiently plausible” indications that the economic operator has entered into agreements to distort competition). Moreover, the Regulations do not provide guidance on the factors that should guide contracting authorities in deciding whether to exercise their discretion, nor do they require contracting authorities to provide reasons for such a decision. This may result in a lack of predictability for economic operators and/or a lack of procedural fairness. On the other hand, these concerns must be balanced against the need for flexibility, which is an important component of a sound public procurement framework.

Regulation 57(11) provides that the mandatory exclusions generally apply for five years from the date of conviction. Regulation 57(12) provides that the discretionary exclusions generally apply for three years from the date of the relevant event. The seemingly rigid nature of these provisions is moderated by the “self-cleaning” provisions discussed below.

²⁰⁴ *Ibid*, Reg 57(8).

The Regulations contain “self-cleaning” provisions designed to encourage companies to take proactive measures to remedy past wrongdoing and prevent future wrongdoing. Regulation 57(13) stipulates that an economic operator may provide evidence that it has taken measures sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. Regulation 57(14) provides that if the contracting authority considers such evidence to be sufficient, it shall not exclude the economic operator from the procurement procedure. To meet this threshold, the economic operator must prove, pursuant to Regulation 57(15), that it has:

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.²⁰⁵

The law firm Norton Rose Fulbright suggests “[e]ffective self-cleaning measures are likely to require a company to invest a considerable amount of time and money into the process and may lead contracting public authorities to insist that companies appoint independent monitors to supervise the process.”²⁰⁶ The firm also suggests that the “self-cleaning” provisions may create a “credible incentive for companies to self-report.”²⁰⁷ Indeed, the self-cleaning provisions are a welcome development that recognizes the importance of encouraging companies to take appropriate measures to rectify past wrongs, cooperate with authorities and take proactive measures to prevent future wrongdoing.

As discussed in Chapter 12, Section 6.3, in the wake of the UK’s exit from the EU, the UK government proposed an “overhaul” of the UK’s public procurement regime.²⁰⁸ Consequently, the provisions summarized above may be replaced by a new framework. Scholars have observed that the UK’s exit from the EU provides an opportunity for the UK to develop a stronger exclusion regime.²⁰⁹ For example, Sue Arrowsmith argues that “there should be centrally-administered mandatory exclusions for integrity breaches, which should cover wider grounds than current mandatory exclusions and should not be limited to cases where the supplier has a criminal conviction or other formal judgment against it.”²¹⁰ Given the UK government’s indication that it intends to create a new public procurement

²⁰⁵ *Ibid*, Reg 57(15).

²⁰⁶ “Public Contracts Regulations 2015: The New Rules on Debarment” (October 2015), online: *Norton Rose Fulbright* <<https://www.nortonrosefulbright.com/en/knowledge/publications/67f58d50/public-contracts-regulations-2015>>.

²⁰⁷ *Ibid*.

²⁰⁸ UK, Parliamentary Secretary at the Cabinet Office, *Transforming Public Procurement* (CP 353, 2020), online (pdf):

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943946/Transforming_public_procurement.pdf>.

²⁰⁹ See e.g., Sue Arrowsmith, “Constructing Rules on Exclusions (Debarment) Under a Post-Brexit Regime on Public Procurement: A Preliminary Analysis” (2020) Working Paper, online:

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659909>.

²¹⁰ *Ibid* at 4.

framework as a whole, significant changes to the UK's exclusion regime may well be on the horizon.

8.6 Canada

Public Services and Procurement Canada (PSPC), formerly Public Works and Government Services Canada (PWGSC), is responsible for acquiring goods and services on behalf of the departments and agencies of the Government of Canada. PSPC handles a large number of contracts and manages an annual budget of over \$4 billion.²¹¹ It is also responsible for administering the federal government's debarment policies.

PSPC has developed a robust framework to support accountability and integrity in its procurement process. This framework includes policies, procedures and governance measures designed to ensure fairness, openness and transparency. The framework is not, however, free from criticism, and its history is complicated. Its history reflects a trend of increasing formality and severity, followed by attempts to introduce greater flexibility in response to criticism from businesses, NGOs and other organizations, all while maintaining a strong, predictable approach to debarment.²¹²

In November 2007, PSPC began including a *Code of Conduct for Procurement* in its solicitation documents.²¹³ This code included provisions relating to debarment. The intent was to use debarment to ensure that government contracts are awarded only to "reliable and dependable" contractors. The primary purpose of debarment was seen as preserving the integrity of the public procurement process.

In October 2010, PSPC added the following categories of offences that would render suppliers ineligible to bid on procurement contracts:

- (a) corruption;
- (b) collusion;

²¹¹ "About Public Services and Procurement Canada" (last modified 27 September 2021), online: *Public Services and Procurement Canada [PSPC]* <<https://www.tpsgc-pwgsc.gc.ca/abous-pspc-prpsbt-eng.html>>.

²¹² To track the evolution of Canada's debarment policies, see PSPC, *Integrity Provisions*, (Policy Notification), PN-107 (9 November 2012), online: <<https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107>>; PSPC, *Integrity Provisions*, (Policy Notification), PN-107U1 (1 March 2014), online: <<https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107U1>>; PSPC, *New Integrity Regime*, (Policy Notification), PN-107R1 (3 July 2015), online: <<https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R1>>; PSPC, *Update to the Integrity Regime*, (Policy Notification), PN-107R2 (4 April 2016), online: <<https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R2>>; PSPC, News Release, "Canada to Enhance Its Toolkit to Address Corporate Wrongdoing" (27 March 2018), online: <<https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html>>.

²¹³ The most recent version can be found online: Public Works and Government Services Canada, *Code of Conduct for Procurement* (effective as of 13 August 2021), online: *PSPC* <<https://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/cca-ccp-eng.html>>.

- (c) bid-rigging; or
- (d) any other anti-competitive activity.²¹⁴

In July 2012, PSPC established a formal “Integrity Framework” for PSPC procurement. This framework set out a rules-based system that left no room for the exercise of discretion with respect to debarment. It provided for automatic disqualification from bidding on public contracts if the company or any of its affiliates was convicted of any listed Canadian offence. Initially, conviction under a foreign offence did not result in automatic ineligibility. In addition to the offences set out in its previous debarment policies, PSPC added the following new categories of offences:

- (i) fraud;
- (ii) money laundering;
- (iii) participation in activities of criminal organizations;
- (iv) income and excise tax evasion;
- (v) bribing a foreign public official (e.g., contrary to Canada’s *Corruption of Foreign Public Officials Act*); and
- (vi) drug-related offences.²¹⁵

In March 2014, PSPC introduced several fundamental changes to the Integrity Framework. PSPC added the following new categories of offences:

- extortion;
- bribery of judicial officers;
- bribery of officers;
- secret commissions;
- criminal breach of contract;
- fraudulent manipulation of stock exchange transactions;
- prohibited insider trading;
- forgery and other offences resembling forgery; and
- falsification of books and documents.²¹⁶

PSPC also amended the Integrity Framework such that convictions under offences in foreign jurisdictions that are “similar” to the listed Canadian offences would result in ineligibility. Germany-based Siemens was the first major government supplier to receive confirmation of

²¹⁴ “ARCHIVED — Context and Purpose of the Code” (last modified 8 August 2021), online: PSPC <<https://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html>>.

²¹⁵ Government of Canada, *Expanding Canada’s Toolkit to Address Corporate Wrongdoing: The Integrity Regime Stream Discussion Guide*, (Discussion Paper for Public Consultation), P4-74/2017E-PDF (Gatineau, QC: PSPC, 2017) [Integrity Regime Stream Discussion Guide] at 7, online (pdf): <<https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/examiner-review-eng.pdf>>.

²¹⁶ *Ibid.*

its debarment under the “similar offences” provision of the Integrity Framework.²¹⁷ Siemens paid a \$1.6 billion fine after pleading guilty to corruption-related offences in 2008 in the US and Germany.²¹⁸

PSPC introduced a new automatic ineligibility period: all suppliers convicted of a relevant offence are automatically debarred for ten years. Once the ten-year debarment period passed, bidders are required to certify that adequate measures were established to avoid recurrence. Prime contractors are also required to apply the provisions of the Integrity Framework to their subcontractors.

The March 2014 expansion proved highly controversial. Businesses, NGOs, and bar associations argued that Canada’s Integrity Framework had become so inflexible, punitive and far-reaching that it had become counterproductive to its primary objective—namely, preserving the integrity of the public procurement process. Key criticisms included the following:

- The strictness of the Integrity Framework could deprive the government, and the taxpaying public, of certain specialized expertise and high-quality goods and services.
- The policy’s harshness and inflexibility discouraged companies from acknowledging and remediating wrongdoing. Companies were not offered strong incentives to cooperate with authorities or to seek to bring about wide-ranging cultural reforms within the corporation.
- The mandatory ten-year ineligibility period failed to provide any scope for reduction or leniency in light of the gravity of the offence or the supplier’s remediation efforts. This rigid stance stood in contrast with the more flexible, forgiving position taken in the US, the EU and other jurisdictions whose procurement regimes grant credit for mitigating circumstances and remediation efforts. Notably, Transparency International Canada criticized the finality and rigidity of the ten-year debarment policy, pointing out that the World Bank’s debarment policy “provides for regular third-party reviews of a company’s compliance measures which provide an opportunity for the World Bank to determine if the company’s debarment should be lifted.”²¹⁹
- Debarment based on the commission of “similar” foreign offences, with PSPC being the arbiter of what constitutes a “similar” foreign offence, was seen as being too subjective. In many cases, it could not be said with any certainty whether a

²¹⁷ Barrie McKenna, “Ottawa Could Face Lawsuits for Strict Corruption Rules: Report”, *The Globe and Mail* (24 November 2014), online: <<http://www.theglobeandmail.com/report-on-business/international-business/ottawa-could-face-lawsuits-for-strict-trade-corruption-rules-report/article21739211/>>.

²¹⁸ *Ibid.*

²¹⁹ Letter from Transparency International Canada Inc to the Honourable Diane Finley, Minister of Public Works and Government Services (17 February 2015) at 5, online (pdf): <http://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/5df7c87b3a774003e678a7c8/5df7c87b3a774003e678a8ab/1576519803317/20150218-TI-Canada_Letter_to_Minister_Finley.pdf?format=original>.

particular foreign offence would be sufficiently “similar” to be captured under the Integrity Framework. Furthermore, concerns were raised about the unfairness of the severe consequences that would follow if a company were to be convicted in a foreign jurisdiction under circumstances that, in Canada, would be seen as unfair or unjust. Such a conviction would result in the company being debarred in Canada without having a meaningful opportunity to contest the unfair conviction.

- The foreign affiliates policy meant that law-abiding Canadian companies could be held responsible for a distant affiliate’s criminal conduct occurring abroad in circumstances where the Canadian company had no participation or involvement. This policy came under considerable scrutiny after PSPC announced that it was investigating whether Hewlett Packard, the Government of Canada’s largest computer hardware supplier, might be at risk of debarment due to the actions of an overseas affiliate.²²⁰ In 2014, a Russian subsidiary of Hewlett Packard entered a guilty plea in the US for violating FCPA anti-bribery provisions.²²¹ Executives of the Russian subsidiary had bribed Russian government officials to secure government contracts. It soon became apparent that, in light of the Integrity Framework’s provisions regarding “similar foreign offences” and affiliate responsibility, Hewlett Packard might be debarred in Canada. Although fears over Hewlett Packard’s potential debarment were never realized, the notion that an important and well-respected government supplier might be debarred for ten years, with existing contracts being either terminated or continued under strict monitoring, raised eyebrows.

In November 2014, *The Globe and Mail* reported that the federal government might face a challenge from the World Trade Organization and NAFTA investor lawsuits due to the strictness of Canada’s debarment rules.²²² Further concerns were expressed over the implications for trade. The severity of Canada’s debarment policy gave rise to the possibility that Canadian companies could face “tit-for-tat retaliation” by countries in which major companies that had been debarred in Canada are headquartered.²²³

In response to these and other criticisms, PSPC replaced the “Integrity Framework” with a new, government-wide “Integrity Regime” on July 3, 2015.²²⁴ The Integrity Regime emphasizes the importance of fostering ethical business practices, ensuring due process for suppliers, and upholding the public trust in the procurement process. The key elements of the current Integrity Framework are as follows:

- The Integrity Regime is administered by PSPC on behalf of the Canadian government. Other government departments and agencies may apply this regime

²²⁰ Andy Blatchford, “Anti-Corruption Rules on Suppliers a Threat to Canadian Economy: Study”, *Ottawa Citizen* (23 November 2014), online: <<http://ottawacitizen.com/news/national/anti-corruption-rules-on-suppliers-a-threat-to-canadian-economy-study>>.

²²¹ *Ibid.* Hewlett Packard’s Russian subsidiary was fined \$58.7 million for the FCPA violation.

²²² McKenna, *supra* note 217.

²²³ *Ibid.*

²²⁴ See John W Boscariol & Robert A Glasgow, “Canada Implements New Integrity Regime for Public Procurement” (5 July 2015), online: *McCarthy Tétrault* <http://www.mccarthy.ca/article_detail.aspx?id=7126>.

to their solicitations and contracts pursuant to memoranda of understanding with PSPC.

- The Integrity Regime applies government-wide to procurement and real property transactions over CDN\$10,000 (as well as any other contract that incorporates the regime by reference), subject to specified exceptions.
- The following circumstances automatically lead to a determination of ineligibility:
 - the supplier has been convicted of an offence that results in a loss of capacity to contract with Her Majesty (ineligibility period: as long as the supplier lacks capacity);
 - the supplier has been convicted of any listed bribery, extortion, forgery, fraud, insider trading, falsification of books and records, money laundering, conspiracy, bid rigging, drug trafficking, lobbying or other listed offence (ineligibility period: ten years, with the possibility of a reduction of up to five years under an administrative agreement);
 - the supplier has entered into a subcontract with a first-tier subcontractor who lacks capacity to receive any benefit under a contract between Canada and any other person or is ineligible for, or suspended from, contract award under the Integrity Regime, subject to certain exceptions (ineligibility period: five years); and
 - the supplier has provided a false or misleading certification or declaration to PSPC (ineligibility period: ten years).²²⁵
- The following circumstances may lead to a determination of ineligibility or suspension (i.e., they are discretionary grounds):
 - the supplier has been convicted of an offence outside Canada that is “similar to” any Canadian offence for which a conviction would result in automatic ineligibility (ineligibility period: ten years, with the possibility of a reduction of up to five years under an administrative agreement);
 - the supplier’s affiliate has been convicted of any Canadian offence for which a conviction would result in automatic ineligibility, or of a “similar offence” outside Canada and the supplier “directed, influenced, authorized, assented to, acquiesced in or participated in the commission of the offence” (ineligibility period: ten years, with the possibility of a reduction of up to five years under an administrative agreement);
 - the supplier has breached any term of condition of an administrative agreement with PSPC (ineligibility period: PSPC may lengthen the original period of ineligibility or re-impose a suspension); and
 - PSPC may suspend a supplier if the supplier has been charged with, or admits guilt of, any Canadian offence for which a conviction would result in automatic ineligibility, or has been charged with, or admits guilt of, a

²²⁵ “Ineligibility and Suspension Policy” (last modified 14 July 2017), online: PSPC <<https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>>.

“similar offence” outside Canada (suspension period: 18 months, subject to extension pending final disposition of the charges, and subject to a stay of the suspension period under an administrative agreement).²²⁶

- For purposes of determining whether a foreign offence is “similar” to a listed Canadian offence, PSPC takes into account the following factors:
 - in the case of a conviction, whether the court acted within its jurisdiction;
 - whether the supplier was afforded the right to appear during the court’s proceedings or to submit to the court’s jurisdiction;
 - whether the court’s decision was obtained by fraud; or
 - whether the supplier was entitled to present to the court every defence that the supplier would have been entitled to present had the proceeding taken place in Canada.²²⁷
- PSPC will not make a determination of ineligibility in respect of a listed offence if the supplier (or its affiliate, if applicable) has been granted an absolute discharge, or has been granted a conditional discharge and those conditions have been satisfied.
- Any administrative agreement may include, among other things, terms and conditions regarding separation of specific employees, implementation or extension of compliance programs, employee training, outside auditing, access by PSPC to specific information and/or records, reporting by a third party, or any other remedial or compliance measure that PSPC considers to be “in the public interest.”
- A contracting authority may enter into a contract or real property agreement with an ineligible or suspended supplier if the relevant Deputy Head or equivalent considers that doing so is “in the public interest.” The reasons for invoking this public interest exception may include:
 - the need to respond to an emergency where delay would be injurious to the public interest;
 - the supplier is the only person capable of performing the contract or providing the real property agreement;
 - the contract is essential to maintain sufficient emergency stocks in order to safeguard against possible shortages; or
 - not entering into the contract or real property agreement with the supplier would have a significant adverse impact on the health, national security, safety, public security or economic or financial well-being of Canadians or the functioning of any portion of the federal public administration.²²⁸

²²⁶ *Ibid.*

²²⁷ “Guide to the *Ineligibility and Suspension Policy*” (last modified 16 December 2020), online: PSPC <<https://www.tpsgc-pwgsc.gc.ca/ci-if/guide-eng.html>>.

²²⁸ *Ibid.*

- PSPC may require a supplier to retain a third party in specified circumstances, such as where PSPC needs information with respect to foreign charges and convictions, or where a third party will monitor the supplier and report to PSPC pursuant to an administrative agreement.
- PSPC maintains a list of ineligible and suspended suppliers (which, at the time of writing, had only three suppliers listed).²²⁹

Some commentators applauded the Integrity Regime for moving away from punishment and retribution and towards the goal of preserving the integrity of public procurement processes. However, others observed that the new Integrity Regime is still strict in comparison to US, UK, and World Bank debarment regimes.

The debarment policies contained in the Integrity Regime are more lenient and flexible than those contained in the previous Integrity Framework in several ways. For the purposes of this section, three policy changes are particularly noteworthy.

- First, the new Integrity Regime eliminates automatic debarment of companies for an affiliate's conduct. This can be seen as a significant improvement, enhancing both the fairness and logic of the regime.
- Second, the ten-year debarment period is no longer set in stone. This period may be reduced through an administrative agreement, which would typically require the supplier to demonstrate that it has put in place measures to avoid potential future wrongdoing. (Note, however, that obtained reduction through an administrative agreement is not always available.) The possibility of receiving a shortened debarment period gives companies a compelling incentive to remedy the misconduct, cooperate with authorities and take proactive measures to prevent future wrongdoing. This new policy is more forward-looking in its orientation, rather than the retributive nature of the previous Integrity Framework.
- Third, Canadian lawyers Milos Barutciski and Matthew Kronby point out that the new regime increases transparency and fairness of the process of determining ineligibility through the addition of "due process" provisions.²³⁰ Canadian lawyer Christopher Burkett summarized these provisions in the following terms:

²²⁹ "About the Integrity Regime" (last modified 16 December 2020), online: PSPC <<https://www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html>>; "Ineligibility and Suspension Policy", *supra* note 226. See also "Ineligible and Suspended Suppliers Under the Integrity Regime" (last modified 16 December 2020), online: PSPC <<https://www.tpsgc-pwgsc.gc.ca/ci-if/four-inel-eng.html>>; "Departments and Agencies That Follow the Integrity Regime" (last modified 16 December 2020), online: PSPC <<https://www.tpsgc-pwgsc.gc.ca/ci-if/pe-mou-eng.html>>.

²³⁰ Milos Barutciski & Matthew Kronby, "New Integrity Regime of Procurement Rules Still Tilts Toward Punishment", *The Globe and Mail* (13 July 2015), online: <<http://www.theglobeandmail.com/report-on-business/rob-commentary/new-integrity-regime-of-procurement-rules-still-tilts-toward-punishment/article25475524/>>. See also Sean Silcoff, "Industry Players Say Ottawa's Revised Integrity Rules Still Too Harsh", *The Globe and Mail* (7 July 2015), online: <<http://www.theglobeandmail.com/report-on-business/industry-players-say-ottawas-integrity-regime-still-unfair/article25334479/>>.

Suppliers are notified of their ineligibility/suspension and provided information of the process(es) available to them. A supplier is able to come forward at any time and ask for an advanced determination. Upon a determination of ineligibility, the supplier would see their ineligibility period begin immediately. This will incent suppliers to come forward and proactively disclose wrongdoing. An administrative review process of the assessment of affiliates would be available to the supplier.

This process is a step in the right direction, as it provides for proactive advance determinations and a review process for the assessment of affiliates, which will oversee the factually complex issue of control, participation or involvement. The due process provision does not appear to cover the decision as to whether the period should be reduced from 10 to five years, however.²³¹

However, many commentators continue to criticize Canada's debarment regime for being too strict. Barutciski and Kronby argue that the new regime still "tilts too heavily toward punishment and retribution at the expense of promoting a fair and competitive public procurement market and value for the taxpayer."²³² The authors note that a five-year debarment "can still be a death penalty for some companies" and criticize the lack of flexibility and relief for companies that cooperate and implement remedial measures.²³³ Barutciski and Kronby conclude that "[t]he new integrity regime fails to strike the right balance between punishment and deterrence of misconduct (principally the domain of criminal law) and protecting the integrity of federal procurement and taxpayer dollars (the domain of procurement rules)."²³⁴

Writing in 2015, John Manley, president and CEO of the Business Council of Canada and former deputy prime minister, pointed out that corporations in Canada had a strong disincentive to self-report wrongdoing or cooperate in investigations, since a guilty plea or conviction triggered the harsh debarment regime, and deferred prosecution agreements (DPAs) remained unavailable in Canada.²³⁵ Manley advocated for the introduction of DPAs in Canada to incentivize cooperation and provide prosecutors with an additional tool for fighting corporate crime. On the other hand, Stephen Schneider, professor of sociology and criminology at Saint Mary's University, argued that DPAs were a means of allowing corporations that are "too big to fail" to escape criminal liability, which makes corporations

²³¹ Christopher Burkett, "The New Integrity Regime in Canada: Revised Debarment Rules Still Too Strict?" (16 July 2015), online: *Baker McKenzie LLP* <<http://www.canadianfraudlaw.com/2015/07/the-new-integrity-regime-in-canada-revised-debarment-rules-still-too-strict/>>.

²³² Barutciski & Kronby, *supra* note 230. See also "The 'Integrity Framework' Is Still Too Tough", Editorial, *The Globe and Mail* (8 July 2015), online: <<http://www.theglobeandmail.com/opinion/editorials/the-integrity-framework-is-still-too-tough/article25373384/>>.

²³³ Barutciski & Kronby, *supra* note 230.

²³⁴ *Ibid.*

²³⁵ Manley, *supra* note 172.

“more apt to behave badly.”²³⁶ For further discussion of DPAs (which have since been introduced in Canada in the form of “remediation agreements”), see Chapter 6, Section 6.3.

Some have expressed concerns that the strictness of Canada’s debarment policies may leave the government unable to call upon the specialized expertise and in-depth knowledge of certain goods and services providers who have no close competitors.²³⁷ This in turn, can result in economic losses to the government, as well as harm to Canadian taxpayers.²³⁸ An added concern is the detrimental impact the Integrity Regime’s debarment policy may have on Canadian companies and their employees. Responding to the severity of Canada’s debarment policies, a report commissioned by the Canadian Council of Chief Executives emphasizes that “[d]ebarment imposes a direct cost on the debarred firms, but also on innocent parties and society at large.”²³⁹ The report suggests that a “typical” major supplier headquartered overseas would lose sales of over CDN\$350 million per year and lay off 400 workers as a result of debarment, resulting in a net loss to the Canadian economy of over CDN\$1 billion over the ten-year debarment period.²⁴⁰ The report raises concerns over the following potential collateral effects of Canada’s debarment policy:

- (1) a reduction in the number of potential suppliers, which could lead to less variety, poorer quality and higher prices;
- (2) supply-chain impacts, such as small- and medium-sized firms losing contracts due to suspensions of larger companies;
- (3) a “chilling effect” on foreign investment in Canada by firms concerned about the stigma of being debarred in a G7 country; and
- (4) the Canadian government’s procurement rules being out of step with, and harsher than, those in many other countries.²⁴¹

A further basis for criticism is that Canada’s approach to debarment remains uncodified through legislation or regulations. The US, by contrast, has legally codified its debarment provisions under the *Federal Acquisition Regulation*. Canada’s lack of codified debarment policies may leave contractors with a lack of certainty and predictability. Moreover, an uncodified debarment framework is not subject to the sort of legislative review and scrutiny it would otherwise receive if it were codified.

Commentators have argued that the harshness of the Integrity Regime provides a disincentive for companies to participate in the Canadian Competition Bureau’s immunity

²³⁶ Stephen Schneider, “Deferred Prosecution Won’t Put a Dent in Corporate Crime”, *The Globe and Mail* (2 June 2015), online: <<http://www.theglobeandmail.com/report-on-business/rob-commentary/deferred-prosecution-wont-put-a-dent-in-corporate-crime/article24758293/>>.

²³⁷ “The ‘Integrity Framework’ Is Still Too Tough”, *supra* note 232.

²³⁸ Blatchford, *supra* note 220.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

and leniency programs.²⁴² Under the Integrity Regime, companies are automatically debarred if they are convicted of cartel offences (e.g., conspiracies and bid-rigging), and no exception or allowance is made in this regard for parties who participate in the Competition Bureau's immunity and leniency program. Since the success of the immunity and leniency program depends on cartel participants' willingness to come forward and cooperate in return for either full immunity from prosecution or a reduction in penalties, and since the Integrity Regime works against such incentives, companies may feel reluctant to cooperate with either the Competition Bureau or PSPC.

The Integrity Framework now includes a requirement that all bidders provide a complete list of all foreign criminal charges and convictions pertaining to themselves, their affiliates and their proposed first-tier subcontractors that, to the best of the entity's knowledge and belief, may be similar to one of the listed offences.²⁴³ In submitting a bid, the bidder must certify that it has provided a complete list. If, in the opinion of PSPC, a supplier has provided a false or misleading certification or declaration, the bidder is rendered automatically ineligible for ten years. Barutciski et al. criticize the new reporting requirement in the following terms:

the certification requirement with respect to affiliate charges and convictions, in conjunction with the severe penalty for false reporting, seems destined to create compliance nightmares for large multinational companies. Given the broad range of offences – both in Canada and abroad – that might be captured by the new provisions, and the obligation to include charges as well as convictions, this requirement will inject yet further compliance cost and uncertainty into the process for uncertain benefits from the standpoint of preserving integrity in government procurement as opposed to punishment.²⁴⁴

Against this backdrop, in September 2017, the Government of Canada launched a public consultation in relation to a proposal to “[expand] Canada’s toolkit to address corporate wrongdoing.”²⁴⁵ A major focus of the consultation was on whether Canada should enhance its Integrity Regime by making its current suspension and debarment policies more flexible. The consultation included a discussion paper on possible enhancements to the Integrity

²⁴² See Mark Katz & Alysha Manji-Knight, “Canada’s Integrity Regime and Cartel Enforcement” (5 July 2016), online (blog): *Kluwer Competition Law Blog* <<http://kluwercompetitionlawblog.com/2016/07/05/canadas-integrity-regimeunintended-consequences-for-canadian-cartel-enforcement/>>.

²⁴³ See “Standard Instructions – Goods or Services – Non-Competitive Requirements” at 01 Integrity Provisions—Bid, Clause 4(d), online: PSPC <<https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2004/15#integrity-provisions>>. See also Milos Barutciski et al, “Changes to Canada’s Integrity Regime for Public Procurement Create Onerous New Reporting Requirement” (8 April 2016), online: *Bennett Jones LLP* <<https://www.bennettjones.com/Publications-Section/Updates/Changes-to-Canadas-Integrity-Regime-for-Public-Procurement-Create-Onerous-New-Reporting-Requirement>>.

²⁴⁴ *Ibid.*

²⁴⁵ See the Government of Canada’s website devoted to the consultation: “Consultation: Expanding Canada’s Toolkit to Address Corporate Wrongdoing” (last modified 16 December 2020), online: *Government of Canada* <<https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/index-eng.html>>.

Regime, setting out ten issues or considerations that should be taken into account in deciding whether and how to alter the current suspension and debarment policies.²⁴⁶ In February 2018, the Canadian government published a report on its consultations.²⁴⁷ The report indicates that the government received 45 online submissions on the possible adoption of a DPA scheme with 43% from business, 30% from individuals, 20% from law enforcement and other justice sectors, and 7% from NGOs.²⁴⁸ Government officials also held 40 meetings with 370 participants to hear their views (some on DPAs, others on suspensions, debarments, and the Integrity Regime). On the key question related to whether more discretion in fixing periods of debarment is desirable, the report indicated that this question “garnered the most comments and strongest views.”²⁴⁹ On this issue, the report states:

Time period

The majority of participants suggested that the time periods associated with ineligibility be reduced from the current 10 years (reducible to five), which was seen as too long. The principal view was to favour full discretion in the determination of a period of ineligibility, including the ability to reduce the period to zero.

Other views were for:

- an ineligibility period aligned with those of Canada's major trading partners
- a maximum period of between three and five years

Factors to determine time period

Many provided a list of factors to be taken into account when determining an appropriate ineligibility period with some noting that these should be published as part of the policy; others suggested that such factors be used as guidelines rather than be an exhaustive list. Most proposals for factors for consideration included:

- the severity of the offence committed
- self-reporting and cooperation with law enforcement
- taking corrective action
- establishing compliance programs
- efforts at restitution
- repeat offences

²⁴⁶ Integrity Regime Stream Discussion Guide, *supra* note 215.

²⁴⁷ Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: What We Heard*, P4-78/2017E-PDF (PSPC, 2018), online (pdf): <<https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/rapport-report-eng.pdf>>.

²⁴⁸ *Ibid* at 7.

²⁴⁹ *Ibid* at 9.

Other factors raised were:

- the consideration of the impacts on employees, the economy and government
- the inclusion of exemptions from debarment for participants in pre-existing cooperation programs, such as the Competition Bureau's Leniency program

There was a recognition that introducing a considerable amount of discretion into the Integrity Regime could pose risks of inconsistent decision making and reduced predictability in determination processes. Therefore, the importance of transparency and due process in the determination process was stressed, including:

- an opportunity for suppliers to present their side / facts and submissions
- the publication of guidelines governing the exercise of discretion
- procedures to appeal and to reduce debarment periods

The need to integrate a safe-harbour provision that would allow companies to self-disclose adverse information without being punished was identified. The possibility of a reassessment of the debarment decision after a certain amount of time was also raised.²⁵⁰

Shortly after the publication of this report, in March 2018, PSPC announced that the Integrity Regime would be "enhanced" to:

- introduce greater flexibility in debarment decisions (rendering companies ineligible from receiving federal contracts or real property agreements)
- increase the number of triggers that can lead to debarment
- explore alternative measures to further mitigate the risk of doing business with organized crime
- expand the scope of business ethics covered under the regime into key areas such as combatting human trafficking and the protection of labour rights and the environment[.]²⁵¹

The announcement also advised that the government had introduced a "made-in-Canada" version of a DPA regime, to be known as a Remediation Agreement Regime.²⁵²

²⁵⁰ *Ibid* at 9–10.

²⁵¹ PSPC, News Release, "Canada to Enhance Its Toolkit to Address Corporate Wrongdoing" (27 March 2018), online: <<https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html>>.

²⁵² *Ibid*.

The proposed changes to the Integrity Regime were slated to come into effect on January 1, 2019. However, before that date, the government announced that, as a result of increased “public discourse regarding corporate wrongdoing and governments’ responses to this type of misconduct” (an indirect reference to the SNC-Lavalin affair discussed below), it would “take additional time to assess aspects of the Policy and possible next steps regarding the Integrity Regime.”²⁵³ To date, the proposed changes have not been implemented.

The government has, however, published a draft revised *Ineligibility and Suspension Policy*.²⁵⁴ Notably, this policy contemplates the following:

- the creation of a Registrar of Ineligibility and Suspension, an independent position responsible for making determinations of ineligibility and suspension, setting periods of ineligibility and suspension, and entering into administrative agreements;
- greater flexibility in setting periods of ineligibility and suspension, with a maximum, rather than mandatory, ten-year period, and discretion to set any period under this maximum based on enumerated factors to be considered (e.g., the seriousness of the conduct and the steps taken to address concerns);
- a wider set of circumstances that may trigger ineligibility or suspension, including new categories of covered offences (e.g., certain human trafficking, *Canada Elections Act*, *Canada Labour Code*, environmental and provincial offences), as well as suspension for “professional misconduct or acts or omissions of the supplier which adversely reflect on the commercial integrity of the supplier”; and
- new procedural fairness provisions and review mechanisms.²⁵⁵

The enhanced discretion and procedural protections contemplated by the draft policy will no doubt be considered a welcome development by those who consider the current regime to be unduly harsh and/or arbitrary.²⁵⁶ On the other hand, industry may view the expanded triggers for ineligibility or suspension less favourably.

A key aspect of the context surrounding the recent developments in relation to the Integrity Regime and the introduction of DPAs (“remediation agreements”) is the SNC-Lavalin

²⁵³ “Integrity Regime: Annual Report—April 1, 2018, to March 31, 2019” (last modified 16 December 2020), online: PSPC <<https://www.tpsgc-pwgsc.gc.ca/ci-if/rpri-irr-2018-2019-eng.html>>.

²⁵⁴ “Revised Ineligibility and Suspension Policy—Coming into Effect (Date to be Determined)” (last modified 16 December 2020), online: Government of Canada <<https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-rev-eng.html>>.

²⁵⁵ *Ibid.*

²⁵⁶ Christopher Naudie, Michael Fekete & Peter Franklyn, “Government of Canada Announces Significant Expansion of Integrity Regime for Federal Contracting” (29 March 2018), online: Osler LLP <<https://www.osler.com/en/resources/regulations/2018/government-of-canada-announces-significant-expansion-of-integrity-regime-for-federal-contracting>>.

affair.²⁵⁷ In April 2013, SNC-Lavalin, Canada's largest engineering firm, and its affiliates were debarred for a ten-year period by the World Bank for corruption relating to the Padma Bridge project (see Chapter 1, Section 1.2).²⁵⁸ After SNC-Lavalin agreed to the ten-year ban, the RCMP laid corruption and fraud charges against SNC-Lavalin and two subsidiaries over alleged bribery in Libya. The company argued that the strict Canadian debarment rules could destroy the company.²⁵⁹ In December 2015, SNC-Lavalin became the first corporation to sign an administrative agreement under the new Integrity Regime, which confirmed the company's eligibility as a supplier to the Canadian government while the foreign bribery charges were pending.²⁶⁰ As discussed in Chapter 12, Section 1.3, in December 2019, a construction subsidiary of SNC-Lavalin pleaded guilty to one count of fraud over CDN\$5,000 under section 380 of the *Criminal Code* in connection with its activities in Libya between 2001 and 2011.²⁶¹ As part of the settlement, SNC-Lavalin agreed to pay a record fine of CDN\$280 million, payable in equal instalments over five years, and to be subject to a three-year probation order. By agreeing to this outcome, SNC-Lavalin avoided automatic ineligibility under the Integrity Regime as a conviction under section 380 of the *Criminal Code* results in automatic ineligibility only if the fraud was committed against Her Majesty.²⁶² SNC-Lavalin may, however, be subject to debarment under other debarment regimes, though the company has indicated that it believes the guilty plea will not result in debarment.²⁶³

The government's consultation on potential changes to the Integrity Regime, the subsequent draft policy and political factors all point towards a revised regime that reflects greater flexibility, stronger procedural protections and a broader scope of application. Whether this

²⁵⁷ "Fixing the Bad Policy at the Root of the Trudeau Government's SNC-Lavalin Scandal", Editorial, *Globe and Mail* (20 December 2019), online:

<<https://www.theglobeandmail.com/opinion/editorials/article-fixing-the-bad-policy-at-the-root-of-the-trudeau-governments-snc/>>.

²⁵⁸ World Bank, Press Release, 2013/337/INT, "World Bank Debars SNC-Lavalin Inc and Its Affiliates for 10 Years" (17 April 2013), online: <<https://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years>>.

²⁵⁹ Barrie McKenna, "SNC Case Shows Downside of Ottawa's Strict Anti-Corruption Regime", *The Globe and Mail* (19 February 2015), online: <<http://www.theglobeandmail.com/report-on-business/snc-case-shows-downside-of-ottawas-strict-anti-corruption-regime/article23087586/>>.

²⁶⁰ SNC-Lavalin, Press Release, "SNC-Lavalin Signs an Administrative Agreement under the Government of Canada's New Integrity Regime" (10 December 2015), online:

<<https://www.snc-lavalin.com/en/media/press-releases/2015/10-12-2015>>.

²⁶¹ SNC-Lavalin, Press Release, "SNC-Lavalin Group Settles Federal Charges" (18 December 2019), online: <<https://www.snc-lavalin.com/en/media/press-releases/2019/18-12-2019>>; Kamila Hinkson, "SNC-Lavalin Pleads Guilty to Fraud for Past Work in Libya, Will Pay \$280M Fine", *CBC News* (18 December 2019), online: <<https://www.cbc.ca/news/canada/montreal/snc-lavalin-trading-court-libya-charges-1.5400542>>.

²⁶² John W Boscariol, Andrew Matheson & Robert A Glasgow, "SNC-Lavalin Pleads Guilty in Canada's Most Significant Foreign Corruption Case to Date" (20 December 2019), online: *McCarthy Tétrault* <<https://www.mccarthy.ca/en/insights/blogs/terms-trade/snc-lavalin-pleads-guilty-canadas-most-significant-foreign-corruption-case-date>>.

²⁶³ SNC-Lavalin, Press Release, "SNC-Lavalin Group Settles Federal Charges" (18 December 2019), online: <<https://www.snc-lavalin.com/en/media/press-releases/2019/18-12-2019>>.

forthcoming revised regime will better achieve the primary objective of ensuring integrity in public procurement remains to be seen.

Finally, Quebec's *Act Respecting Contracting by Public Bodies*²⁶⁴ contains a debarment policy unique to the province. While a comprehensive analysis of this legislation is not possible due to space constraints, it is worth noting that Quebec's legislation provides for automatic debarment from the public sector bidding process where the corporation has been found guilty of prescribed offences—including offences under the *CFPOA*—in the preceding five years.²⁶⁵

9. DISQUALIFICATION AS COMPANY DIRECTOR

Convictions for serious criminal offences such as bribery have various collateral consequences, some mandatory and others discretionary. For example, a conviction for a serious offence can result in disqualification to hold a public office or ineligibility to travel to a foreign country. In this section, the possibility of disqualification from being a director or officer of a company is discussed.

9.1 US

Pursuant to the US *Securities Exchange Act*,²⁶⁶ the SEC can apply to a federal court for permanent or temporary injunctive relief.²⁶⁷ A court can prohibit conditionally, unconditionally, or permanently any person who has violated securities laws and who demonstrates unfitness from serving as an officer or director.²⁶⁸ The standard for a bar was substantially broadened with the passing of the *Sarbanes Oxley Act*,²⁶⁹ which changed the standard from “substantial unfitness” to “unfitness.”²⁷⁰

The SEC itself cannot impose the remedy via an administrative proceeding; it must be done by a court, although the SEC may negotiate a “voluntary” director disqualification as part of a settlement agreement or a DPA.²⁷¹ The courts have broad discretion to impose an appropriate remedy.²⁷² When determining the previous standard of substantial unfitness, courts looked at the non-exhaustive “*Patel* factors”: “(1) the ‘egregiousness’ of the

²⁶⁴ *Act Respecting Contracting by Public Bodies*, CQLR c C-65.1, Chapter V.1.

²⁶⁵ *Ibid*, s 21.1.

²⁶⁶ *Securities Exchange Act*, 15 USC, §§ 78a-78qq (1934).

²⁶⁷ *Ibid*, § 78u(d)(1); see also *Securities Act of 1933*, 15 USC §§ 77a-77mm (1933), in which a similar provision has been enacted in, § 77t(d)(1).

²⁶⁸ *Securities Exchange Act*, *ibid*, § 78u(d)(2); See also *Securities Act of 1933*, *ibid*, § 77t(e) for a similar provision.

²⁶⁹ *Sarbanes Oxley Act of 2002*, Pub L No 107-204, 116 Stat 745.

²⁷⁰ *Ibid*, § 305(1).

²⁷¹ Michael Dailey, “Comment: Officer and Director Bars: Who is ~~Substantially~~ Unfit to Serve After *Sarbanes-Oxley*?” (2003) 40:3 Hous L Rev 837 at 850.

²⁷² *SEC v Penn*, 2020 US Dist LEXIS 46440 (SD NY 2020); *SEC v Patel*, 61 F (3d) 137 (2nd Cir 1995) [*Patel*]; *SEC v Posner*, 16 F (3d) 520 (2nd Cir 1994) [*Posner*].

underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur."²⁷³ These factors remain relevant under the new lower standard.

Since a permanent bar may result in a "loss of livelihood and stigma,"²⁷⁴ courts require more than what would be required for a non-permanent bar. In fact, Congress intended the permanent bar remedy to be used with caution.²⁷⁵ A court should first consider a conditional bar.²⁷⁶ The following five cases are examples of the courts' approach to these officer or director bars.

In *Posner*, the US Second Circuit Court of Appeals upheld a permanent bar imposed by a US District Court.²⁷⁷ The Court focused on the high degree of scienter in violating the securities laws, several past violations (including conspiracy, tax evasion and filing false tax returns), the high likelihood of future violations, and the fact that the defendants had refused to testify (the Court inferred that the defendants' testimony would have negatively impacted their case). The Court stated that such a punishment would serve as a "sharp warning" to other violators.²⁷⁸

In *Boey*, the US District Court of New Hampshire refused to issue a permanent bar because the defendant had no prior history of violations and there was no plausible risk that they would reoffend. Over a decade had passed since their violation. As such, a five-year bar was held to be sufficient. The Court also refused to issue a permanent injunction because adequate punishment had already been imposed (e.g., the five-year officer and director bar, a civil penalty and disgorgement).

In *Selden*, the US District Court of Massachusetts imposed a two-year officer and director bar along with other monetary penalties. The Court noted that the offences were particularly serious because the defendant was a director and CEO who made misleading statements over several years and acted with a high degree of scienter. Although it was their first and only violation, there was a strong probability of reoccurrence. The Court also pointed out that the defendant had a minimal economic stake in the violation and that they cooperated with the investigation, although their acknowledgement of responsibility was "less than stellar."²⁷⁹

In *Dibella*, the US District Court of Connecticut refused both an officer and director bar and a permanent injunction. The Court focused on the fact that the defendant was not serving

²⁷³ *Patel*, *ibid* at 141; see also *SEC v Boey*, 2013 US Dist LEXIS 102102 at 6-7 (D NH 2013) and *SEC v Dibella*, 2008 US Dist LEXIS 109378 at 40 (D Conn 2008) for further discussion. See also *SEC v Selden*, 632 F Supp (2d) 91 (D Mass 2009) [*Selden*] and *SEC v Chan*, 465 F Supp (3d) 18 (D Mass 2020) [*Chan*], in which the US District Court of Massachusetts expressly endorses the *Patel* factors.

²⁷⁴ *Patel*, *ibid* at 142.

²⁷⁵ *Dailey*, *supra* note 271 at 851.

²⁷⁶ *Patel*, *supra* note 272; *Chan*, *supra* note 273.

²⁷⁷ See *SEC v Drexel Burnham Lambert Inc*, 837 F Supp 587 (SD NY 1993) for the lower court's reasons.

²⁷⁸ *Posner*, *supra* note 272 at 522.

²⁷⁹ *Selden*, *supra* note 273 at 100.

on any boards of publicly traded companies, had never served as an officer, had no prior history of violations and would be unlikely to commit an offence in the future.

In *Penn*, the SEC moved for summary judgment against two entities, which Lawrence Penn controlled and used to commit securities violations. Penn managed a private equity fund, Capital Acquisitions Secondary Opportunities LP (the “Fund”), from 2007 until 2014. During this time, Penn ran a scheme diverting over \$9,000,000 from the Fund to entities under the defendant’s control. Penn pleaded guilty to grand larceny and falsifying business records and made a number of admissions when doing so. The Court found that the undisputed facts as to Penn’s conduct, knowledge and relationship with the two entities established their liability. It then considered, among other remedies, whether it was appropriate to impose a permanent injunction. The Court reinforced that the question that a court must answer, in deciding whether to issue a permanent injunction, is whether there is a reasonable likelihood that the wrong will be repeated. In determining that a permanent injunction was warranted in this case, the Court highlighted that the acts were egregious, there was a high degree of scienter, and there was substantial planning. In addition, the incident was not an isolated one and the defendants had not accepted responsibility.

9.2 UK

Individuals convicted of indictable offences in the management of a company face disqualification from being a director or officer of a company under the *Company Directors Disqualification Act 1986* (*CDDA*).²⁸⁰ The disqualifications are mandatory in some circumstances and discretionary in other circumstances.

Section 6 of the *CDDA* provides that a court must make a disqualification order against a director or former director of a company that has become insolvent where “his conduct as a director of that company (either taken alone or taken together with his conduct as a director of one or more other companies or overseas companies) makes him unfit to be concerned in the management of a company.”²⁸¹ A disqualification under section 6 must last for a minimum of two years and may be in place for a maximum of 15 years.²⁸²

More generally, section 2 of the *CDDA* provides discretion for a court to “make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management liquidation or striking off of a company with the receivership of a company’s property or with his being an administrative receiver of a company.” This disqualification, when made by a court of summary jurisdiction, may last for a maximum period of five years. In all other cases, the maximum period of disqualification is 15 years.²⁸³

²⁸⁰ *Company Directors Disqualification Act 1986* (UK), c 46 [*CDDA*].

²⁸¹ *Ibid*, s 6. See also s 9A of *ibid*, which provides for a similarly mandatory order in instances where a company has breached competition law.

²⁸² *Ibid*, s 6(4).

²⁸³ *Ibid*, s 2(3).

Disqualification orders provide, in respect of the person subject to the order that for the period specified in the order:

- a) he shall not be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of the court, and
- b) he shall not act as an insolvency practitioner.²⁸⁴

In specified circumstances, set out in sections 5A, 7, 8, 8ZC and 8ZE of the CDDA, the Secretary of State is also empowered to accept a disqualification undertaking from a person that, for the period of the undertaking, they will not act in a role which would be prohibited by a disqualification order.²⁸⁵

Disqualification can also occur by voluntary arrangement. In *R v Hibberd and Another*, two company directors defrauded a bank and loan company of over £1.5 million.²⁸⁶ The Court declined to make a disqualification order because such an order had already been made under a voluntary arrangement with the Department of Trade and Industry.²⁸⁷

A leading case on disqualification is the 1998 case of *R v Edwards*. In *Edwards* the appellant was charged with a number of counts of conspiracy to defraud. Edwards eventually pleaded guilty to one count and, as part of the sentence, was disqualified from being a director for 10 years. On appealing the imposition of this disqualification, the Court denied the appellant's argument that no disqualification should be imposed at all, stating:

The rationale behind the power to disqualify is the protection of the public from the activities of persons who, whether for reasons of dishonesty, or of naivety or incompetence in conjunction with the dishonesty of others, may use or abuse their role and status as a director of a limited company to the detriment of the public. Frauds of the kind in this case archetypally give rise to a situation in which the exercise of the court's power is appropriate.²⁸⁸

The Court then drew on guidance from the case of *R v Millard*, where disqualification was divided into three brackets:

- (i) the top bracket of disqualification for periods over ten years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again.

²⁸⁴ *Ibid*, s 1(1).

²⁸⁵ *Ibid*, s 1A(1).

²⁸⁶ *R v Hibberd and Another*, [2009] EWCA Crim 652.

²⁸⁷ *Ibid* at para 3.

²⁸⁸ *R v Edwards*, [1998] 2 Cr App R (S) 213 (sentencing reasons of Potter LJ).

- (ii) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is relatively not very serious.
- (iii) The middle bracket of disqualification from six to ten years should apply for serious cases which do not merit the top bracket.²⁸⁹

Ultimately, the appellant in *Edwards* was unemployed and persuaded to participate in a fraudulent enterprise as a director, a role for which he was inexperienced and unsuited. The Court found that a ten-year disqualification order was too harsh and substituted a three-year order.

In *R v Cadman*,²⁹⁰ the Court of Appeal Criminal Division reviewed a number of decisions regarding disqualification orders:

- 24. ... *Sevenoaks Stationers (Retail) Limited* [1991] CH 164, Court of Appeal Civil Division, dealt with an accountant who over five years with five separate companies which had all become insolvent had accrued total indebtedness of approximately £560,000. There were no audited accounts and he had traded whilst insolvent in relation to at least one company. This amounted to incompetence or negligence in a very marked degree falling short of dishonesty. His disqualification period was reduced to five years. This case is memorable for the trio of brackets it established, later to be adopted with approval in *Millard* (1994) 15 Cr. App. R. (S.) 445. (1) The top bracket, periods over ten years, should be reserved for particularly serious cases. These may include cases where a doctor who has already one period of disqualification imposed upon him falls to be disqualified yet again. (2) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious. (3) The middle bracket of disqualification, from six to ten years, should apply to serious cases which do not merit the top bracket.
- 25. In *Millard* [1994] 15 Cr App R(S) 445 that approach was not only approved but applied so as to substitute for a 15-year disqualification one of eight years. An appellant had fraudulently traded using six company vehicles, creating a deficiency of £728,000 odd. He had been convicted and the fraudulent trading spanned nearly four years. He had three previous convictions for dishonesty. Miss Small readily accepts that what assistance that case can offer is tempered by its age.
- 26. *Robertson* [2006] EWCA Crim 1289 was an appellant of 49 and of good character. He was convicted of fraudulent trading during some six months. His business defrauded the DFES in respect of an ILA. The department paid his company £1.4 million. His disqualification period, which was not challenged in the Court of Appeal, was five years.

²⁸⁹ *R v Millard*, [1994] 15 Crim App R 445.

²⁹⁰ *R v Cadman*, [2012] EWCA Crim 611.

27. *Sukhdabe Singh More* [2007] EWCA Crim 2832 was an appellant pleading guilty to one money laundering offence. Over some two months he had allowed his business account to be used to launder £136,000. He had two previous convictions for dishonesty. The Court of Appeal reduced his disqualification to three years.
28. *Jules Paul Simpson* [2007] EWCA Crim 1919 was an appellant who had pleaded guilty to conspiracy to defraud. For the last months of his legitimate business he carried on knowing it to be insolvent. The loss to creditors was £200,000. He was disqualified for six years.
29. *Nigel Corbin* (1984) 6 Cr App R(S) 17 is even older than Robertson but Miss Small prays it in aid since it featured an appellant involved with three originally legitimate businesses. Over 18 months he admitted nine counts of deception. A criminal bankruptcy order was made in the sum of £35,000. The Court of Appeal left untouched his disqualification period of five years.
30. In *Anthony Edwards* [1998] 2 Cr App R(S) 213 the assistance to this court lies in a comment:

“The rationale behind the power to disqualify is the protection of the public from ... persons who, whether for reasons of dishonesty, or of naivety or incompetence in conjunction with the dishonesty of others, may use or abuse their role and status as a director of a limited company to the detriment of the public.”
31. In *Attorney General's Reference No 88 of 2006* [2006] EWCA Crim 3254 the disqualification periods were in excess of six years, more often seen in cases involving carousel frauds. Those tended to involve greater sums and greater sophistication, making the perpetrators a great risk to the public if permitted to act in the management of companies in the future. The first three appellants had caused a £20 million loss over 16 months. To the clear astonishment of the Court of Appeal no disqualification period had been imposed in the court below. On the first three appellants the court imposed an eight year disqualification. The final appellant secured a benefit of £1.5 million during one month and was disqualified for four years.
32. In *Sheikh and Sheikh* [2011] 1 Cr App R(S) 12 the court upheld a ten year period of disqualification. The case featured illegal production of pirated DVDs. The appellants were 29 and 27. They had been convicted after a lengthy trial and there was no evidence of remorse. The turnover was in excess of £6 million. The offending lasted a number of years and was very sophisticated, crossing international boundaries and exploiting vulnerable immigrants.
33. In *Brealy* [2010] EWCA Crim 1860 disqualification of a director convicted of corruption showed that for six years he had allowed a local counsellor to live rent free whilst being a director of a property business which required a number of building consents. The value of the

nonpayment of rent was some £34,000. The disqualified appellant was of good character, but the court said that his offending struck at the very heart of a democratic government. It was an aggravating feature that the offending continued for some six years. Five years' disqualification was upheld.

The guidance set out in *Sevenoaks* remains apposite for courts determining the appropriate length of a director's disqualification. For example, more recently, in *Secretary of State for Business Innovation and Skills v Rahman*,²⁹¹ the Court reviewed the *Sevenoaks* principles. It found, with respect to length of disqualification, that "the same approach is appropriate under s.2 and s.6 and that the *Sevenoaks Stationers* principles ought to be applied under s.2 as much as under s.6," and further commented that "civil and criminal courts should be applying the same standards: the purpose of disqualification - to protect the public from the activities of persons unfit to be concerned in the management of a company - is the same in both kinds of court. That is the approach that the CACD took in *Cadman*." It agreed with commentary that:

although s.2 and s.6 are different gateways to disqualification, with different rules at that stage of the inquiry, once the court, be it criminal or civil, is satisfied that the s.2 gateway has been passed through, it should apply the same principles to the exercise of its discretion as have been developed in the extensive jurisprudence under s.6 on the question of unfitness, unless the statute otherwise requires.²⁹²

An example of a statute requiring otherwise for example, would be found in the mandatory minimum two-year disqualification that must be applied under section 6 (and which is not applicable to section 2).²⁹³

9.3 Canada

Some provincial corporate statutes, including those in British Columbia²⁹⁴ and New Brunswick, have a "director disqualification" rule for persons convicted of certain offences. For example, a person is not qualified to become or to continue as a director of a British Columbia company for five years after the completion of a sentence for an offence in connection with the management of a business or an offence involving fraud.²⁹⁵ Nevertheless, the *Canada Business Corporations Act*,²⁹⁶ the *Ontario Business Corporations Act*,²⁹⁷ and most other provincial corporate statutes have no such disqualification provision.

²⁹¹ *Secretary of State for Business Innovation and Skills v Rahman*, [2017] EWHC 2468 (Ch).

²⁹² *Ibid* at para 50.

²⁹³ *Ibid*.

²⁹⁴ *Business Corporations Act*, SBC 2002, c 57, s 124(2)(d).

²⁹⁵ *Ibid*.

²⁹⁶ See, e.g., *Canada Business Corporations Act*, 1985 RSC 1985, c C-44 [CBCA], s 105 (*Qualifications of directors*).

²⁹⁷ See, e.g., *Business Corporations Act*, RSO 1990, c B 16, s 118 (*Qualifications of directors*).

However, disqualification can arise under provincial securities legislation. The powers of disqualification can be quite broad. For example, under section 127(1)(8) of the *Ontario Securities Act*, the Securities Commission may “in the public interest” make an order that “a person is prohibited from becoming or acting as a director or officer of any issuer [i.e., a company issuing securities under the *Ontario Securities Act*].”²⁹⁸ The “public interest” is a very broad term and includes prior acts of fraud and corruption. Other provincial securities legislation confer similar disqualification powers.²⁹⁹

The “public interest” jurisdiction of the securities commissions confers on them broad powers. The commissions can make orders pursuant to “public interest” jurisdiction even where there has been no breach of securities law. The provisions are regulatory and contain administrative sanctions, meaning the commission’s public interest jurisdiction is preventative and protective rather than punitive.

10. MONITORSHIP ORDERS

10.1 UNCAC and OECD

There is no specific mention in either Convention of imposing an independent monitor on a corporation that has been convicted of a corruption offence.

10.2 US

According to Robert Tarun and Peter Tomczak, the imposition of an independent monitor on an offending corporation is a frequent condition of a DOJ or SEC settlement.³⁰⁰ Typically, the monitorship lasts for three years with the monitor filing two or three reports yearly with DOJ or SEC. The criteria for appointing monitors and the scope of their duties are set out in a DOJ policy memorandum known as the Morford Memorandum.³⁰¹ Tarun notes that “more than half of the DOJ’s 2016 FCPA resolutions provided for a monitorship. The current

²⁹⁸ *Securities Act*, RSO 1990, c S5 [OSA], s 127(1). See also *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, [2001] 2 SCR 132, 2001 SCC 3 at paras 39-45.

²⁹⁹ In Alberta, *Securities Act*, RSA 2000, c S-4, s 198(1)(e); in British Columbia, *Securities Act*, RSBC 1996, c 418, s 161(1)(d); in Manitoba, *The Securities Act*, RSM 1988, c S50, s 148; in New Brunswick, *Securities Act*, SNB 2004, c S-5.5, s 184(1)(i); in Newfoundland, *Securities Act*, RSN 1990, c S-13, s 127(1)(h); in the Northwest Territories, *Securities Act*, SNWT 2008, c 10, ss 58-63; in Nunavut, *Securities Act*, SNu 2008, c 12, ss 58-63; in Nova Scotia, *Securities Act*, RSNS 1989, c 418, ss 134, 135A, 136A, 145; in Prince Edward Island, *Securities Act*, RSPEI 2007, c 17, ss 58-63; in Quebec, *Securities Act*, RSQ v-1.1, S-42.2, s 262.1; in Saskatchewan, *Securities Act*, SS 1988-99, c S-42.2, ss 134, 134.1, 135.1, 135.2; in Yukon, *Securities Act*, SY 2002, c 16, ss 58-63.

³⁰⁰ Tarun & Tomczak, *supra* note 202 at 61.

³⁰¹ Memorandum from Craig S Morford, Acting Deputy Attorney General to Heads of Department Components United States Attorneys (7 March 2008), “Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations”, online (pdf): <<https://www.justice.gov/sites/default/files/dag/legacy/2008/04/15/dag-030708.pdf>>.

prevalence of appointed monitors is consistent with the DOJ's increased emphasis on companies adopting and maintaining effective compliance programs.”³⁰²

The Morford Memorandum was recently supplemented by the Benczkowski Memorandum,³⁰³ which “provides new and important insights into the selection of monitors and the scope of their work”³⁰⁴ and, perhaps suggests a movement away from imposing monitorships. The Benczkowski Memorandum notes:

[T]he imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor. The Morford Memorandum explained that, “[a] monitor should only be used where appropriate given the facts and circumstances of a particular matter[,]” and set forth the two broad considerations that should guide prosecutors when assessing the need and propriety of a monitor: “(1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation.” The Memorandum also made clear that a monitor should never be imposed for punitive purposes.³⁰⁵

Some of the most important clarifications the Benczkowski Memorandum makes include:

- (1) The Benczkowski Memorandum has expanded application. While the Morford Memorandum applies only to DPAs and NPAs, the Benczkowski Memorandum also applies to plea agreements, as long as a presiding court approves.
- (2) The Morford Memorandum sets out two broad considerations guiding prosecutors when determining whether a monitor is necessary: (1) the potential benefits that employing a monitor may have for the corporation and the public and (2) the cost of a monitor and its impact on the operations of a

³⁰² Tarun, *ibid* at 61.

³⁰³ Memorandum from Brian A Benczkowski, Assistant Attorney General, to All Criminal Division Personnel (11 November 2018), “Selection of Monitors in Criminal Division Matters” [The Benczkowski Memorandum], online (pdf): <https://dlbjbjzgnk95t.cloudfront.net/1091000/1091818/selection_of_monitors_in_criminal_division_matters_memo_0.pdf>.

³⁰⁴ Matthew R Hubbell & Laura A Musselman, “The Benczkowski Memorandum: DOJ’s New Guidance on Corporate Monitors” (25 October 2018), originally online: *K & L Gates* <<https://www.klgates.com/The-Benczkowski-Memorandum-DOJs-New-Guidance-on-Corporate-Monitors-10-24-2018>>. See also Judith Seddon, Chris Stott & Andris Ivanovs, “Monitorships in the United Kingdom” in Anthony S Barkow, Neil M Barofsky & Thomas J Perrelli, eds, *The Guide to Monitorships*, 2nd ed (London, UK: Global Investigations Review, 2020) 125, online: <<https://globalinvestigationsreview.com/guide/the-guide-monitorships/second-edition/article/11-monitorships-in-the-united-kingdom>> at footnote 8 where Seddon, Stott and Ivanovs suggest that the Benczkowski Memorandum will, in theory, bring the United States more in line with the UK’s approach.

³⁰⁵ The Benczkowski Memorandum, *supra* note 303 at 2.

corporation. The Benczkowski Memorandum elaborates on the first consideration by providing a list of non-exclusive factors to consider and elaborates on the second by “noting that Criminal Division attorneys should consider not only the projected monetary costs to the business organization, but also whether the proposed scope of a monitor’s role is appropriately tailored to avoid unnecessary burdens on the business’s operations.”³⁰⁶

- (3) It sets out a clear, step-by-step process for monitor selection.³⁰⁷

10.3 UK

Monitorships are assuming an increasingly important role in the UK, in particular in the context of DPAs. Judith Seddon, Chris Stott, and Andris Ivanovs note that:

Before the introduction of deferred prosecution agreements (DPAs) to the UK legal system, monitors were appointed under negotiated settlements entered into between cooperating corporate entities and enforcement authorities, but the statutory foundations for their appointment were less solid and appointments were largely the product of prosecutorial improvisation. Monitors were perceived squarely as a feature of the US corporate crime enforcement landscape and their appointment in the United Kingdom drew significant judicial opprobrium.³⁰⁸

That said, Seddon, Stott, and Ivanovs also caution against assuming that monitorships will become as common or extensive in the UK as they are in the United States. Monitorships in the UK remain narrower and less routine.³⁰⁹

The *Crime and Courts Act* (CCA),³¹⁰ along with relevant guidance, allows for monitorship to be used to oversee a compliance program imposed by a DPA, but it does not prescribe or encourage such enforcement.³¹¹ Schedule 17 of the CCA provides for entering into DPAs, while section 5(3)(e) of the Schedule reads:

- (3) The requirements that a DPA may impose on P include, but are not limited to, the following requirements—

...

- (e) to implement a compliance programme or make changes to an existing compliance programme relating to P’s policies or to the training of P’s employees or both;³¹²

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ Seddon, Stott & Ivanovs, *supra* note 304.

³⁰⁹ *Ibid.*

³¹⁰ *Crime and Courts Act 2013* (UK), c 22 [CCA].

³¹¹ Seddon, Stott & Ivanovs, *supra* note 304.

³¹² See also CCA, *supra* note 310, s 45.

The CCA is informed by the *Deferred Prosecution Agreements Code of Practice* (the *DPA Code*),³¹³ which must be taken into account when negotiating, applying to the court for DPAs and overseeing DPAs.³¹⁴ Sections 7.11–7.22 of the *DPA Code* deal specifically with monitors. Section 7.11 states:

An important consideration for entering into a DPA is whether P [the organisation being considered for prosecution] already has a genuinely proactive and effective corporate compliance programme. The use of monitors should therefore be approached with care. The appointment of a monitor will depend upon the factual circumstances of each case and must always be fair, reasonable and proportionate.³¹⁵

Recently, in October 2020, the Serious Fraud Office updated its *SFO Operational Handbook (Operation Handbook)* to include a chapter providing more guidance with respect to Deferred Prosecution Agreements,³¹⁶ a section of which deals specifically with those considerations that are ordinarily relevant for monitorship. That *Operation Handbook* states:

Less onerous alternatives to a monitorship can also be considered such as an external reviewer, to be agreed by the SFO. Careful consideration will need to be given to the process of selection, in particular any conflicts of interest.³¹⁷

There are other ways in which corporate behaviour can be monitored to prevent future criminal conduct. One such way is through a Serious Crime Prevention Order (SCPO). Such SCPOs are governed by Part 1 of the *Serious Crime Act 2007 (SCA)*.³¹⁸ When a corporate defendant is convicted of a ‘serious offence’ (including bribery, fraud or money laundering) a SCPO can be made against that company if there are “reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime.”³¹⁹ It should be noted that SCPOs are not specifically directed towards corporate crime. They have been used to impose restrictions on individuals following conviction, but have not been used to resolve white-collar investigations. The person who is subject to such an order may have to provide documents and information to a monitor, answer questions, and cover monitor-related costs.³²⁰

³¹³ UK, Crown Prosecution Service & Serious Fraud Office, *Deferred Prosecution Agreements Code of Practice* (London, UK: Crown Prosecution Service & Serious Fraud Office, 2014), online (pdf): <<https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf>>.

³¹⁴ Seddon, Stott & Ivanovs, *supra* note 304.

³¹⁵ See also *ibid*.

³¹⁶ “Deferred Prosecution Agreements” (last visited 1 October 2021), online: *Serious Fraud Office* <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>>.

³¹⁷ “Deferred Prosecution Agreements - Guidance for Corporates” (last visited 1 October 2021), online: *Serious Fraud Office* <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/>>.

³¹⁸ *Serious Crime Act 2007 (UK)*, c 27.

³¹⁹ CCA, *supra* note 310, s 1(b); Seddon, Stott & Ivanovs, *supra* note 304.

³²⁰ Seddon, Stott & Ivanovs, *supra* note 304.

Another way is through a Civil Recovery Order (CRO), provided for by Part 5 of the *Proceeds of Crime Act 2002 (POCA)*.³²¹ CROs are civil remedies allowing enforcement authorities to recover property obtained as a result of unlawful conduct.³²² CROs were seen as an attractive way of concluding investigations through negotiation before DPAs. As Seddon, Stott, and Ivanovs note, “There is no equivalent to the DPA Code in respect of CROs and no constraints on the appointment of monitors under them (beyond those required to settle any civil proceedings, namely acceptable wording for a consent order and associated settlement documents).”³²³ This can lead to CROs being negotiated with limited court influence on the contents and in a manner, which is favourable to the company involved.³²⁴

10.4 Canada

The *Canada Business Corporations Act (CBCA)*,³²⁵ along with those provincial corporate statutes modeled after the CBCA, does not contain a power to impose specifically a monitorship order on a corporation convicted of a serious crime of fraud or corruption. However, the provincial securities acts generally do have a power somewhat analogous to monitorship. For example, section 127(1)(4) of the *Ontario Securities Act* authorizes the Ontario Securities Commission to make an order in the public interest “that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Securities Commission.”³²⁶

Under the 2015 Integrity Regime, quoted in Section 8.6, a third-party monitor may be imposed on a company through an administrative agreement if the company’s ten-year debarment period is reduced, if a public interest exception to debarment is made or if the company is suspended.

Another route for monitoring a corporation is the use of a probation order. Organizations convicted of a *Criminal Code* offence, including fraud, bribery and corruption, can be placed on probation for a maximum of three years. The judge can impose, as conditions of that probation order, one or more of the following:

- (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;

³²¹ *Proceeds of Crime Act 2002 (UK) c 29 [POCA]*.

³²² *Ibid*, s 242.

³²³ Seddon, Stott & Ivanovs, *supra* note 304.

³²⁴ *Ibid*.

³²⁵ *CBCA*, *supra* note 296.

³²⁶ *OSA*, *supra* note 298, s 127(1)(4).

- (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- (f) provide, in the manner specified by the court, the following information to the public, namely,
 - (i) the offence of which the organization was convicted,
 - (ii) the sentence imposed by the court, and
 - (iii) any measures that the organization is taking – including any policies, standards and procedures established under paragraph (b) – to reduce the likelihood of it committing a subsequent offence; and
- (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.³²⁷

Section 732.1(3.2) of the *Criminal Code* provides that before imposing the conditions in (b) above, the court “shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.”³²⁸

PART B: CIVIL AND ADMINISTRATIVE ACTIONS AND REMEDIES

11. NON-CONVICTION BASED FORFEITURE

Non-conviction based (NCB) forfeiture is introduced in Chapter 5, Section 2.4.2. The law and procedures for NCB forfeiture under UNCAC, the OECD Convention and US, UK and Canadian law are discussed in Chapter 5, Sections 3.1, 3.2, 5.1, 5.2, and 5.3 respectively.

12. CIVIL ACTIONS AND REMEDIES

Civil actions provide a means of deterring corruption and compensating victims. Victims of corruption can bring personal claims against corrupt actors for damages, for example in tort or contract. Punitive damages may also be awarded. Victims may also make proprietary claims to assets acquired through corruption, forcing the corrupt actor to return assets to their true owner. Disgorgement of profits is another tool used to punish wrongdoers and is frequently employed by the US SEC. Civil actions and remedies are dealt with more thoroughly in Chapter 5, Sections 2.4.5 to 2.4.7.

³²⁷ *Criminal Code*, *supra* note 100, s 732.1(3.1).

³²⁸ *Ibid*, s 732.1(3.2).

13. INTERNATIONAL INVESTMENT ARBITRATION

Administrative, civil, and criminal actions and remedies against corrupt public officials, entities, and private individuals are instruments to directly combat corruption. In contrast, arbitration is a private and consensual dispute resolution mechanism where the disputants agree to submit their disputes to an independent decision-maker whose judgment (an arbitral award) will be final and binding on the parties.³²⁹ This system of dispute settlement has a long history, which may be traced back to medieval merchant guilds and even ancient Greek mythology, and, at least at first sight, does not have much in common with the global fight against corruption.³³⁰

However, increasing involvement of states and state-owned enterprises in the globalized economy, as well as rising sophistication of regulatory and reporting schemes in various countries, inevitably leads to complex disputes arising out of international trade and investment transactions. For instance, the International Chamber of Commerce reported that in 20% of arbitration cases initiated in 2019, at least one of the parties was a state or parastatal entity.³³¹ The following sections will demonstrate that in international arbitration, private investors and sovereign states may make allegations of corruption and use them either as a “sword” to seek compensation for the losses caused by corrupt public officials, or as a “shield” to escape liability in cases arising out of contracts or investments tainted by corruption.³³² Therefore, the manner in which allegations of corruption are and should be

³²⁹ Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford; New York: Oxford University Press, 2015), paras 1.04-1.05.

³³⁰ Gary Born, *International Commercial Arbitration*, 3rd ed (Alphen aan den Rijn: Kluwer Law International, 2021) at 7-67.

³³¹ International Chamber of Commerce (ICC), *ICC Dispute Resolution 2019 Statistics*, DRS 901 ENG (ICC, 2020), online (pdf): <<https://globalarbitrationnews.com/wp-content/uploads/2020/07/ICC-DR-2019-statistics.pdf>> at 4, 10-11, 23. For 2020, this figure was 19.8%; see ICC, *ICC Dispute Resolution 2020 Statistics*, DRS895 ENG (ICC, 2021) at 11, online (pdf): <https://iaa-network.com/wp-content/uploads/2021/09/2020statistics_icc_disputeresolution_895.pdf>.

³³² For recent commentary on global corruption and international arbitration, see Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2015); Charles Brower & Jawad Ahmad, “The State’s Corruption Defence, Prosecutorial Efforts, and Anti-corruption Norms in Investment Treaty Arbitration” in Katia Yannaca-Small, ed, *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd ed (Oxford; New York: Oxford University Press, 2018) at 455-81; Utku Cosar, “Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions” in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series (Alphen aan den Rijn: Kluwer Law International, 2015) at 531-56; Isuru Devendra, “State Responsibility for Corruption in International Investment Arbitration” (2019) 10:2 J Intl Disp Settlement 248; Joachim Drude, “*Fiat iustitia, ne pereat mundus*: A Novel Approach to Corruption and Investment Arbitration” (2018) 35:6 J Intl Arb 665; Emmanuel Gaillard, “The Emergence of Transnational Responses to Corruption in International Arbitration” (2019) 35:1 Arb Intl 1; Bruce Klaw, “State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities” (2015) 33:1 BJIL 60; Carolyn Lamm, Brody Greenwald & Kristen Young, “From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption” (2014) 29:2 ICSID Rev 328; Carolyn Lamm & Andrea Menaker, “The Consequences of Corruption in Investor-State Arbitration” in Meg Kinnear et al, eds, *Building*

dealt with in the international arbitration process, and the remedies arising therefrom, are important components in the fight against global corruption.

This section starts with a brief overview of the system of international arbitration to provide students and practitioners of anti-corruption law with a necessary background in this method of dispute resolution. It then outlines the reasons why parties may agree to arbitrate their disputes, including neutrality and flexibility of the procedure, enforceability of arbitration agreements, and the final and binding character of arbitral awards. This section also discusses cases where allegations of corruption were made by foreign investors and states, and concludes by formulating several principles on the treatment of corruption and bribery in international investment arbitration practice.

13.1 International Arbitration Explained

Arbitration, as stated above, is a dispute settlement mechanism where two or more parties (corporations, individuals or states) agree to refer their existing or future disputes to an individual, who is called a “single arbitrator,” or a group of persons collectively referred to as an “arbitral tribunal.” This subsection explains the differences between institutional and *ad hoc* arbitration, as well as between commercial and investment arbitration.

13.1.1 Institutional and *ad hoc* Arbitration

International arbitration exists in different forms and shapes. To begin with, arbitration can be either “institutional” or “*ad hoc*.³³³ Institutional arbitrations are overseen by international organizations that may appoint members of arbitral tribunals, resolve challenges to arbitrators, designate the place of arbitration, fix the sum of the arbitrators’ fees or review drafts of arbitral awards to ensure their compliance with formal requirements. Arbitral institutions do not issue judgments on the merits of the parties’ dispute—that is the responsibility of the individuals selected by the parties or appointed by the institution—but ensure, within the limits of their authority, the smooth, speedy and cost-efficient conduct of the proceedings. Among the best-known arbitral institutions are the International Court of

International Investment Law: The First 50 Years of ICSID (Alphen aan den Rijn: Kluwer Law International, 2015) at 433-46; Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford: Oxford University Press, 2014); Aloysius Llamzon & Anthony Sinclair, “Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct” in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series (Alphen aan den Rijn: Kluwer Law International, 2015) at 451-530; Lucinda Low, “Dealing with Allegations of Corruption in International Arbitration” (2019) 113 AJIL 341; Michael Nueber, “Corruption in International Commercial Arbitration – Selected Issues” in Christian Klausegger et al, eds, *Austrian Yearbook on International Arbitration* (Vienna: Manz, 2015) at 3-13; Matthew Reeder, “Estop That! Defeating a Corrupt State’s Corruption Defense to ICSID BIT Arbitration” (2016) 27:3 Am Rev Intl Arb 311; Dai Tamada, “Host States as Claimants: Corruption Allegations” in Shaheiza Lalani & Rodrigo Polanco, eds, *The Role of the State in Investor-State Arbitration* (Leiden; Boston: Brill Nijhoff, 2015) at 103-22; Sergey Usoskin, “Illegal Investments and Actions Attributable to a State under International Law” in Shaheiza Lalani & Rodrigo Polanco, eds, *The Role of the State in Investor-State Arbitration* (Leiden; Boston: Brill Nijhoff, 2015) at 334-49.

³³³ Born, *supra* note 330 at 168-71.

Arbitration of the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), which was established by the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), the Permanent Court of Arbitration (PCA) in The Hague, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Center (SIAC), the Hong Kong International Arbitration Centre (HKIAC), and the Vienna International Arbitration Centre (VIAC). Where the parties agree to arbitrate their dispute at a particular arbitral institution, a set of procedural rules promulgated by such an institution applies to the proceedings.

In contrast, *ad hoc* arbitrations are not conducted under the auspices of a particular institution. Instead, the parties merely agree to arbitrate their disputes, rather than to litigate them in state courts, and may choose an appointing authority that will select the arbitrators if the parties cannot reach an agreement on this issue. The United Nations Commission on International Trade Law (UNCITRAL) has prepared a set of procedural rules that the parties may use to organize their arbitration proceedings.³³⁴

13.1.2 Commercial and Investment Arbitration

International arbitration is usually divided into “investment” arbitration, which may be either contract-based or treaty-based, and “commercial” arbitration. The boundary between these two categories sometimes gets blurry and largely depends on the definition of what constitutes an investment. In general, arbitration is deemed commercial if it concerns a dispute arising out of a purely commercial transaction, such as a contract for the sale of goods, and where the parties’ consent to arbitration is expressed in an arbitration clause contained in their contract. On the other hand, the subject matter of the dispute in international investment arbitration is an “expenditure to acquire property or assets to produce revenue; a capital outlay.”³³⁵ Consent to arbitrate disputes with foreign investors may be found in an international treaty concluded between the investor’s “home state” and the “host state” where the investment was made (hence “treaty-based international investment arbitration”), in the host state’s domestic law on foreign investment, or in an investment contract between the foreign investor and the host state or its instrument, such as a ministry or a state-owned enterprise (hence “contract-based international investment arbitration”).

The backbone of the international investment treaty-based arbitration system is a web of over 3,300 international investment agreements (IIAs), including 2,943 bilateral investment treaties (BITs) and 417 treaties with investment provisions (TIPs), such as the Canada-United States-Mexico Agreement (CUSMA), which replaced the North American Free Trade Agreement (NAFTA), or the Energy Charter Treaty (ECT).³³⁶ Another important element of the investment protection regime is the ICSID Convention, which established the

³³⁴ “UNCITRAL Arbitration Rules” (last visited 1 October 2021), online: *United National Commission on International Trade Law* <<https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>>.

³³⁵ Bryan A Garner, ed, *Black’s Law Dictionary*, 10th ed (St Paul, MN: Thomson Reuters, 2014), “investment”.

³³⁶ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2021*, UNCTAD/WIR/2021 (New York: United Nations Publications, 2021) [World Investment Report 2021] at 123.

International Centre for Settlement of Investment Disputes (ICSID), a specialized arbitral institution that is part of the World Bank Group, together with the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA).³³⁷ The US, UK, and Canada are parties to the ICSID Convention, which entered into force for those countries on October 14, 1966, January 18, 1967, and December 1, 2013, respectively.³³⁸ The US is party to 47 BITs and 70 TIPs, the UK is party to 110 BITs and 29 TIPs, and Canada is party to 45 BITs and 22 TIPs.³³⁹

International commercial and contract-based investment arbitration, and international treaty-based investment arbitration, both have a lot in common when one views how proceedings are conducted, how the evidence is admitted and how the tribunals issue procedural orders and awards.³⁴⁰ Furthermore, the same experienced commercial lawyers may act either as the arbitrators or the parties' counsel in different arbitration cases, and arbitration proceedings are governed by the same rules promulgated by the UNCITRAL or various arbitral institutions.

However, while the procedure and the personalities involved may be the same, contract-based and treaty-based arbitration are different in several significant ways. To begin with, parties to commercial transactions typically insert a clause into their contract agreeing to refer to arbitration any dispute arising out of or in connection with the contract. By contrast, the host state's consent to arbitration in an IIA is usually expressed as an open offer to arbitrate any future dispute with any investor-national of the counterparty state to the IIA, and such an offer is deemed to be accepted and becomes a binding arbitration agreement when the investor commences arbitration against the host state.³⁴¹ For instance, the 2012 US Model BIT and the 2004 Canadian Model FIPA provide that a foreign investor may submit to arbitration a claim that the host state has breached an obligation under the treaty and the investor has thus incurred loss or damage,³⁴² and the claimant may choose between submitting the claim for resolution under:

³³⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [ICSID Convention].

³³⁸ "Database of ICSID Member States" (last visited 1 October 2021), online: ICSID <<https://icsid.worldbank.org/about/member-states/database-of-member-states>>.

³³⁹ "International Investment Agreements Navigator" (last visited 1 October 2021), online: UNCTAD *Investment Policy Hub* <<https://investmentpolicy.unctad.org/international-investment-agreements>>.

³⁴⁰ Llamzon (2014), *supra* note 332 at paras 5.06-5.07.

³⁴¹ *Ibid* at para 5.11.

³⁴² 2004 Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA) [2004 Model FIPA], arts 22-23; Note that Canada recently published an update for its model FIPA: see Global Affairs Canada, 2021 Model FIPA, (Global Affairs Canada, 2021) art 27, online:

<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng>. US, 2012 United States Model Bilateral Investment Treaty [US Model BIT], art 24(1), online:

<<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>.

- (i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings (if both the host state and the investor's home state are parties to the ICSID Convention),
- (ii) the ICSID Additional Facility Rules (if either the home state or the host state is a party to the ICSID Convention),
- (iii) the UNCITRAL Arbitration Rules, or
- (iv) any other arbitration rules agreed on between the investor and the host state.³⁴³

This distinction has important implications as to the rules of law applicable to the merits of the dispute. In a purely commercial setting, the arbitral tribunal will resolve the parties' dispute in accordance with the national law applicable to the contract concluded by the parties. The parties may either agree on the applicable law themselves or, in the absence of such agreement, the arbitral tribunal will apply the law determined by the conflict-of-laws rules that the tribunal considers applicable.³⁴⁴ In contrast, in a treaty-based arbitration, a tribunal applies the relevant BIT or TIP and the relevant rules and principles of public international law. A typical BIT requires each state party to accord to investors of the other state party and their investments treatment no less favorable than the treatment it accords, in like circumstances, to its own investors and investments ("national treatment"). Similar treatment is accorded to investors of other state parties and their investments ("most-favored-nation treatment"), while treating foreign investments fairly and equitably, and with full protection and security.³⁴⁵ Furthermore, BITs prohibit either state party from nationalizing or expropriating an investment, either directly or indirectly through measures equivalent to expropriation or nationalization, unless the expropriation or nationalization is effected for a public purpose, in accordance with due process of law, in a non-discriminatory manner and with prompt, adequate and effective compensation.³⁴⁶

13.2 Why Parties Agree to Arbitrate

There are several reasons why arbitration has become the primary means for settling international commercial and investment disputes.³⁴⁷ In general, this is because arbitration is often perceived as a "neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions."³⁴⁸ This subsection concentrates on three distinct characteristics of international arbitration: (i) neutrality and flexibility, (ii)

³⁴³ 2004 Model FIPA, *ibid*, art 27; US Model BIT, *ibid*, art 24(3).

³⁴⁴ UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration*, (Vienna: UNCITRAL, 1985) [UNCITRAL Model Law], art 28, online (pdf): <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf>.

³⁴⁵ 2004 Model FIPA, *supra* note 342, arts 3-5; 2012 US Model BIT, *supra* note 342 arts 3-5.

³⁴⁶ 2004 Model FIPA, *ibid*, art 13; US Model BIT, *ibid*, art 6.

³⁴⁷ Blackaby et al, *supra* note 329, paras 1.94-1.107; Born, *supra* note 330 at 73–93.

³⁴⁸ Born, *ibid* at 73.

enforceability of arbitration agreements, and (iii) the final and binding nature of arbitral awards.

13.2.1 Neutrality and Flexibility

To begin with, international arbitration is neutral and flexible. Naturally, a party to a transaction may be hesitant to agree to litigate its disputes in the domestic courts of a state where the other party resides or has its place of business, as the party will face litigation in foreign courts, before foreign judges, in a foreign language and with the assistance of foreign legal counsel. This is particularly true in cases where one of the parties is located in a country with high corruption risk or is itself a sovereign state or state entity.

In international arbitration, the parties are free to agree on a neutral place and language of proceedings. For instance, a corporation from Germany and a state-owned enterprise from Indonesia may agree to arbitrate their disputes pursuant to the ICC Arbitration Rules with the proceedings held in a major business center (such as Geneva, Hong Kong, London, New York, Paris or Singapore) in English. Furthermore, the parties are generally given an opportunity to participate in the selection of the tribunal (usually, both parties jointly choose a sole arbitrator or if the arbitral tribunal is to consist of three arbitrators, each party may nominate one and the presiding arbitrator will be either agreed on by the two party-appointed arbitrators or chosen by the appointing authority). In addition, each arbitrator is required to remain independent and impartial.

In other words, the parties are free to tailor their arbitration agreement to their wishes and the specifics of a particular transaction. For instance, if their venture concerns construction, exploration activities, insurance or the telecommunications business, the parties may provide for specialized procedures for presenting expert evidence or agree that prospective arbitrators have to possess certain technical expertise or be members of a particular professional association.

13.2.2 Enforceability of Arbitration Agreements

Another important characteristic of international arbitration is the enforceability of arbitration agreements. Article II(3) of the New York Convention, which is in force in some 168 jurisdictions,³⁴⁹ requires the courts to refer the parties to arbitration if one of them commences litigation in respect of a matter subject to an arbitration agreement.³⁵⁰ In the same manner, the US *Federal Arbitration Act*³⁵¹ stipulates that court proceedings must be stayed where the matter in dispute is referable to arbitration. Similarly, the *Arbitration Act*³⁵² in the UK provides for a stay of proceedings.

³⁴⁹ "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (last visited 2 October 2021) [New York Convention Status], online: UNCITRAL <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>.

³⁵⁰ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739 (entered into force 7 June 1959) [New York Convention].

³⁵¹ *Federal Arbitration Act*, 9 USC § 3.

³⁵² *Arbitration Act 1996* (UK), c 23, s 9.

In Canada, arbitration legislation adopted at federal, provincial and territorial levels is based on the UNCITRAL Model Law on International Commercial Arbitration,³⁵³ which states that:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.³⁵⁴

In conclusion, if a claim which is subject to an arbitration agreement is brought before the court in the US, UK or Canada, the court will stay the proceedings and refer the parties to arbitration, as long as the arbitration agreement is not null and void, inoperative or incapable of being performed. Furthermore, it is a well-established principle that an arbitration clause is deemed to be separate from the contract of which it forms a part and, as such, it survives the termination or invalidation of that contract.³⁵⁵

In the UK, the principle of the separability of an arbitration agreement is embodied in section 7 of the *Arbitration Act 1996*:

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.³⁵⁶

The UNCITRAL Model Law has a similar provision:

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.³⁵⁷

The principle of separability prevents parties from frustrating an arbitration agreement by attempting to terminate or invalidate the contract in which the arbitration clause appears. For instance, if a high-ranking public official solicits a bribe by threatening to terminate a

³⁵³ See Canada *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp); British Columbia *International Commercial Arbitration Act*, RSBC 1996, c 233; Ontario *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sched 5; Alberta *International Commercial Arbitration Act*, RSA 2000, c I-5; UNCITRAL, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 [UNCITRAL Model Law Status]*, online

<https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

³⁵⁴ UNCITRAL Model Law, *supra* note 344, art 8(1).

³⁵⁵ Blackaby et al, *supra* note 329 at para 2.101.

³⁵⁶ *Arbitration Act 1996 (UK)*, *supra* note 352, s 7.

³⁵⁷ UNCITRAL Model Law, *supra* note 344, art 16(1).

procurement contract and the party refuses to comply, the arbitration clause in the contract remains valid. Independent and impartial arbitrators will settle the dispute rather than courts in the public official's state. However, if the arbitration agreement itself is procured by corruption, the state courts would recognize it as null and void and thus refuse to refer the matter to arbitration.

13.2.3 Arbitral Awards Are Final and Binding

Not only are arbitration agreements enforceable, but the tribunal's awards are final and binding on the parties and may be enforced around the globe. In general, there is no possibility to appeal an arbitral award to a superior tribunal or national court, but a party may file an application with a competent state court to set the award aside on limited (mostly procedural) grounds. In addition, under certain circumstances state courts may deny a request to enforce an arbitral award. This subsection gives an overview of setting aside and recognition and enforcement proceedings under the New York Convention, ICSID Convention, and national laws of the US, UK and Canada. It explains that state courts may set aside (or refuse to enforce) arbitral awards procured by corruption or based on an investment or commercial agreement tainted by corruption.

13.2.3.1 New York Convention

The New York Convention requires Contracting States to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."³⁵⁸ Article V(1) of the New York Convention provides that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked if that party furnishes proof that:

- (a) the parties to the arbitration agreement were under some incapacity or the arbitration agreement is not valid;
- (b) the party against whom the award is invoked was not given proper notice or was otherwise unable to present their case;
- (c) the award contains decisions on matters beyond the scope of the submission to arbitration;
- (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
- (e) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority.³⁵⁹

Furthermore, recognition and enforcement of an arbitral award may also be refused pursuant to Article V(2) of the New York Convention, if the competent court in the country where recognition and enforcement is sought finds that: (a) the subject matter of the dispute

³⁵⁸ *New York Convention*, *supra* note 350, art III.

³⁵⁹ *Ibid*, art V(1).

is not capable of settlement by arbitration under the law of that country or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

If an award is based on a contract tainted by bribery or corruption, the courts may deny its enforcement on public policy grounds.³⁶⁰ For instance, the High Court of England and Wales refused to enforce an arbitral award ordering the respondent to pay commission to a public official because the Court found that the commission was effectively a bribe to be paid in exchange for the official procuring a contract between the respondent and a government entity.³⁶¹ Similarly, the Paris Court of Appeal denied enforcement of an award where the defendant used part of the commission fee to bribe Iranian officials.³⁶² The Court noted that a “contract having as its aim and object a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community.”³⁶³

13.2.3.2 ICSID Convention

The ICSID Convention requires each contracting state to “recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”³⁶⁴ An award rendered by an ICSID tribunal will be governed by the laws concerning the execution of judgments in the state where execution is sought.³⁶⁵

ICSID awards are binding on the parties and may not be subject to any appeal.³⁶⁶ The ICSID Convention also does not provide for the possibility of arbitral awards to be set aside by national courts, but instead creates a self-contained annulment mechanism. Within 120 days after the date on which the award was rendered, a party may submit an application to the ICSID Secretary-General requesting annulment of the award.³⁶⁷ An *ad hoc* committee of three persons will be formed,³⁶⁸ and may annul an award only on the basis of the following grounds:

- (a) that the tribunal was not properly constituted;
- (b) that the tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or

³⁶⁰ Born, *supra* note 330 at 3673-74; Dirk Otto & Omaia Elwan, “Article V(2)” in Herbert Kronke et al, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Alphen aan den Rijn: Kluwer Law International, 2010) at 372-73.

³⁶¹ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*, [1988] 1 QB 448 (Comm).

³⁶² Cour d’Appel, Paris, 30 September 1993, *European Gas Turbines SA v Westman International Ltd*, XX YB Comm Arb 198 (1995).

³⁶³ *Ibid* at 202, para 6.

³⁶⁴ ICSID Convention, *supra* note 337, art 54(1).

³⁶⁵ *Ibid*, art 54(3).

³⁶⁶ *Ibid*, art 53(1).

³⁶⁷ *Ibid*, art 51(1) & (2).

³⁶⁸ *Ibid*, art 52(3).

(e) that the award has failed to state the reasons on which it is based.³⁶⁹

13.2.3.3 US

In the US, the *Federal Arbitration Act* provides that a court in the district where the award was made may, upon application of a party to the arbitration, make an order vacating the award if:

- (1) the award was procured by corruption, fraud, or undue means;
- (2) there was evident partiality or corruption in the arbitrators, or either of them;
- (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or
- (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.³⁷⁰

Within three years after an arbitral award under the New York Convention is made, a party to the arbitration may apply for an order confirming the award as against any other party to the arbitration.³⁷¹ Federal district courts have original jurisdiction in proceedings for recognition and enforcement of foreign arbitral awards.³⁷² The court will confirm the award unless it finds one of the grounds for refusal of recognition or enforcement specified in Article V of the New York Convention,³⁷³ which has been in force in the US since 29 December 1970.³⁷⁴

13.2.3.4 UK

In the UK, a party to arbitration proceedings may apply to a court to challenge the award of an arbitral tribunal as to its substantive jurisdiction, on the grounds of a serious irregularity affecting the tribunal, the proceedings or the award.³⁷⁵ In this context, “serious irregularity” means any of the following, if the court considers that such an irregularity has caused or will cause substantial injustice to the applicant:

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction);

³⁶⁹ *Ibid*, art 52(1).

³⁷⁰ *Federal Arbitration Act*, *supra* note 351, § 10(a).

³⁷¹ *Ibid*, § 207.

³⁷² *Ibid*, § 203.

³⁷³ *Ibid*, § 207.

³⁷⁴ New York Convention Status, *supra* note 349.

³⁷⁵ *Arbitration Act 1996 (UK)*, *supra* note 352, ss 67(1) & 68(1).

- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award; or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.³⁷⁶

Also, unlike many other jurisdictions, the *Arbitration Act 1996* provides a party to arbitration proceedings with an opportunity to appeal to the court on a question of law arising out of an award made in the proceedings.³⁷⁷ An appeal may be brought only (a) with the agreement of all the other parties to the proceedings or (b) with the leave of the court.³⁷⁸ Leave to appeal will be given only if the court is satisfied that:

- (a) the determination of the question will substantially affect the rights of one or more of the parties,
- (b) the question is one which the tribunal was asked to determine,
- (c) on the basis of the findings of fact in the award
 - (i) the decision of the tribunal on the question is obviously wrong or
 - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.³⁷⁹

Any application or appeal must be brought within 28 days of the date of the award and may not be brought unless the applicant or appellant has already exhausted any available arbitral process of appeal or review.³⁸⁰

³⁷⁶ *Ibid*, s 68(2).

³⁷⁷ *Ibid*, s 69(1).

³⁷⁸ *Ibid*, s 69(2).

³⁷⁹ *Ibid*, s 69(3).

³⁸⁰ *Ibid*, ss 70(3) & 70(2)(a).

The *Arbitration Act 1996* provides that a New York Convention award (i.e., an arbitral award made in the territory of a state which is a party to the New York Convention) is binding on the persons as between whom it was made and may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.³⁸¹ Recognition or enforcement of an award may be refused only on the grounds enumerated in Article V of the New York Convention,³⁸² which has been in force in the UK since December 23, 1975.³⁸³

13.2.3.5 Canada

Under the UNCITRAL Model Law, adopted in Canada at the federal, provincial and territorial levels, recourse to a court to challenge an arbitral award is only available through an application for setting aside.³⁸⁴ The grounds for setting aside an arbitral award are enumerated in Article 34(2) of the UNCITRAL Model Law and mirror the grounds for refusal of recognition or enforcement of arbitral awards in Article V of the New York Convention.³⁸⁵ An application for setting aside must be made within three months after the date on which the party making the application received the award.³⁸⁶

An arbitral award, irrespective of the country in which it was made, must be recognized as binding and will be enforced upon application in writing to the competent court.³⁸⁷ The grounds for refusal of recognition or enforcement of arbitral awards, enumerated in Article 35(1) of the UNCITRAL Model Law, mirror those listed in Article V of the New York Convention, which has been in force in Canada since August 10, 1986.³⁸⁸

13.3 Treatment of Allegations in International Investment Arbitration

This subsection gives an overview of contract- and treaty-based international investment arbitration cases where parties made allegations of corruption. It shows that corruption has been invoked by private investors as claimants to seek compensation for the losses caused by the actions of corrupt public officials, and by states as respondents to escape liability in cases arising out of investments tainted by corruption.

13.3.1 Claimant Allegations

Four cases described below show where the question of corruption was raised by the investors who alleged that public officials in the host state solicited bribes from them (*EDF*

³⁸¹ *Ibid*, ss 100(1) & 101(1)-(2).

³⁸² *Ibid*, ss 103(1)-(4).

³⁸³ UNCITRAL Model Law Status, *supra* note 353.

³⁸⁴ *Ibid*; UNCITRAL Model Law, *supra* note 344, art 34(1).

³⁸⁵ New York Convention, *supra* note 350, arts V(1)(a)-(d) & V(2).

³⁸⁶ UNCITRAL Model Law, *supra* note 344, art 34(3).

³⁸⁷ *Ibid*, art 35(1).

³⁸⁸ New York Convention Status, *supra* note 349.

*v Romania*³⁸⁹) or were corruptly influenced by the investors' competitors (*Methanex v United States*,³⁹⁰ *Oostergetel v Slovakia*,³⁹¹ and *ECE and PANTA v Czech Republic*³⁹²).

13.3.1.1 *Methanex v United States*

In *Methanex v United States*, the claimant initiated arbitration proceedings under Chapter 11 of NAFTA seeking compensation from the US for \$970 million in losses caused by the State of California's ban on the sale and use of the gasoline additive MTBE, a key ingredient of which is methanol.³⁹³ Methanex, a Canadian producer of methanol, alleged that the then-California Governor Grays' decision to issue the ban on MTBE was motivated by corruption, as the Governor received more than \$200,000 in political campaign contributions from ADM, the principal US producer of ethanol.³⁹⁴

The tribunal ultimately found that it did not have jurisdiction over some of the claimant's claims and dismissed all other claims on their merits.³⁹⁵ The importance of this case is its approach to evaluating the evidence of corruption.³⁹⁶ Methanex invited the tribunal to base the finding of corruption on the totality of factual inferences and interpretations:

Counsel for Methanex's description of this methodology can be summarised, colloquially, as one of inviting the Tribunal to "connect the dots," i.e., while individual pieces of evidence when viewed in isolation may appear to have no significance, when seen together, they provide the most compelling of possible explanations of events, which will support Methanex's claims.³⁹⁷

The tribunal agreed with the methodology proposed by the claimant, but the dots did not connect for Methanex:

Connecting the dots is hardly a unique methodology; but when it is applied, it is critical, first, that all the relevant dots be assembled; and, second, that each be examined, in its own context, for its own significance, before a possible pattern is essayed. Plainly, a self-serving selection of events and a

³⁸⁹ *EDF (Services) Ltd v Romania* (2009), ICSID Case No ARB/05/13 (ICSID) (Arbitrators: Piero Bernardini, Arthur W Rovine, Yves Derains) [*EDF (Services) Ltd*].

³⁹⁰ *Methanex Corporation v United States of America* (2005), Final Award of the Tribunal on Jurisdiction and Merits (UNCITRAL) (Arbitrators: V V Veeder, J William F Rowley, W Michael Reisman) [*Methanex*].

³⁹¹ *Jan Oostergetel and Theodora Laurentius v The Slovak Republic* (2012), (UNCITRAL) (Arbitrators: Gabrielle Kaufmann-Kohler, Mikhail Wladimiroff, Vojtěch Trapl) [*Oostergetel*].

³⁹² *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic* (2013), PCA Case No 2010-5 (UNCITRAL) (Arbitrators: Sir Franklin Berman, Andreas Bucher, J Christopher Thomas) [*ECE Projektmanagement International GmbH*].

³⁹³ *Methanex*, *supra* note 390, Part I at para 1.

³⁹⁴ *Ibid*, Part I at para 5.

³⁹⁵ *Ibid*, Part VI at para 1.

³⁹⁶ Llamzon (2014), *supra* note 332 at para 6.106.

³⁹⁷ *Methanex*, *supra* note 390, Part III, Chapter B at para 2.

self-serving interpretation of each of those selected, may produce an account approximating verisimilitude, but it will not reflect what actually happened. Accordingly, the Tribunal will consider the various “dots” which Methanex has adduced — one-by-one and then together with certain key events (essentially additional, noteworthy dots) which Methanex does not adduce — in order to reach a conclusion about the factual assertions which Methanex has made. Some of Methanex’s proposed dots emerge as significant; others, as will be seen, do not qualify as such. In the end, the Tribunal finds it impossible plausibly to connect these dots in such a way as to support the claims set forth by Methanex.³⁹⁸

In particular, the tribunal observed that in the US, political campaigns at the federal and state level may accept private financial contributions, and “no rule of international law was suggested as evidence that the US and other nations which allow private financial contributions in electoral campaigns are thereby in violation of international law.”³⁹⁹ The tribunal also rejected Methanex’s suggestion that the fact that ADM hosted a “secret” dinner for Mr. Davis confirms an intent to favor ethanol and thus injure methanol producers (including Methanex).⁴⁰⁰ While the contribution of campaign funds, if made under circumstances that suggest a deal or a *quid pro quo*, could be unlawful and amount to a breach of NAFTA’s provisions on national treatment, minimum standard of treatment, and expropriation, Methanex itself acknowledged that it was unable to prove any *quid pro quo* or handshake deal.⁴⁰¹

13.3.1.2 *EDF v Romania*

In *EDF v Romania*, a UK company that formed two joint ventures with Romanian state-owned entities claimed that Romania failed to accord fair and equitable treatment to EDF’s investment. EDF claimed that the revocation of its duty-free store licenses and non-renewal of its lease agreements resulted from EDF’s refusal to pay \$2.5 million in bribes allegedly solicited by the Prime Minister of Romania and other senior public officials.⁴⁰² The respondent denied the allegations of corruption and noted that the claimant did not provide “reliable evidence” that the numerous decision-makers involved in the process of deciding whether to extend the contract or to approve the act governing duty-free licenses “were even aware of, let alone influenced by, alleged bribes solicited by the Prime Minister’s staff members.”⁴⁰³ The claimant did not report the alleged bribe solicitations when they occurred in August and October of 2001, but published them in a German newspaper in November 2002, following which an investigation was opened by the Romanian Anti-Corruption Authority (DNA).⁴⁰⁴ The DNA has twice investigated the claimant’s allegations of bribery solicitation and twice (in 2003 and 2006) rejected them, and the criminal courts in Romania

³⁹⁸ *Ibid*, Part III, Chapter B at para 3.

³⁹⁹ *Ibid*, Part III, Chapter B at para 17.

⁴⁰⁰ *Ibid*, Part III, Chapter B at paras 34-46.

⁴⁰¹ *Ibid*, Part III, Chapter B at paras 37-38.

⁴⁰² *EDF (Services) Ltd*, *supra* note 389 at paras 1, 46, 101-106, 221-222.

⁴⁰³ *Ibid* at para 144.

⁴⁰⁴ *Ibid* at para 222.

have twice reviewed and affirmed the DNA's findings that the claimant's allegations are groundless.⁴⁰⁵

The tribunal agreed that solicitation of bribes by the host state's officials would amount to a violation of the BIT, but ruled that the claimant failed to furnish "clear and convincing" evidence of the respondent's corruption:

The Tribunal shares the Claimant's view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that "exercising a State's discretion on the basis of corruption is a ... fundamental breach of transparency and legitimate expectations".... Respondent flatly denies that such a request for a corrupt payment was made. In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.⁴⁰⁶

Furthermore, the tribunal seemed to imply that, in order to attribute bribe solicitation by a public official to the official's state, the investor would need to prove, by clear and convincing evidence, that such a public official was soliciting the bribe "on behalf and for the account of the Government."

The burden of proof lies with the Claimant as the party alleging solicitation of a bribe. Clear and convincing evidence should have been produced by the Claimant showing not only that a bribe had been requested from Mr. Weil [the CEO of EDF], but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect. In the absence of such evidence, the Tribunal is compelled to draw the conclusion that Claimant did not sustain its burden of proof.⁴⁰⁷

13.3.1.3 *Oostergatel v Slovakia*

In *Oostergatel v Slovakia*, the claimants contended that the bankruptcy proceedings of BCT, their investment vehicle, were conducted in an illegitimate manner.⁴⁰⁸ They alleged that, possibly due to corruption, the state officials involved in the bankruptcy proceedings (tax

⁴⁰⁵ *Ibid* at para 228.

⁴⁰⁶ *Ibid* at para 221 (internal quotations omitted).

⁴⁰⁷ *Ibid* at para 232.

⁴⁰⁸ *Oostergatel*, *supra* note 391 at para 88.

authorities, ministers, judges, and trustees) supported the so-called “Slovak financial mafia” in depriving the claimants of their real estate.⁴⁰⁹

With regard to the claimants’ allegation that they were denied justice in the Slovak courts, the tribunal observed that despite the seriousness of the allegations of corruption and conspiracy to ruin the claimants’ investment, the investors “made no serious attempt to establish that the adjudication of the bankruptcy of BCT by the Slovak Courts was so bereft of a basis in law that the judgment was in effect arbitrary or malicious.”⁴¹⁰ The claimants appealed the adjudication of bankruptcy only on procedural grounds (and did not contest the substantive reasons for the bankruptcy), and the claimants’ own legal expert largely supported the correctness of the proceedings.⁴¹¹ Accordingly, the tribunal rejected the claimants’ allegations of a denial of justice:

296. In light of these statements, it is clear that a claim for denial of justice must fail. The Claimants failed to provide sufficient proof of the alleged missteps of the bankruptcy proceedings. As regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law. Neither did the Claimants explain the causal link between the alleged conduct by the relevant actors and the alleged damage. The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.

297. Even accepting that irregularities did occur in the course of the proceedings, the record shows that the bankruptcy of BCT was the lawful consequence of the Claimants’ persistent default on their tax debts, and no proof was found that the State organs conspired with the so-called “financial” or “bankruptcy mafia” against the investors or their investment in the Slovak Republic.⁴¹²

The tribunal was also not convinced by the claimants’ suggestion that bribery was a possible explanation for the alleged conduct of the relevant public officials. The claimants relied on general reports about corruption in Slovak courts, local news clippings concerning irregularities in bankruptcy proceedings handled by the Regional Court of Bratislava, and reports by the European Union and US, which mentioned that bribery is widespread in Slovak courts:

While such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. For obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial

⁴⁰⁹ *Ibid* at paras 92-93, 178.

⁴¹⁰ *Ibid* at para 292.

⁴¹¹ *Ibid.*

⁴¹² *Ibid* at paras 296-97.

evidence. In the present case, both are entirely lacking. Mere insinuations cannot meet the burden of proof which rests on the Claimants.⁴¹³

13.3.1.4 ECE and PANTA v Czech Republic

In *ECE and PANTA v Czech Republic*, the dispute arose out of an unsuccessful real estate project attempted by two German investors in the Czech Republic.⁴¹⁴ The claimants alleged that the conduct of the Czech authorities with respect to permits required for the construction of a shopping center resulted in excessive delays and ultimately left the claimants no choice but to abandon their investment.⁴¹⁵ The claimants thus sought compensation for the alleged breaches of their treaty rights to fair and equitable treatment, admission of lawful investments, non-discrimination and protection against arbitrary measures, as well as for expropriation.⁴¹⁶ The investors admitted that they had no direct proof that a competitor bribed officials to halt their permit applications, but presented what they believed to be “numerous serious indices that leave no other option but to conclude that a corruption scheme exists.”⁴¹⁷ The claimants cited several NGO reports on systematic corruption in the Czech Republic generally and the city in which the proposed project was located.⁴¹⁸ The claimants also relied on the testimony of a Czech lawyer who was involved in advising ECE on the permit proceedings. She testified that local officials admitted to her that they had been instructed to obstruct the permit proceedings.⁴¹⁹

The tribunal noted that it “cannot turn a blind eye to corruption and cannot decline to investigate the matter simply because of the difficulties of proof”⁴²⁰ and accepted that it had to “examine with care the facts alleged to prove corruption.”⁴²¹ However, as in *Methanex v United States*, the “dots” did not connect for the claimants who alleged corruption:

4.876 When considering the Claimants’ evidence the Tribunal has borne in mind the difficulties of obtaining evidence of corruption. It is well aware that acts of corruption are rarely admitted or documented and that tribunals have discussed the need to “connect the dots”. At the same time, the allegations that have been made are very serious indeed. Not only would they (if true) involve criminal liability on the part of a number of named individuals, they also implicate the reputation, commercial and legal interests of various business undertakings which are not party to these proceedings and which are not represented before the Tribunal. Corruption is a charge which an arbitral tribunal must take seriously. At the same time, it is a charge that should not be made lightly, and the Tribunal is bound to express its reservations as to whether it is acceptable for charges of that level

⁴¹³ *Ibid* at paras 302-303 (internal quotations omitted).

⁴¹⁴ *ECE Projektmanagement International GmbH*, *supra* note 392 at paras 1.1-1.4, 1.9-1.15.

⁴¹⁵ *Ibid* at paras 1.13, 4.1-4.7.

⁴¹⁶ *Ibid* at paras 1.14, 4.8-4.22.

⁴¹⁷ *Ibid* at para 4.394.

⁴¹⁸ *Ibid* at paras 4.846-4.847.

⁴¹⁹ *Ibid* at paras 4.848-4.849.

⁴²⁰ *Ibid* at para 4.871.

⁴²¹ *Ibid* at para 4.873.

of seriousness to be advanced without either some direct evidence or compelling circumstantial evidence. That said, the Tribunal must of course decide the case on the basis of the evidence before it. If the burden of proof is not discharged, the allegation is not made out. The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.⁴²²

...

4.879 The Tribunal must begin by stating that it finds to be deeply unattractive an argument to the effect that 'everyone knows that the Czech Republic is corrupt; therefore, there was corruption in this case.... The Tribunal acknowledges that some effort was made to adduce specific evidence of corruption, but it did feel that there was a strain of the 'everyone knows' argument in the overall case, for example in the reliance on reports of NGOs as to the general presence of corruption within the Czech Republic. The Tribunal does not close its eyes to the fact that the Czech Republic, like other countries, has had, and reportedly still has, problems with corruption. But the Tribunal remains vigilant against blanket condemnatory allegations which can have the appearance of an attempt to 'poison the well' in the hopes of making up for a lack of direct proof. Reference to other instances of alleged corruption may prove that corruption exists in the State, but it does little to advance the argument that corruption existed in the specific events giving rise to the claim. Nor do allegations of this kind, however seriously advanced, give rise to a burden on the Respondent to 'disprove' the existence of corruption. While the present Tribunal is therefore willing to "connect the dots", if that is appropriate, the dots have to exist and they must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.⁴²³

Therefore, after reviewing the evidence, the tribunal found no substantial evidence of corruption, be it in respect to individual acts or in respect to an alleged "scheme" of corruption.⁴²⁴

13.3.2 Respondent Allegations of Corruption

This subsection describes four cases where host states alleged that the claimants' investments had been procured by corruption and the claimants thus were not entitled to any recovery of their losses or damages.

⁴²² *Ibid* at para 4.876.

⁴²³ *Ibid* at para 4.879.

⁴²⁴ *Ibid* at para 4.932.

13.3.2.1 *World Duty Free v Kenya*

The importance of the tribunal's decision in *World Duty Free v Kenya*⁴²⁵ lies in the fact that it was the first contract-based investment arbitration case in which a tribunal made a determinative finding of corruption.⁴²⁶ In 2000, World Duty Free (WDF) filed a claim at the ICSID pursuant to the arbitration clause in a 1989 contract (governed by English and Kenyan law) for construction and operation of duty free complexes at two international airports.⁴²⁷ WDF alleged that Kenya, through its executive, judiciary, and agents, improperly used WDF in election campaign finance fraud, illegally expropriated the company, wrongfully placed it in receivership, caused damage through mismanagement in receivership, refused to protect WDF from crime and unlawfully deported its CEO.⁴²⁸ Subsequently, the owner and CEO of WDF acknowledged that, in order to be able to engage in business in Kenya, WDF was required to make a "personal donation" in the amount of \$2 million to the then-President of Kenya in March 1989.⁴²⁹ In response, Kenya submitted an application alleging that the 1989 contract was unenforceable because the contract was procured by paying a bribe and requesting dismissal of WDF's claims in their entirety.⁴³⁰

The tribunal held that payments made by WDF's owner and CEO were bribes rather than a "personal donation for public purposes," because they were made not only in order to obtain an audience with the President, but "above all to obtain during that audience the agreement of the President on the contemplated investment."⁴³¹ The arbitrators noted that "bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries,"⁴³² including Kenya. The tribunal reviewed several international anti-corruption treaties, court decisions and arbitral awards⁴³³ and concluded that even though in some countries or economic sectors bribery is "a common practice without which the award of a contract is difficult – or even impossible," arbitrators "always refused to condone such practices,"⁴³⁴ and thus contracts based on corruption may not be upheld in arbitration:

In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of

⁴²⁵ *World Duty Free Company Limited v Republic of Kenya* (2006), 46 ILM 339 at para 6.01 (ICSID) [*World Duty Free*].

⁴²⁶ Llamzon (2014), *supra* note 332.

⁴²⁷ *World Duty Free*, *supra* note 425 at paras 62, 75.

⁴²⁸ *Ibid* at paras 68-74.

⁴²⁹ *Ibid* at para 66.

⁴³⁰ *Ibid* at para 105.

⁴³¹ *Ibid* at para 136.

⁴³² *Ibid* at para 142.

⁴³³ *Ibid* at paras 143-156.

⁴³⁴ *Ibid* at para 156.

corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.⁴³⁵

The tribunal, therefore, found that Kenya was legally entitled to avoid the contract tainted by corruption, and WDF was “not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract’s applicable laws.”⁴³⁶

The tribunal, however, noted that Kenya’s failure either to recover the bribe in civil proceedings or to prosecute the former President, who appears to have solicited the bribe, was “highly disturbing”:

It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant’s bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant’s claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings.⁴³⁷

Nevertheless, the tribunal ruled that “the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world,”⁴³⁸ and thus refrained from imposing a duty to prosecute upon the responding state as a precondition to successfully raising the corruption defence.

13.3.2.2 *Metal-Tech v Uzbekistan*

*Metal-Tech v Uzbekistan*⁴³⁹ was the first investment *treaty* arbitration case where the tribunal decided that it did not have jurisdiction because the investment was tainted by corruption.⁴⁴⁰ Metal-Tech, an Israeli company, commenced ICSID proceedings alleging that Uzbekistan failed to accord fair and equitable treatment and protection and security to the company. Metal-Tech also alleged that Uzbekistan had expropriated Metal-Tech’s investment in Uzmetal, a joint venture formed with two Uzbek state-owned companies.⁴⁴¹

In November 2011, Uzbekistan informed the tribunal that it had recently become aware of the details of a criminal investigation by the Prosecutor General’s Office into questionable payments to Uzbek public officials and individuals affiliated with Metal-Tech and

⁴³⁵ *Ibid* at para 157.

⁴³⁶ *Ibid* at para 188.

⁴³⁷ *Ibid* at para 180.

⁴³⁸ *Ibid* at para 181.

⁴³⁹ *Metal-Tech Ltd v The Republic of Uzbekistan* (2013), ICSID Case No ARB/10/3 at para 6.43 (ICSID) (Arbitrators: Gabrielle Kaufmann-Kohler, John M Townsend, Claus von Wobeser) [*Metal-Tech Ltd*].

⁴⁴⁰ Llamzon (2014), *supra* note 332.

⁴⁴¹ *Metal-Tech Ltd*, *supra* note 439 at paras 1, 3, 7, 19, 55.

Uzmetal.⁴⁴² Uzbekistan alleged that several consulting agreements, which Metal-Tech entered into between 2000 and 2005, were a sham designed to cover illegal payments to Uzbek public officials or their close affiliates.⁴⁴³ Metal-Tech's CEO admitted that about \$4 million had been paid to consultants who were "primarily engaged in 'lobbying' activities."⁴⁴⁴ Therefore, the tribunal concluded that it lacked jurisdiction over the investor's claims because Metal-Tech breached both the Uzbek *Criminal Code* and the legality requirement under the Israel-Uzbekistan BIT by making payments to a governmental official and a close relative of a high-ranked public official for the purpose of influence peddling.⁴⁴⁵

The arbitrators decided that the investor had lost protection under the BIT, but denied Uzbekistan's request that costs be assessed against the claimant:

The Tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.⁴⁴⁶

Although the claimant's insistence that "there is no evidence that [the claimant's consultant] is being investigated or has been arrested for any crime"⁴⁴⁷ and that "no official was charged with unlawful conduct in connection with its project"⁴⁴⁸ did not preclude the tribunal from refusing to hear the investor's claims, the arbitrators found it necessary to state:

While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.⁴⁴⁹

⁴⁴² *Ibid* at para 76.

⁴⁴³ *Ibid* at paras 28-30.

⁴⁴⁴ *Ibid* at para 240.

⁴⁴⁵ *Ibid* at paras 325, 327, 337, 351-52, 389.

⁴⁴⁶ *Ibid* at para 422.

⁴⁴⁷ *Ibid* at para 308.

⁴⁴⁸ *Ibid* at para 336.

⁴⁴⁹ *Ibid* at para 389.

13.3.2.3 *Niko Resources v Bangladesh*

In a contract-based investment arbitration arising out of the 2003 Joint Venture Agreement (JVA) and the 2006 Gas Purchase and Sales Agreement (GSPA), Niko Resources and state-owned companies Bapex and Petrobangla, Niko Resources claimed \$35.71 million, alleging it had not been paid for deliveries of gas.⁴⁵⁰

During negotiations for the GSPA, the claimant delivered a car to the Bangladeshi State Minister for Energy and Mineral Resources, while the claimant's Canadian parent company provided the Minister with an all-expenses-paid trip to an exposition in Calgary.⁴⁵¹ Following an investigation in Canada, Niko Canada, on the basis of an agreed statement of facts, was convicted of bribery in 2011 and ordered to pay about CDN\$9.5 million in fines.⁴⁵² The respondents objected to the tribunal's jurisdiction, arguing that the claimant "has violated the principles of good faith and international public policy" and the tribunal was thus "empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law."⁴⁵³ The tribunal noted that the question, therefore, was "whether any instance of bribery and corruption in which the Claimant has been or may have been involved deprives the Claimant from having its claims considered and ruled upon by the present Tribunal."⁴⁵⁴

The arbitrators confirmed that bribery is contrary to international public policy,⁴⁵⁵ but made a distinction between contracts *of* corruption and contracts *obtained by* corruption:

There is indeed a fundamental difference between the two types of situations. In contracts of corruption, the object of the contract is the corruption of a civil servant and this object is intended by both parties to the contract. In contracts obtained by corruption, one of the parties normally is aware of the corruption and intends to obtain the contract by these means. But this is not necessarily the case for the other side. As explained in the *World Duty Free* award, bribes normally are covert. In that case the bribe was received not by the Government or another public entity but by an individual, the then President of the country. As the *World Duty Free* tribunal held, the receipt of the bribe is "*not legally imputed to Kenya itself. If it were otherwise, the payment would not be a bribe.*"⁴⁵⁶

⁴⁵⁰ *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")* (2013), ICSID Case No ARB/10/11 & ARB/10/18, Decision on Jurisdiction at paras 1-7, 45, 88 (ICSID) (Arbitrators: Michael E Schneider, Campbell McLachlan, Jan Paulsson) [*Niko Resources v Bangladesh*].

⁴⁵¹ *Ibid* at para 6.

⁴⁵² *Ibid*. See *R v Niko Resources Ltd*, 2011 CarswellAlta 2521 (QB) discussed in Section 6.5, and in Chapter 2, Section 3.5.1.

⁴⁵³ *Ibid* at paras 374, 376.

⁴⁵⁴ *Ibid* at para 380.

⁴⁵⁵ *Ibid* at paras 432-433.

⁴⁵⁶ *Ibid* at para 443 (italics in the original, internal quotations omitted).

While the tribunal observed that contracts of corruption were found void or unenforceable and denied effect by international arbitrators,⁴⁵⁷ in the case of covert bribes, the side innocent of corruption may have a justifiable interest in preserving the contract.⁴⁵⁸ In the present case, the contracts giving rise to the investor's claims had a legitimate object (the development of a gas field)⁴⁵⁹ and there was no causal link between the corruption and conclusion of the agreements (the JVA was concluded before the acts of corruption and the GPSA was concluded 18 months after the Minister resigned).⁴⁶⁰ In addition, the respondents did not seek to avoid the agreements or to declare them void *ab initio*.⁴⁶¹

Instead, the respondents asserted that, because the act of bribery linked to the investment and for which the investor's parent company was convicted in Canada, ICSID jurisdiction should be denied to the claimant.⁴⁶² The respondents invoked three arguments:

- (a) ICSID arbitration applies only to investments made in good faith;
- (b) accepting jurisdiction would jeopardize the integrity of the ICSID dispute settlement mechanism; and
- (c) the doctrine of clean hands.⁴⁶³

With respect to the first argument, the tribunal ruled that in a contractual dispute, "alleged or established lack of good faith in the investment does not justify the denial of jurisdiction but must be considered as part of the merits of the dispute."⁴⁶⁴ Secondly, the integrity of the investment arbitration system is "protected by the resolution of the contentions made (including allegations of violation of public policy) rather than by avoiding them."⁴⁶⁵ Finally, in response to the third objection, the arbitrators stated that Petrobangla and Bapex, with the approval of the Bangladesh Government, entered into the GPSA even after the corruption scandal and resignation of the Minister, so that even if the claimant and Niko Canada had unclean hands, the respondents disregarded this situation and may no longer rely on these events to deny jurisdiction under an arbitration agreement which they then accepted.⁴⁶⁶ The tribunal thus held that Niko Canada's corruption conviction in Canada could not be used as grounds to refuse jurisdiction over the merits of a dispute which the parties to the JVA and GPSA had agreed to submit to ICSID arbitration.⁴⁶⁷

Niko Resources v Bangladesh is thus a rare case where corruption was found to exist but did not determine the outcome, as the tribunal rejected the respondents' objection to jurisdiction despite the claimant's admissions of wrongdoing.⁴⁶⁸ In 2014, the tribunal ordered

⁴⁵⁷ *Ibid* at paras 434-436.

⁴⁵⁸ *Ibid* at para 444.

⁴⁵⁹ *Ibid* at para 438.

⁴⁶⁰ *Ibid* at para 453-455.

⁴⁶¹ *Ibid* at para 456.

⁴⁶² *Ibid* at para 465.

⁴⁶³ *Ibid* at para 466.

⁴⁶⁴ *Ibid* at para 471.

⁴⁶⁵ *Ibid* at para 474.

⁴⁶⁶ *Ibid* at para 484.

⁴⁶⁷ *Ibid* at para 485.

⁴⁶⁸ Llamzon (2014), *supra* note 332 at para 6.289.

Petrobangla to pay Niko \$25.5 million for gas delivered from November 2004 to April 2010.⁴⁶⁹ However, in March 2016, the respondents submitted a new request seeking declarations that the JVA and the GPSA had been procured through corruption and the claimant was thus not entitled to use international arbitration to pursue its claims or, alternatively, that the JVA and the GPSA were void.⁴⁷⁰ The tribunal affirmed that it was “conscious of the seriousness of corruption offenses” and, being “[m]indful of [the tribunal’s] responsibility for upholding international public policy,”⁴⁷¹ decided it would examine circumstances surrounding the negotiation and conclusion of the JVA and the GPSA to determine whether they were procured by corruption.

In a 587-page decision issued in February 2019, the tribunal rejected the respondents’ objections to the tribunal’s jurisdiction and concluded that the JVA and the GPSA were not procured by corruption.⁴⁷² The evidence presented by the respondents did not contain any indication of corruption in the proposal and acceptance of the arbitration clauses,⁴⁷³ and the object of the JVA and the GPSA, that is for Niko to develop the gas fields and sell the gas to Petrobangla, was lawful; the question whether Niko was lawfully granted governmental authority to do so was one concerning the merits, not the jurisdiction.⁴⁷⁴ As to the merits of the respondents’ corruption allegations, the tribunal found it “difficult to identify an invariable rule on the standard of proof” and did not “find much assistance in terms such as ‘preponderance of evidence’ and ‘heightened standard of proof.’”⁴⁷⁵ Ultimately, the question was simply “whether the Tribunals are persuaded that the JVA and GPSA were procured by corruption or not,”⁴⁷⁶ and the arbitrators rejected the respondents’ allegations as unfounded.⁴⁷⁷

13.3.2.4 *MOL v Croatia*

Another case in which a host state’s allegations of corruption may be determinative is currently in the making. In *MOL v Croatia*,⁴⁷⁸ the investor alleges that Croatia breached its obligations under the Energy Charter Treaty in connection with MOL’s investments in INA,

⁴⁶⁹ *Niko Resources v Bangladesh*, *supra* note 450, Decision on the Payment Claim (2014) at para 292(1).

⁴⁷⁰ *Niko Resources v Bangladesh*, *supra* note 450, Procedural Order No 13 Concerning the Further Procedure Regarding the Corruption Issue and Related Issues (2016) at paras 1-3.

⁴⁷¹ *Ibid* at paras 2, 7.

⁴⁷² *Niko Resources v Bangladesh*, *supra* note 450, Decision on the Corruption Claim (2019) at para 2010.

⁴⁷³ *Ibid* at para 576.

⁴⁷⁴ *Ibid* at para 580.

⁴⁷⁵ *Ibid* at paras 803-805.

⁴⁷⁶ *Ibid* at para 806.

⁴⁷⁷ *Ibid* at paras 1970-2009.

⁴⁷⁸ *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia* (2014), ICSID Case No ARB/13/32, Decision on Respondent’s Application under ICSID Arbitration Rule 41(5) (ICSID) (Arbitrators: Sir Franklin Berman, William W Park, Brigitte Stern) [*MOL v Republic of Croatia*].

an oil company.⁴⁷⁹ In 2003, following the Croatian government's decision to privatize INA, MOL acquired a 25%+1 share in INA while the government remained the majority shareholder. Further negotiations culminated in two agreements which allowed MOL to increase its stake in INA to 49% (the 2009 Agreements). Whereas Croatia alleges the 2009 Agreements were procured by MOL's CEO through bribery of then-Prime Minister of Croatia Ivo Sanader, the investor points out that neither MOL nor its CEO has been convicted of any crime in relation to the 2009 Agreements, and alleges that criminal charges against MOL's CEO are "baseless" and represent an attempt by Croatia to take control of INA.⁴⁸⁰ In addition, the investor asserts that allegations of bribery constitute an "illegal effort to harass and intimidate MOL."⁴⁸¹ Croatia maintains that initiation of the ICSID proceedings was "just another attempt [made by the investor's CEO] to evade justice."⁴⁸²

In November 2012, Ivo Sanader was convicted in Croatia for accepting €5 million bribe from MOL in exchange for facilitating the conclusion of the 2009 Agreements. However, in July 2015, Croatia's Constitutional Court annulled the conviction and ordered a retrial, which began in September of 2015. Croatian law enforcement authorities also issued an indictment against MOL's CEO and chairman Zsolt Hernádi, but Hungarian authorities declined Croatia's requests to question him.

On December 2, 2014, the ICSID tribunal declined Croatia's application to dismiss the investor's claims on a summary basis and decided that consideration of the objections put forward by the respondent should be postponed to a later stage of the proceedings.⁴⁸³ Meanwhile, Croatia initiated a contract-based arbitration against MOL. However, in its December 23, 2016 award, the tribunal refused to declare the 2009 Agreements null and void as it arrived at a "confident conclusion" that Croatia had not proven that MOL bribed Mr. Sanader to secure the impugned contracts.⁴⁸⁴ As the ICSID arbitration is still pending, it remains to be seen how the ICSID tribunal will approach the issue of corruption and what

⁴⁷⁹ For the facts of the case, see *ibid* at paras 1-21; Margareta Habazin, "MOL v Republic of Croatia: The ICSID Case Where Investor Corruption as a Defense Strategy of the Host State in International Investment Arbitration Might Succeed" (16 November 2015), online (blog): *Kluwer Arbitration Blog* <<http://arbitrationblog.kluwerarbitration.com/2015/11/16/mol-v-republic-of-croatia-the-icsid-case-where-investor-corruption-as-a-defense-strategy-of-the-host-state-in-international-investment-arbitration-might-succeed/>>; Luke Eric Peterson, "Croatia Fails in Bid to Argue that Umbrella Clause Carve-out Should Knock Out Claim; UNCITRAL Tribunal Finalized in Separate Case", *Investment Arbitration Reporter* (3 December 2014), online: <<https://www.iareporter.com/articles/croatia-fails-in-bid-to-argue-that-umbrella-clause-carve-out-should-knock-out-claim-uncitral-tribunal-finalized-in-separate-case/>>.

⁴⁸⁰ *MOL v Republic of Croatia*, *supra* note 478 at para 17.

⁴⁸¹ *Ibid* at para 19.

⁴⁸² *Ibid* at para 39.

⁴⁸³ *Ibid* at paras 46, 52.

⁴⁸⁴ Luke Eric Peterson, "Kaplan-Paulsson-Barbic Award Surfaces, Illuminating why Tribunal Rejected Croatia's Allegation that Favourable Outcomes were Procured through Bribery of Prime Minister", *Investment Arbitration Reporter* (7 November 2017), online:

<<https://www.iareporter.com/articles/kaplan-paulsson-barbic-award-surfaces-illuminating-why-tribunal-rejected-croatias-allegation-that-favourable-energy-deals-were-procured-through-bribery-of-prime-minister/>>.

effect, if any, the allegations of corruption by the host state will have on the outcome of the case.

13.4 International Investment Arbitration and the Global Fight against Corruption

International arbitration is, by nature, a private and consensual procedure. Its neutrality and flexibility, as well as the enforceability of arbitration agreements and final and binding character of arbitral awards, make international arbitration the primary mechanism for the settlement of disputes arising out of international commercial and investment transactions. However, the global nature of modern business, increasing involvement of states and state-owned enterprises in international investment, and rising sophistication of regulatory and reporting schemes in various countries inevitably result in a corresponding surge in the number of investment disputes. In 2020, investors initiated 68 publicly-known treaty-based international investment arbitrations, and the respondent was a developing country or a transition economy in around 75% of these cases.⁴⁸⁵ As of 2021, 124 countries and one economic grouping have been named as respondents in one or several known treaty-based investment arbitration disputes.⁴⁸⁶

Not surprisingly, the issue of corruption has found its way into some investment disputes. Arbitration cases reviewed in this section demonstrate that both foreign investors and host states may make allegations of corruption. On the one hand, investors have made attempts to seek compensation from host states for damages or losses caused by public officials who allegedly solicited bribes or were corruptly influenced by the investors' competitors. Tribunals have hinted that corruption on the side of the host state's public officials, if proven, may engage the host state's liability for the breach of national treatment or fair and equitable treatment standards, as well as for illegal expropriation. However, while the arbitrators accepted the possibility that corruption may be proven with circumstantial evidence, by "connecting the dots," the investors failed to furnish "clear and convincing" evidence of corruption. On the other hand, where the claimants' investments were tainted by corruption, the arbitrators exercised their duty to uphold international public policy and thus rejected the investors' claims.

In summary, international arbitration principles and procedures discourage investors from getting involved in corrupt activities, as such activities deny recovery to claimants whose investments are tainted by bribery. At the same time, international arbitration remains a private and consensual dispute resolution mechanism in which arbitrators have no power or authority to investigate allegations of corruption on their own. This means that in some cases (at least theoretically), public officials may get away with soliciting bribes or being bribed by the investors' competitors.

⁴⁸⁵ World Investment Report 2021, *supra* note 336 at 129.

⁴⁸⁶ *Ibid.*

CHAPTER 8

THE LAWYER'S ETHICAL AND PROFESSIONAL DUTIES

ROB LAPPER, Q.C. AND GERRY FERGUSON*

* Gerry Ferguson thanks Erin Halma for her research and writing assistance on the previous version of this chapter.

CONTENTS

- 1. INTRODUCTION**
- 2. LAWYERS AND BUSINESS CLIENTS**
- 3. LEGAL AND ETHICAL DUTIES**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

All lawyers owe certain legal, professional, and ethical duties to their clients. This chapter focuses on four of those duties, which are most relevant when lawyers provide advice to their business clients for the purpose of assisting their clients in pursuit of the client's business objectives. Those duties are:

- Duty to avoid Conflicts of Interest
- Duty not to Advise or Assist in Violation of Law
- Duty of Confidentiality and
- Duty to preserve Lawyer/Client Privilege

This chapter is an important prelude to the next chapter that focuses on the seminal role that lawyers play in the context of anti-corruption policies, risk assessments, and due diligence practices in modern multi-national business transactions.

2. LAWYERS AND BUSINESS CLIENTS

2.1 Multiple Roles of Lawyers

In the context of business law, lawyers have an increasingly large role to play in anti-corruption compliance. Lawyers provide legal, and often business, advice to their clients. We will address the critical distinction between legal and business advice later in this chapter.

In providing legal advice, lawyers are “transaction facilitators.” They are expected to construct transactions in a way that complies with relevant laws, including laws prohibiting the offering or paying of bribes.¹ In addition to providing legal advice, lawyers educate their clients on the law and on how to comply with the law while achieving business objectives.² Lawyers may act as internal or external investigators if there is an allegation of corruption against a client.³ They will frequently have to conduct or oversee due diligence investigations prior to closing certain transactions. Lawyers may act as compliance officers or ethics officers by creating, enforcing and reviewing their client’s compliance program.⁴ Lawyers may act as assurance practitioners and conduct an assurance engagement on the effectiveness of the organization’s control procedures.⁵ In an increasingly technology-enabled practice environment, the use of technology for information storage, retrieval, and exchange, document preparation, and communication increases, and lawyers are required

¹ Sarah Helene Duggin, “The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility” (2006-2007) 51 St Louis ULJ 1004 at 1006 (HeinOnline). Duggin’s article provides an examination of the different roles in-house counsel play in a corporation.

² *Ibid* at 1005.

³ *Ibid* at 1008. Dealt with more fully in Chapter 6, Section 4.2.

⁴ *Ibid* at 1011-12.

⁵ Discussed more fully in Chapter 9, Section 3.1.3 (item 6) and Section 3.1.4.

to address privacy, confidentiality and privilege protection, and to act as privacy and technology risk management advisors. Finally, some lawyers may be in the position of a gatekeeper in the sense that, by advising their client on the illegality or potential illegality of a proposed transaction and refusing to do the necessary legal work for the transaction, they may prevent their client from breaching the law. In each of these roles, the lawyer may come face to face with issues of corruption and have to consider the ethical and professional obligations that may guide and constrain their conduct and advice.⁶

2.2 Who is the Client?

Lawyers owe various duties to their clients. To fulfill those duties, the lawyer must of course know who their client is. In many forms of legal practice, the client is a physical person and their identity is self-evident. However, in the business world, the client is usually an organization. Businesses are usually conducted under one of the many forms of business organizations, which include:

- Incorporated companies (both for-profit and not-for-profit and including special corporate structures such as universities, hospitals, municipalities and unions);
- Unincorporated associations or societies;
- Sole proprietorships;
- Partnerships; and
- Trusts (e.g., pension fund trusts, mutual trusts, and real estate investment fund trusts).

In this chapter, we will focus primarily on incorporated companies, both for simplicity and because incorporated companies are the prevalent business form for most commercial entities of any significant size.

In common law countries (and some civil law countries), a corporation is a separate legal entity. While treating the corporation as a person is a legal fiction, it nonetheless means the corporation can act as a legal entity. For example, it can own property, enter into contracts for goods and services, hire and fire employees, and sue or be sued by others. Most importantly, it also means the corporation has limited liability; if the corporation fails financially, the individual owners and/or shareholders are not personally liable for the debts of the corporation. The legal authority for the actions of a corporation is vested in the board of directors. Thus, when a lawyer is hired by a corporation, the lawyer's client is the corporation whose authority and ultimate directions come from the board of directors. While a lawyer may operationally receive instructions from and interact with senior management, including Chief Executive Officers (CEOs), Chief Financial Officers (CFOs) and Chief Operating Officers (COOs), the lawyer's client is still the corporation (i.e., the corporate entity that speaks through its board). Thus, the lawyer must always be satisfied that they are receiving instructions from someone who is authorized to give them. The

⁶There is a more expansive discussion of the lawyer as “gatekeeper” in Section 2.4.

lawyer owes their professional duties to the corporation, not to senior management, the chair of the board, or individual owners or shareholders.⁷

2.3 In-House and External Counsel

A lawyer may have one of two primary relationships with their business client: in-house counsel or external counsel. External counsels are not employees of the client; they operate independently and normally have multiple clients. The employment of lawyers as in-house counsel has largely developed over the past 75 to 100 years.⁸ More than forty years ago, Lord Denning described the position of in-house counsel in the legal profession as follows:

Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority.... In every case these legal advisers do legal work for their employer and for no-one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer.... They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act

⁷ American Bar Association (ABA), *Model Rules of Professional Conduct*, 2020 ed, ABA, Centre for Professional Responsibility, 2020 [ABA Model Rules (2020)], Rule 1.13(a), online: <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/>; Federation of Law Societies of Canada (FLSC), *Model Code of Professional Conduct*, (as amended October 19 2019) Ottawa: FLSC, 2019 [FLSC Model Code, (2019)], Rule 3.2-3, online (pdf): <<https://flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf>>.

In discussing the duties to clients and ethical obligations that a lawyer owes to clients in the US context, this chapter will refer to the ABA *Model Rules of Professional Conduct*. In the Canadian context, it will refer to the FLSC *Model Code of Professional Conduct*. These are model codes and are not the specific code that applies in any given jurisdiction in the United States (for the ABA *Model Rules (2020)*) or in Canada (for the FLSC *Model Code (2019)*). Each of these model codes includes a comprehensive assessment of the general rule by which lawyers in the US or Canada, as the case may be, are expected to abide. These model codes, while intended to help provide rules that are consistent in the common law jurisdictions of their respective countries, are not consistently adopted in their entirety by each jurisdiction. Courts and state bar authorities in the US, and Law Societies in common law jurisdictions in Canada review provisions of the applicable model code, and consider whether to incorporate them into their state, provincial or territorial codes. There remain variations or departures from model code provisions in the codes of conduct of a number of state, provincial and territorial jurisdictions. It is therefore important to check the rules in the code of every jurisdiction that is under consideration. (The FLSC publishes and updates an *Interactive Model Code* that allows the user to cross check the rules of a provincial Law Society against the comparable rules and commentary in the model code. FLSC, *Interactive Model Code of Professional Conduct* (as updated to November 2020) (FLSC, 2020) [Interactive Model], online: <<https://flsc.ca/interactivecode/>>.)

Provincial and Territorial Law Society websites can be accessed for detailed information on each province's code of professional conduct.)

⁸ "Legal Profession" (1985) 11 Commonwealth L Bull 962 at 974 (HeinOnline). See also John C Coffee, *Gatekeepers: The Role of the Professions in Corporate Governance* (New York: Oxford University Press, 2006) at 194.

for one client only and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidence. They and their clients have the same privileges.⁹

This description of in-house counsel remains generally accurate. The number of in-house counsel compared to external counsel continues to grow as the use of “insourcing” is preferred to the generally more expensive alternative of retaining external counsel.¹⁰ In-house counsel constitute 15 to 20 percent of practicing lawyers. They have two active professional associations in Canada: the Canadian Corporate Counsel Association¹¹ and the Association of Corporate Counsel of Canada.¹² The former is an organization within the Canadian Bar Association that focuses on the interests of corporate counsel. It has sections in most jurisdictions in Canada, and offers specialized training and certification for in-house counsel, as well as regular programming on issues relevant to corporate and business practice. The latter represents more than 1,400 members in 500 corporations across Canada. They have chapters in Alberta, British Columbia, Ontario, and Quebec and hold programs every month on topics like compliance, ethics, intellectual property, legal risk management, project management, career development, and more.¹³

While many corporations have in-house counsel, a corporation will often turn to external counsel for highly specialized legal areas or for litigation. Some smaller corporations have no in-house counsel. They refer all their legal work to one or more external law firms. While the balance of work between in-house and external lawyers is often in flux, Woolley et al. describe some attractions for retaining in-house counsel:

Companies have found it valuable to have dedicated legal expertise resident within their walls, with professionals who know both the law and the organization intimately. Hiring corporate counsel can also be far more cost-efficient than hiring outside law firms on a case-by-case basis. For many lawyers, in-house practice can offer the combined attractions of interesting work, a lifestyle often perceived as more accommodating than that offered by private practice, greater job security, and significant financial reward through both substantial salaries and the chance to

⁹ Crompton Amusement Machines Ltd v Commission of Customs and Excise (No 2), [1972] 2 QB 102, 2 All ER 353 at 376 (CA).

¹⁰ See Deloitte, *Canadian Legal Landscape 2019: Issues and trends facing in-house counsel in Canada* (2019) at 3, online (pdf): *Deloitte Touche Tohmatsu Limited* <<https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/ca-deloitte-legal-industry-report-2019-en-aoda.pdf>>.

¹¹ “Canadian Corporate Counsel Association” (last visited July 2021), online: *CCAA-AAJE* <<http://www.ccca-accje.org/>>. The “CCCA” is part of the Canadian Bar Association.

¹² “Association of Corporate Counsel of Canada: Chapters and Networks, Canada” (last visited July 2021), online: *AAC* <<https://www.acc.com/chapters-networks/chapters/canada>>. It is an affiliate of the global Association of Corporate Counsel organization.

¹³ *Ibid.*

participate in the success of the company through compensation plans that include stock options.¹⁴

While in-house lawyers have the same general duties as external lawyers, their status as an employee of the corporate client can raise professional issues requiring careful consideration. In particular, the need to distinguish between legal advice and advice related to business and business strategy is critical for example, to preserve privilege (discussed below).

Further, in-house counsel are often dependent on the CEO of the corporation. This makes it essential for them to do careful due diligence on both the CEO and the company itself to ensure they are not entering an environment without a “culture of integrity.”¹⁵ They must be aware of their role as not only legal counsel, but also revenue-generators for the corporation.¹⁶

Difficult issues around solicitor-client privilege and conflict of interest may arise more frequently for in-house counsel than external counsel. For example, a member of the upper management in a company may seek out the advice of in-house counsel on a matter of corporate business.¹⁷ That person may mistakenly believe there is a degree of confidentiality covering the conversation. However, the in-house counsel may feel duty-bound to immediately disclose those seemingly confidential conversations to the board of directors. In addition, the role of in-house counsel may involve advising the board of directors or audit committee on acts or omissions of the officers and upper managers of the organization with whom the lawyer works and from whom the lawyer regularly receives directions.¹⁸ Legally and ethically, in-house counsel’s client is the corporation, but as a practical matter, in-house counsel are hired by and receive legal advice requests from officers or upper management. Reporting on some or all matters to the Board of Directors may greatly strain the relationship between the lawyer and company officers.¹⁹

¹⁴ Alice Woolley et al, *Lawyers’ Ethics and Professional Regulation*, 3rd ed (LexisNexis Canada, 2017) at 547.

¹⁵ Ben W Heineman Jr, “Resolving the Partner-Guardian Tension: The Key to General Counsel Independence” (2019) 42:1 Del J Corp L 149 at 179-180, online (pdf): <<https://www.djcl.org/wp-content/uploads/2019/08/42.1.A5.pdf>>.

¹⁶ Henrik Aro, *The Role of General Counsel in Corporate Decision-Making* (Master’s Thesis, Hanken School of Economics, 2018) at 81, online: <<https://helda.helsinki.fi/dhanken/bitstream/handle/123456789/207883/Aro.pdf>>.

¹⁷ Out of 70 general counsel surveyed by Deloitte across Canada, 68% indicated that members of legal department in their organization are required to spend time with business units or in the front line of the business. See Deloitte, *Spotlight on General Counsel* (2015), at 4-5, online (pdf): *Deloitte Touche Tohmatsu Limited* <<https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/ca-EN-fa-2015-General-Counsel-Survey-AODA.pdf>>.

¹⁸ Duggin, *supra* note 1 at 1004.

¹⁹ William Alan Nelson II, “Attorney Liability under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions” (2008-2009) 39 U Mem L Rev 255 at 273 (HeinOnline).

Another concern for in-house counsel in respect to faithfully fulfilling their professional legal duties and in particular their duty to act objectively and independently, has been referred to as the problem of “cognitive dissonance.” Woolley et al. explain as follows:

Finally, in-house lawyers have to be especially aware of the challenges to their independence, and the phenomenon described as “cognitive dissonance.” As many legal ethics experts have noted, in cases of client misconduct, lawyers’ professional norms of client loyalty often conflict with personal norms of honesty and integrity. To reduce the “cognitive dissonance,” lawyers will often unconsciously dismiss or discount evidence of misconduct and its impact on third parties. This becomes even more of a problem when lawyers bond socially and professionally with other employees, including senior management. The more a lawyer blends into insider culture, the greater the pressures to conform to the organization’s cultural norms. That can in turn lead lawyers to underestimate risk and to suppress compromising information in order to preserve internal solidarity. In the long run, this dynamic can create problems for everyone: clients lose access to disinterested advice; lawyers lose capacity for independent judgment and moral autonomy; and the public loses protection from organizational misconduct. While this is a problem for all lawyers, the challenge is especially strong for corporate counsel. Although the financial and other consequences of terminating a relationship with a major client can be significant for lawyers in law firms, they pale in comparison to the consequences faced by an in-house counsel who is in essence walking away from their job and their financial security. The pressures – personal and professional – are enormous.²⁰

2.4 Lawyer as a Corporate Gatekeeper

The term gatekeeper in the world of business generally refers to an outside or independent monitor or watchdog.²¹ A corporate gatekeeper is someone who “screen[s] out flaws or defects or who verifies compliance with standards or procedures.”²² A corporate gatekeeper will normally have at least one of two roles: (1) prevention of a corporate client’s wrongdoing by withholding their legal approval from actions that appear illegal and/or disclosing such actions if the client does not desist from those actions and (2) acting as a “reputational intermediary” who assures investors of the quality of the message or signal sent out by the corporation.²³ Coffee suggests there are four elements involved in gatekeepers’ responsibilities:

²⁰ Woolley et al, *supra* note 14 at 549. See also Deborah Rhode & Paul Paton, “Lawyers, Ethics, and Enron” (2002-2003) 8 Stan JL Bus & Fin 9 at 20 (HeinOnline). This article uses the Enron scandal as an example of how counsel reviewing its own work could have been viewed as contrary to professional ethics. However, no action was taken against the firm for breach of ethical duties.

²¹ Coffee, *supra* note 8 at 2.

²² *Ibid.*

²³ *Ibid.*

- (1) independence from the client;
- (2) professional skepticism of the client's representations;
- (3) a duty to the public investor; and
- (4) a duty to resign when the [gatekeeper's] integrity would otherwise be compromised.²⁴

Gatekeeping is "premised on the ability of professionals to monitor and control their client's conduct."²⁵ Failure to do so can result in gatekeeper liability. Some scholars consider auditors, lawyers, and securities analysts to be the primary gatekeeping professions. However, the legal profession generally seeks to distance itself from the view that lawyers are gatekeepers, promoting instead the view that the lawyer's role is to facilitate transactions.²⁶ Being a gatekeeper, with the attached obligation of protecting the public from potential harm caused by clients, runs contrary to the traditional role of the lawyer as a committed and loyal advocate for the client's interests and a guardian of the confidentiality between lawyer and client. Business and securities regulators and the legal profession disagree over whether lawyers should play a gatekeeping role in certain large corporate affairs. On the one hand, the government has an obligation to regulate the corporate arena to prevent widespread public harm and, on the other hand, the legal profession has an interest in upholding the legal duties of confidentiality and loyalty to their clients.

Nonetheless, in some contexts lawyers are considered gatekeepers. The strongest argument for the lawyer's role as a gatekeeper has arisen in the context of the securities and banking sectors in the US, in which lawyers facilitated the questionable or illegal behaviour that lead to major stock market collapses and harm to the economy and public. The US Congress described lawyers as gatekeepers in the sense of "[p]rivate intermediaries who can prevent harm to the securities markets by disrupting the misconduct of their client representatives."²⁷ If corporate lawyers are seen as transaction engineers rather than advocates for their clients, this strengthens the argument that (some) corporate lawyers may have a gatekeeping role.²⁸ Litigators are not generally in the same position; they are approached on an *ex post* basis, i.e., after trouble has arisen, and are by definition advocates for their clients. However, corporate lawyers that provide services on an *ex ante* basis are described as "wise counselors who gently guide their clients toward law compliance."²⁹ In that sense, they may be seen as having a role to play in ensuring that all transactions they assist with and advise on comply with the law.

The key debate centers on the question of whether corporate lawyers have or should have a duty to report their client or employer to market regulators when that client or employer

²⁴ John C Coffee Jr, "The Attorney as Gatekeeper: An Agenda for the SEC" (2003) 103 Colum L Rev 1296 at 1299 (HeinOnline). These four elements also define the responsibilities of securities lawyers practicing in front of the SEC.

²⁵ Andrew F Turch, "Multiple Gatekeepers" (2010) 96 Va L Rev 1583 at 1584 (HeinOnline).

²⁶ Coffee, *supra* note 8 at 3.

²⁷ Sung Hui Kim, "Naked Self-Interest – Why the Legal Profession Resists Gatekeeping" (2011) 63 Fla L Rev 131 at 131 (HeinOnline).

²⁸ Coffee, *supra* note 8 at 192.

²⁹ *Ibid.*

refuses to comply with the law. As noted, the primary arguments against assigning lawyers the role of corporate gatekeeper (i.e., requiring disclosure of client wrongdoing) are that (1) the role of gatekeeper destroys the duty of confidentiality and loyalty owed by a lawyer to their client and (2) it will tend to have a chilling effect on full and open solicitor-client communications.³⁰ These risks exist where gatekeepers must report wrongdoing externally rather than simply withhold their consent and withdraw from representation. Critics of the imposition of gatekeeper obligations on lawyers also oppose the idea that lawyers owe a duty to anyone aside from their clients and the courts, since additional duties may be at odds with the interests of clients.³¹ In acting as a gatekeeper, the lawyer is put in a potentially adversarial position with their client. This diminishes the lawyer's ability to effectively fulfill their essential role of "promoting the corporation's compliance with law."³² The American Bar Association Task Force on Corporate Responsibility found that lawyers are not gatekeepers in the same way that auditors are:

Accounting firms' responsibilities require them to express a formal public opinion, based upon an independent audit, that the corporation's financial statements fairly present the corporation's financial condition and results of operations in conformity with generally accepted accounting principles. The auditor is subject to standards designed to assure an arm's length perspective relative to the firms they audit. In contrast ... corporate lawyers are first and foremost counselors to their clients.³³

The American Bar Association (ABA) also asserts that lawyers do not have an obligation or a right to disclose reasonable doubts concerning their clients' disclosures to the Securities and Exchange Commission (SEC).³⁴

If corporate lawyers are considered gatekeepers, or at least partial gatekeepers, it should be recognized that the extent of influence they can or will practically exert on a corporation can vary. The "cognitive dissonance" noted above in the employment relationship between in-house counsel and their client dampens the lawyer's independence from their client. The practical ability of in-house counsel to give unwelcome but objective advice may be lessened by the existence of internal reviews of counsel and pressure from senior managers, as well as reprisals, if lawyers refuse to provide legal approval for a transaction.³⁵ Since the legality of certain conduct may be grey, rather than black or white, in-house counsel may tend to consciously or unconsciously approve grey areas in circumstances where an external counsel may not.

³⁰ Coffee, *supra* note 24 at 1296.

³¹ Kim, *supra* note 27.

³² American Bar Association, "Report of the American Bar Association Task Force on Corporate Responsibility" (2003-2004) 59 Bus L 156 at 156 (HeinOnline).

³³ *Ibid.*

³⁴ American Bar Association, "Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission" (1975) 31 Bus L 543 at 545.

³⁵ *Ibid.*

However, external counsel may also feel pressure to approve grey-area transactions due to the desire to maintain the corporation as a client, especially if that corporation comprises a significant portion of their billing. Additionally, as the role of in-house counsel expands and less transactional business goes through external counsel, external counsel may have less opportunity to discover and put a stop to corrupt or unlawful practices. Although in-house counsel arguably have less professional independence than external counsel does, they may be able to exert greater influence over corporate officers and directors because of their working relationship and the ability of corporations to shop for another law firm if unhappy with the advice or lack of cooperation of their current external law firm.³⁶

A different aspect of a gatekeeper's role is the use of their reputation to assure the marketplace that the corporation is abiding by various rules and regulations. External law firms are arguably better suited to this role than in-house counsel. In-house counsel will generally have less credibility in acting as a reputational intermediary, since they are seen as too closely associated with their company to provide an objective and impartial assurance to the marketplace.³⁷

At present, it seems that corporate lawyers in the US, UK, and Canada are not gatekeepers in the same way auditors are, since lawyers generally do not have a duty to report a client's past wrongdoing or a duty to report a client's planned crimes unless death or serious bodily harm to others is reasonably imminent. (These disclosure exceptions are discussed in more detail in Section 3.3).

The focus of the discussion of lawyers in a gatekeeper role is the question of the lawyer's duty, if any, to disclose wrongdoing to external regulators and public stakeholders. They do have, however, a duty not to be complicit in any wrongdoing and a duty not to assist a corporation in breaching the law. If asked to engage in illegal transactions, they are under a duty to withdraw as counsel. This is discussed in detail in Section 3.2.

Even if lawyers are not gatekeepers in the sense that auditors are, counsel often have the influence and ability to alter an organization's direction and propose a plan of action that achieves a client's objective without illegality.³⁸ While both in-house and external counsel must say no to illegal methods of achieving the client's objectives, they are entitled and expected to attempt to accomplish the client's objectives through alternative legal means.

3. LEGAL AND ETHICAL DUTIES

As already noted, all lawyers owe certain duties to their clients. In the case of a corporate client, fulfilling those duties may sometimes be challenging. Although the corporate entity has the legal status of a person, it acts through its officers, employees, directors, agents and shareholders. A corporate lawyer works with any number of these individuals, but the lawyer's ultimate duty is to the corporation itself. While this is true for both in-house, and

³⁶ Duggin, *supra* note 1 at 1004.

³⁷ Coffee, *supra* note 8 at 195.

³⁸ Duggin, *supra* note 1.

external counsel, in-house counsel have the added complication of duties as an employee to their corporate employer but also duties to their corporate client as the client's lawyer.

In the most general sense, a lawyer's duties to a client involve integrity and competence. Integrity broadly includes honesty, trustworthiness, candor, loyalty, civility, adherence to rules of confidentiality and avoidance of conflicts of interest while vigorously serving the client's stated interests within the limits of the law. In this context of integrity, this part of the chapter briefly discusses four areas of legal and ethical duties that lawyers, whether in-house or external, owe to their clients and how those duties can come into play in the context of corporate corruption.

3.1 Duty to Avoid Conflicts of Interest

A conflict of interest results from the existence of a factor(s) that materially and adversely affects the lawyer's ability to act in the best interests of their client.³⁹ Generally, there are two main categories of conflicts of interest: client conflict and own interest conflict. Client conflict occurs when two of the lawyer's clients have interests that are at odds with each other. Client conflict will normally only arise with external counsel, not in-house counsel. Of course, in-house counsel may raise the issue if they think that the external lawyer acting for the company has a client conflict. Own interest conflicts occur when a lawyer's interests are at odds with that of a client. This latter genre of conflicts of interest requires a lawyer to avoid placing their own interests before the interests of their clients. In order to avoid the appearance of a conflict of interest, lawyers must avoid taking or keeping clients whose interests are adverse, or potentially adverse, to their own.

The rationale for a lawyer's duty not to proceed with a case in the face of a conflict of interest is often explained by reference to a broader duty—the lawyer's duty of loyalty to a client. As Proulx and Layton state, "The leitmotif of conflict of interest is the broader duty of loyalty. Where the lawyer's duty of loyalty is compromised by a competing interest, a conflict of interest will exist."⁴⁰ In addition, as Graham notes:

Lawyers have an overriding duty to be loyal to their clients, and this duty of loyalty is undermined where lawyers act in cases that involve undisclosed conflicts of interests. As a result, lawyers are generally prohibited from acting in cases involving undisclosed conflicts of interest.

If the basis of the rules regarding conflicts of interest can truly be explained by reference to an overriding duty of loyalty, it should be noted that the word "loyalty," when used in the context of lawyer's conflicts of interest, bears an unusual meaning ... [A] lawyer need not agree with his or her client's position, nor even hope that the client succeeds in achieving his or her legal objectives.... The lawyer may represent a client whose position the lawyer abhors, or a client whose specific legal project the lawyer considers

³⁹ FLCS Model Code (2019), *supra* note 7, Rule 1.1-1; *R v Neil*, 2002 SCC 70 at para 31, [2002] 3 SCR 631.

⁴⁰ Michel Proulx & David Layton, *Ethics and Canadian Criminal Law*, 2nd ed (Toronto: Irwin Law, 2001) at 264.

immoral.... As a result, the lawyer may be unlikely to characterize his or her feelings toward the client as feelings of "loyalty."

Such cases reveal that the lawyer's duty of loyalty does not truly imply loyalty to the client, or even loyalty to the client's legal objectives. Instead, the lawyer is loyal to his or her position as the client's legal adviser. If the lawyer fulfills the role of legal counsel, the lawyer will act as though he or she is loyal to the client. In reality, however, the lawyer's loyalty is to the job of lawyering. The lawyer's loyalty to his or her profession can be explained by reference to the lawyer's interests in (1) promoting access to justice by fulfilling a social role that the lawyer believes to be important; (2) promoting his or her own professional reputation as a skilled and zealous advocate; and (3) receiving legal fees for services rendered.⁴¹

The application of conflict of interest principles can be extremely difficult and frustrating for lawyers. The complexity of business transactions in a corporate context, including the fact that these may involve multiple parties across many jurisdictions complicates enormously the analysis of conflict and the duty of loyalty in any particular transaction.⁴²

Conflicts of interest may arise for corporate lawyers in many aspects of their practice unrelated to concerns of corporate corruption. However, when an allegation or discovery of corruption in a client's business first arises, there is potential for a conflict of interest. For example, if a lawyer is working for two corporations, both of whom are alleged to have been involved in the same corrupt scheme, the two companies' best interests may be in conflict with one another (e.g., one company may agree to cooperate with the prosecution and testify against the other company). In such circumstances, the lawyer cannot continue to act for both client companies.⁴³

The restriction against acting for two or more clients with opposing interests also restricts lawyers from acting for a corporation while acting personally for the CEO or other senior official connected to the corporation. A somewhat related ethical duty for corporate counsel arises when there is an allegation of corruption in respect to a corporate client. The corporate lawyer's client is the corporation. The corporation's best interests may be in conflict with the interests of senior officers of the company if those officers are allegedly involved in the corruption in some active or passive way. Any admissions made by senior officers to corporate counsel are not privileged nor confidential. It would be unethical for a corporate lawyer to allow a senior officer to make statements damaging to that officer without first warning the officer that the lawyer is not, and cannot be, the officer's lawyer and that any statements to the lawyer are not confidential or privileged and may subsequently be used against the officer.

Because a corporation can only act through its officers and employees, the conflict between advising the corporation and acting for senior officers creates difficulties. The corporation

⁴¹ Randal Graham, *Legal Ethics: Theories, Cases, and Professional Regulation*, 3rd ed (Toronto: Edmond Montgomery Publications, 2014) at 321-322.

⁴² Alice Woolley, *Understanding Lawyers' Ethics in Canada*, 2nd ed (Toronto: LexisNexis, 2016) at 241.

⁴³ FLSC Model Code (2019), *supra* note 7, Rule 3.4-5(c).

and its counsel are disadvantaged in determining the facts of a case if its corporate actors (the senior officers) do not cooperate in supplying information. It may be possible to mitigate this problem through various means. For example, the corporation could agree to indemnify the officer for his or her independent and separate legal fees in exchange for cooperation.

Other concerns may arise in regard to “own interest conflicts,” especially for in-house counsel due to the very nature of their employment relationship with their corporate client. As in-house counsel are employees of the organization, they may benefit financially from any lucrative deals the organization makes.⁴⁴ Here again, the problem of ‘cognitive dissonance’ can be a factor. In-house counsel may fear being seen as obstructionist if they vigorously oppose business activities on legal grounds (especially when those grounds leave room for differing interpretations). In-house counsel work daily with senior management and this can affect their ability to be fearlessly objective in delivering legal advice that may be unwelcome to their client’s management. In-house counsel have to be especially aware of these types of challenges to their professional duty to act objectively and independently.

Many corporate business relationships involve related party transactions, in which the principals, shareholders, officers, and directors of different public corporate entities that are involved in a transaction can be some of the same individuals. A Law Society of Upper Canada Appeal Tribunal considered this in a 2015 decision and described the concerns that arise:

When a dominant figure such as an executive, controlling shareholder or another company they control stands to profit from a transaction in a manner different from public shareholders, there is a “commercial tension” between the dominant figure and the public shareholders. This type of transaction is considered a “related party transaction” because of the differing interest of the dominant figure. Without a mechanism to ensure that such transactions are fair to the public company, there is a risk that the dominant figure will influence the transaction’s terms at the expense of public shareholders.⁴⁵

In those circumstances, the Tribunal determined that the analysis of whether a lawyer advising on related party transactions was in a conflict of interest and had to be considered on a transaction-by-transaction basis, and is entirely context driven. It stipulated that:

The principles relating to conflict of interest under the Rules are the same whether the client is an individual, a small corporation or a large public corporation. The analysis, however, must be grounded in the context, which in this case is work on particular retainers for sophisticated corporate clients. None of the allegations in this case falls under the “bright line rule” which prohibits acting, without informed consent, for two current clients whose immediate legal interests are directly adverse. Whether there was a conflict under the Rules in these circumstances must be determined by an analysis, in relation to each transaction of (i) the clients for whom they acted

⁴⁴ Nelson, *supra* note 19 at 276.

⁴⁵ Law Society of Upper Canada v DeMerchant and Sukonick, 2015 ONLSTA 6 at 7.

on a particular transaction; (ii) the nature of the legal work they were retained to do and did; and (iii) whether there were conflicting or diverging interests in relation to that legal work that posed a serious risk of adversely affecting the representation of their client or former client.⁴⁶

Finally, although not specifically related to corruption and conflicts of interest, it is worth noting that conflicts of interest can arise when a lawyer or their firm acts for a corporation and the lawyer serves as a director of the corporation.⁴⁷ Conflicts may occur in this situation because the dual roles may (1) affect the lawyer's independent judgment and fiduciary obligations (2) make it difficult to distinguish between legal and business advice (3) threaten solicitor-client privilege, and (4) potentially disqualify the lawyer or law firm from acting for the organization.⁴⁸

3.1.1 US

The American Bar Association's *Model Rules of Professional Conduct* contain rules regarding conflicts of interest. Rule 1.7 of the ABA's model rules states:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) The representation of one client will be directly adverse to another client; or
 - (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) The representation is not prohibited by law;
 - (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceedings before a tribunal; and
 - (4) Each affected client gives informed consent, confirmed in writing.⁴⁹

⁴⁶ *Ibid* at 6.

⁴⁷ FLSC Model Code (2019), *supra* note 7, Commentary to Rule 3.4-1, para 11(e).

⁴⁸ *Ibid*.

⁴⁹ ABA Model Rules (2020), *supra* note 7, Rule 1.7.

3.1.2 UK

The UK Solicitors Regulation Authority *Code of Conduct* (SRA Code) restricts lawyers from acting when there is “a conflict, or a significant risk of conflict, between you and your client.”⁵⁰ Further, “if there is a conflict, or significant risk of conflict, between two or more current clients,”⁵¹ lawyers are restricted from acting for all of the clients, subject to a few exceptions. The SRA Code applies the same rules to firms.⁵²

Conflict of interest also arises in the SRA rules on confidentiality and disclosure. Under those provisions, solicitors may not act for a client in a matter if that client has an interest adverse to the interest of another current or former client, for whom the solicitor or the solicitor’s business or employer holds confidential information material to the matter, unless

- effective measures are taken or result in no real risk of disclosure or,
- the current or former client whose information the solicitor or business or employer holds has given informed consent, evidenced in writing, including consent to the measures taken.⁵³

3.1.3 Canada

In Canada, the general rule on conflicts of interests is set out in the Federation of Law Society’s *Model Code of Professional Conduct* (FLSC Model Code), rule 3.4-1:

A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.⁵⁴

Rule 1.1-1 in the FLSC Model Code defines “conflict of interest” as:

the existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person.⁵⁵

Paragraphs 1 and 2 of commentary to rule 3.4-1 provide guidance to this definition as follows:

[1] Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright line rule

⁵⁰ UK, Solicitors Regulation Authority, *SRA Code of Conduct for Solicitors, RELs and RFLs*, (updated to November 2019) UK, 2019 [SRA Code of Conduct (2019)], s 6, online: <<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>>.

⁵¹ *Ibid* at para 6.2.

⁵² UK, Solicitors Regulation Authority, *SRA Code of Conduct for Firms*, (updated to November 2019) UK, 2019 [SRA Code of Conduct for Firms (2019)], s 6, online: <<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/>>.

⁵³ SRA Code of Conduct (2019), *supra* note 50, Rule 6.5.

⁵⁴ FLSC Model Code (2019), *supra* note 7, Rule 3.4-1.

⁵⁵ *Ibid*, Rule 1.1-1.

as articulated by the Supreme Court of Canada. The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent. However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary [6].

[2] In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.⁵⁶

The *Model Code* Rule 3.4-2 permits acting where a conflict of interest exists if the lawyer has consent from all of their affected clients. Consent must be fully informed and voluntary after the conflict or potential conflict has been disclosed. The rule provides that it can be inferred when dealing with governments, publicly traded companies, or entities with in-house counsel, provided the other conditions set out in the rule are met.⁵⁷

3.2 Duty to Not Advise or Assist in a Violation of the Law

Lawyers have a duty to not advise or assist in the violation of the law. Professional obligations generally require lawyers to resign as counsel if they are in a situation where, after explaining to their client that the proposed course of conduct is illegal and that they cannot participate in that conduct, the client continues to instruct them to engage in or facilitate the illegal act.⁵⁸ Most codes of conduct expressly forbid lawyers from implementing corporate instructions that would involve the commission of a crime, a fraud, or a breach of professional ethics.⁵⁹

Lawyers who advise or assist in the violation of the criminal law are also subject to prosecution under criminal law for conspiring, aiding, abetting, or counselling a breach of the law.

Lawyers can advise clients on how to achieve a business objective in compliance with the law. For example, a business development contract without certain limiting instructions might lead to a high probability of bribes being paid by company agents; ignoring that risk can constitute assisting in that bribery and therefore would be a violation of the lawyer's legal and ethical duties. However, properly documenting the nature of the work to be

⁵⁶ *Ibid*, Commentary to Rule 3.4-1, para 2.

⁵⁷ *Ibid*, Rule 3.4-2 and commentary.

⁵⁸ *Ibid*, Rule 3.2-8; ABA Model Rules (2020), *supra* note 7, Rule 1.16.

⁵⁹ FLSC Model Code (2019), *supra* note 7, Rules 3.2-7 and 3.2-8 and commentaries.

performed and the identity of those performing the work, along with prohibiting contact by the agent with government officials without specific company approval, can mitigate the potential misuse of the contract in an unlawful scenario.

Another factor that confuses the issue is the definition of “law.” Advising on “hard law,” like the *Corruption of Foreign Public Officials Act* (CFPOA), *Criminal Code*, or *Foreign Corrupt Practices Act* (FCPA), is often (though not always) relatively easy. What can be more difficult is advising on the stance to be taken toward “soft law,” such as unratified treaty obligations or guidelines from multinational organizations like the United Nations. Strictly speaking, the law means hard law; however, it is advisable to at least alert clients to potential soft law concerns, as a client’s level of adherence to these soft law obligations may affect public perceptions and prosecutorial positions.

3.2.1 US

The American Bar Association model rules prohibit lawyers from counselling or assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. The rules allow the lawyer to discuss the legal consequences of proposed conduct and to “counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”⁶⁰

3.2.2 UK

The SRA *Code of Conduct* provides that as a solicitor,

You do not mislead or attempt to mislead your *clients* the *court* or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your *client*).⁶¹

The Solicitors Regulation Authority provides specific guidance on money laundering. The introduction to its *Solicitors Regulation Authority Topic Guide on Money Laundering* sets out the priority that it attaches to enforcement of its rules in the money laundering context. It stipulates that:

Money laundering is a priority risk for us. The credibility of law firms makes them an obvious target for criminals. The overwhelming majority of solicitors want to do the right thing. Yet that alone is not enough. Weak processes or undertrained staff can leave the door open for criminals.⁶²

⁶⁰ ABA Model Rules (2020), *supra* note 7, Rule 1.2(d).

⁶¹ SRA Code of Conduct (2019), *supra* note 50, Rule 1.4. The same applies to firms. See SRA Code of Conduct for Firms (2019), *supra* note 52, Rule 1.4.

⁶² “Topic Guide: Anti-Money Laundering” (3 April 2020), online: *Solicitors Regulation Authority* <<https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/enforcement-practice/anti-money-laundering/>>.

3.2.3 Canada

The FLSC *Model Code* prohibits lawyers from knowingly assisting in or encouraging dishonesty, fraud, crime or illegal conduct:

3.2-7 A lawyer must never:

- (a) knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct
- (b) do or omit to do anything that the lawyer ought to know assists in or encourages any dishonesty, fraud, crime or illegal conduct by a client or others, or
- (c) instruct a client or others on how to violated the law and avoid punishment.⁶³

The commentary to the FLSC *Model Code* further elaborates on the lawyer's duty not to assist in fraud or money laundering:

A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.⁶⁴

3.2.4 Duty to Report

In most jurisdictions, lawyers, even if not directly involved in wrongdoing, have a duty to report it if they become aware of wrongdoing on the part of one of the corporations' directors, officers, employees or agents. This reporting usually requires the lawyer to bring the matter to a more senior individual in the corporation. This is discussed more fully in Section 3.3.1.

⁶³ FLSC Model Code (2019), *supra* note 7, Rule 3.2-7.

⁶⁴ *Ibid*, Commentary to Rule 3.2-7, at paras 2-3.

3.2.5 Criminal Sanctions

In addition to the professional obligations listed above, a lawyer can be subject to criminal penalties for assisting a client in wrongdoing. For example, in Canada the *Criminal Code* provisions on conspiracy, aiding, abetting, and counselling criminalize the conduct of anyone, including a lawyer, who knowingly assists their client in the commission of a crime.

3.3 Duty of Confidentiality and Lawyer/Client Privilege

Both the duty of confidentiality and lawyer/client privilege restrict lawyers from disclosing information about their client without client permission. These concepts are important to a corporate lawyer working on corruption and anti-corruption issues. For example, providing assistance in developing, implementing, reviewing and assessing a client's anti-corruption compliance programs may reveal corporate information that is "secret" or "private" or may involve privileged advice about a company's past or future risk areas or wrongdoing. A fundamental purpose of the duty of confidentiality and solicitor client privilege is to encourage full disclosure from clients to their lawyer, so the lawyer can best represent their client's interests. As the information disclosed may be harmful or embarrassing to the client's interests, providing protection from disclosure ensures that clients feel safe in making disclosures. A lawyer cannot assist in preventing or addressing corruption if the client is afraid that if they divulge information, the lawyer will share this information with others. The protection belongs to the client. The lawyer cannot unilaterally disclose otherwise privileged or confidential information without the client's permission unless a legally recognized exception, discussed below, applies.

3.3.1 Duty of Confidentiality

The duty of confidentiality requires lawyers to hold "in strict confidence" all information concerning the affairs of their client acquired throughout the professional relationship. A breach of this duty, if not otherwise authorized, is a breach of the lawyer's professional and fiduciary obligations and may result in the lawyer being subject to fines, civil liability, or disbarment.⁶⁵ The rationale for the duty is described by Proulx and Layton as:

[T]he client who is assured of complete secrecy is more likely to reveal to his or her counsel all information pertaining to the case. The lawyer who is in possession of all relevant information is better able to advise the client and hence provide competent service, furthering both the client's legal rights and the truth-finding function of the adversarial system. [footnotes omitted]⁶⁶

The duty of confidentiality prevents both the use of confidential information as well as disclosure of confidential information. This protects the client's confidential business information and prevents a lawyer from using this information to their advantage or the client's detriment. This may arise in the corruption context, for example, through disclosure

⁶⁵ Graham, *supra* note 41 at 192.

⁶⁶ Proulx & Layton, *supra* note 40 at 158.

of due diligence procedures for preventing or finding violations of the company's policies, which are considered confidential and proprietary information by the company. A lawyer assisting or assessing a client's corruption compliance program may be restricted from using any information learned through that process when later assisting a second client on a similar project.

Duties of confidentiality originate in, and are defined by the ethical rules that apply to lawyers in their jurisdictions of practice. Each jurisdiction has regulators who enforce these duties.

3.3.1.1 US

The duty of confidentiality is set out in the ABA's *Model Rules of Professional Conduct* at rule 1.6:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) To prevent reasonably certain death or substantial bodily harm;
 - (2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) To secure legal advice about the lawyer's compliance with these Rules;
 - (5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (6) To comply with other law or court order; [or]
 - (7) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.⁶⁷

Note that the *Model Rules* allow, but do not require, disclosure under any of the circumstances in Rule 1.6(b).

3.3.1.2 UK

The UK Solicitors Regulation Authority's *Code of Conduct* (SRA *Code of Conduct*) requires that as a solicitor:

You keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents.⁶⁸

Where you are acting for a client on a matter, you make the client aware of all information material to the matter to which you have knowledge, except when:

- (a) the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;
- (b) your client gives informed consent, given or evidenced in writing, to the information not being disclosed to them.
- (c) you have reason to believe that serious physical or mental injury will be caused to your client or another if the information is disclosed; or
- (d) the information is contained in a privileged document that you have knowledge of only because it has been mistakenly disclosed.⁶⁹

The SRA *Code of Conduct* also prohibits a solicitor from acting for a client, if that client has an interest adverse to the interest of another current or former client, for whom the solicitor or the solicitor's business or employer holds confidential information material to the matter, unless steps are taken to prevent disclosure of that information, and the other or former client consents.⁷⁰

⁶⁷ ABA Model Rules (2020), *supra* note 7, Rule 1.6.

⁶⁸ SRA Code of Conduct (2019), *supra* note 50, Rule 6.3. The same applies to firms. See SRA Code of Conduct for Firms (2019), *supra* note 52, Rule 6.3.

⁶⁹ SRA Code of Conduct (2019), *supra* note 50, Rule 6.4. The SRA Code of Conduct for Firms (2019), *supra* note 52, Rule 6.4 stipulates that "Any individual acting for a client on a matter" must comply with the same provisions.

⁷⁰ SRA Code of Conduct (2019), *supra* note 50, Rule 6.5 (see also discussion of the same provision in Section 3.1.2).

3.3.1.3 Canada

The duty of confidentiality is codified in the following rules set out in Rule 3.3 of the FLSC *Model Code*:

A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

- (a) expressly or impliedly authorized by the client;
- (b) required by law or a court to do so;
- (c) required to deliver the information to the Law Society; or
- (d) otherwise permitted by this rule.⁷¹

A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.⁷²

A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.⁷³

If it is alleged that a lawyer or the lawyer's associates or employees:

- (a) have committed a criminal offence involving a client's affairs;
- (b) are civilly liable with respect to a matter involving a client's affairs;
- (c) have committed acts of professional negligence; or
- (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.⁷⁴

A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.⁷⁵

⁷¹ FLSC Model Code (2019), *supra* note 7, Rule 3.3-1.

⁷² *Ibid*, Rule 3.3-2.

⁷³ *Ibid*, Rule 3.3-3. Note that in New Brunswick, this provision extends to permit disclosure, when the lawyer believes on reasonable grounds that there is an imminent risk of substantial *financial* injury to an individual caused by an unlawful act that is likely to be committed, and disclosure is necessary to prevent the injury [emphasis added]: The Law Society of New Brunswick, *Code of Professional Conduct*, (as amended January 1 2020) Fredericton: LSNB, 2020, Rule 3.3-3B.

⁷⁴ FLSC Model Code (2019), *supra* note 7, Rule 3.3-4.

⁷⁵ *Ibid*, Rule 3.3-5.

A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.⁷⁶

A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.⁷⁷

3.3.2 Lawyer/Client Privilege

Legal Professional Privilege; Solicitor/Client Privilege; Attorney/Client Privilege

Although often unfortunately conflated in discussion, the duties of confidentiality and the law associated with the privilege that attaches to legal advice are distinct, and not identical. They differ in scope, and origin.

(Though the properties of the privilege that attaches to legal advice are similar from jurisdiction to jurisdiction in common law countries, the descriptor applied to it varies. In Canada it is most often called "solicitor/client privilege"; in the US, it is "attorney/client privilege," and in the UK the reference is most often "legal professional privilege." In this chapter, we shall use the term lawyer/client privilege to describe the general privilege. When referring to a text or court decision that uses one of the other terms, we will preserve the reference to the term from the decision or text.)

The scope of the duty of confidentiality is much broader than the scope of lawyer/client privilege. The duty of confidentiality encompasses all communications between the lawyer and client, including the fact that the client has approached and hired the lawyer for assistance with a legal issue. By contrast, lawyer/client privilege applies only to communications for the purpose of obtaining or providing legal advice.

The duty of confidentiality is an ethical duty, whereas lawyer/client privilege is a substantive common law rule of evidence and is in Canada "a principle of fundamental importance to the administration of justice."⁷⁸

As Proulx and Layton note:

[C]rucial distinctions exist between a lawyer's ethical duty of confidentiality and solicitor-client privilege. First, the privilege encompasses only matters communicated in confidence by the client. The duty of confidentiality is broader, covering all information acquired by counsel whatever its source. Second, the privilege applies to the communication itself, does not bar the adduction of evidence pertaining to the facts communicated if gleaned from another source, and is often lost where other parties are present during the communication. In contrast, the ethical duty of confidentiality usually

⁷⁶ *Ibid*, Rule 3.3-6.

⁷⁷ *Ibid*, Rule 3.3-7.

⁷⁸ *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385.

persists even where outside parties know the information in question or where the communication was made in the presence of others. Third, the application of an exception to solicitor-client privilege does not necessarily mean that information is exempt from the ethical duty of confidentiality. A comparable or some other exception to the ethical duty must apply before the lawyer can reveal the information.⁷⁹

Lawyer client privilege arises:

where legal advice of any kind is sought for a professional legal adviser, in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at this instance permanently protected from disclosure by himself or by the legal adviser, except the privilege be waived.⁸⁰

3.3.2.1 Canada

Legislative bodies from time to time try to limit the scope of lawyer/client privilege and the duty of confidentiality in cases where there appears to be a compelling public benefit in the disclosure of otherwise confidential information. These attempts have generally occurred where the lawyer holds information relevant to the question of whether or not the client has committed an offence. However, the courts in Canada tend to guard fiercely the duty of confidentiality and the protection of solicitor client privilege. In 2002, in *Lavallée, Rackel and Heintz v Canada*,⁸¹ the Supreme Court of Canada struck down the *Criminal Code* provision (s. 488.1) that allowed police to obtain a warrant to search a lawyer's office and seize documents that may be privileged. The Court held that solicitor/client privilege is a principle of fundamental justice and must be held to be as close to absolute as possible to protect its relevance. In this instance, particularly because solicitor/client privilege could be compromised without the client's knowledge, it had not been protected, and thus subjected lawyers and their clients to unreasonable search and seizure, contrary to section 8 of the Canadian *Charter of Rights and Freedoms*.⁸²

⁷⁹ Proulx & Layton, *supra* note 40 at 160.

⁸⁰ Adam M Dodek, *Solicitor-Client Privilege* (Markham, ON: LexisNexis Canada, 2014) at 1ii, citing John T McNaughton, rev, *Wigmore on Evidence*, vol 8, revised ed (Boston: Little, Brown, 1961) at s 2292.

⁸¹ *Lavallée, Rackel & Heintz v Canada* (Attorney General); *White, Ottenheimer & Baker v Canada* (Attorney General); *R v Fink*, [2002] SCJ No 61, [2002] 3 SCR 209.

⁸² According to D Watt & M Fuerst in *The 2021 Annotated Tremear's Criminal Code* (Toronto: Carswell, 2016) at 967-968:

The principal constitutional flaws in the regime created by s. 488.1 have to do with the *potential breach* of the privilege *without* the client's knowledge, let alone consent, and the *absence of judicial discretion* in the determination of an asserted claim of privilege. *Reasonableness* requires that the courts retain a *discretion* to decide whether materials seized in a lawyer's office should remain inaccessible to the state as privileged if and when it is in the interests of justice to do so. No search warrant can be issued for documents *known* to be protected by solicitor-client privilege. All documents must be sealed before being examined or removed from a lawyer's office, except where the

In 2015, the Supreme Court of Canada struck down parts of a legislative scheme of the Government of Canada⁸³ that was directed at detecting or preventing money laundering. The legislation requires financial intermediaries, including lawyers, to collect, record, and retain material, including information verifying the identity of those on whose behalf they paid or received money. It permitted the federal compliance authority, the Financial Transactions and Reports Analysis Centre of Canada, to conduct searches of lawyers' offices without warrant, and to seize material. It imposed fines and penal consequences for non-compliance.

The Federation of Law Societies of Canada challenged these provisions. The Court in *Canada v Federation of Law Societies of Canada*⁸⁴ held that these provisions, as they applied to lawyers, are inconsistent with the Constitution of Canada. The majority, applying the *Lavallée* decision above, reiterated that solicitor/client privilege must remain as absolute as possible, and that a lawyer's duty of commitment to their client's cause, of which solicitor/client privilege is an integral part, was a principle of fundamental justice with which the state could not interfere without justification.

3.3.2.2 Business Context

Although the duty of confidentiality extends to all communications between a lawyer and their client, lawyer/client privilege only exists where the advice is "legal advice." As we have noted, many corporate lawyers serve as officers or directors for a company and in that "dual capacity," they may provide business advice alongside legal advice.⁸⁵ Even if not a director or officer, as a trusted advisor to businesses, a lawyer is often asked to advise on business strategy and related issues. This raises issues that require assessment to determine whether privilege exists; it is sometimes difficult for lawyers or courts to separate legal and business advice. Each jurisdiction takes a slightly different view in interpreting the difference

warrant specifically authorizes the immediate examination, copying and seizure of an identified document. Every effort must be made to contact the lawyer and the client at the time of execution of the warrant. If the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents. All potential privilege holders should be contacted by the police and should have a reasonable opportunity to assert a claim of privilege and to have it judicially decided. If such notification is not possible, the lawyer who had possession of the documents, or another lawyer appointed by the Law Society or the court, should examine the documents to determine whether a claim of privilege should be asserted. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents unless it is determined by a judge that the documents are not privileged. Documents found to be privileged are to be returned immediately to the holder of the privilege, or to a person designated by the court. Documents found *not* to be privileged may be used in the investigation.

⁸³ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184.

⁸⁴ *Canada (Attorney General) v Federation of Law Societies of Canada*, [2015] SCJ No 7, [2015] 1 SCR 401 (SCC).

⁸⁵ Nelson, *supra* note 19 at 274.

between legal and business advice and the application of, and exceptions to, legal advice privilege.

American courts take two differing approaches to determining whether advice is business or legal. The first approach is to determine whether the person is acting as a lawyer or a businessperson and treat all advice provided by that person accordingly.⁸⁶ A businessperson will be found to only give business advice and a lawyer will be found to only give legal advice. Under the second method, the court will determine whether the advice is business or legal on an ad hoc basis and provide privilege only for legal advice.⁸⁷ This involves looking at individual communications to determine the purpose and nature of the communication.

UK legal advice privilege requires that the advice given is legal in nature, in the sense that there is a relevant legal context. As Lord Denning stated:

It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps an executive capacity. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction.⁸⁸

As such, the court must make the determination of whether the advice was business or legal.

In Canada, the Supreme Court stated:

Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.⁸⁹

However, the courts have generally interpreted “legal advice” broadly. The following excerpts show that the line between business and legal advice is fuzzy:

[Legal advice privilege] is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.

Whether communications are made to the lawyer himself or employees, and whether they deal with matters of an administrative nature such as

⁸⁶ Robert J Wilczek, “Corporate Confidentiality: Problems and Dilemmas of Corporate Counsel” (1982) 7 Del J Corp L 221 at 240.

⁸⁷ *Ibid.*

⁸⁸ *Crompton Amusement Machines Ltd v Commission of Customs and Excise* (No 2), [1972] 2 QB 102, 2 All ER 353 at 376 (CA). As discussed by John S Logan & Michael Dew, *Overview of Privilege and Confidentiality* (Paper, Continuing Legal Education Society of British Columbia, 2011) [unpublished] at 1.1.7.

⁸⁹ *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 20, [2004] 1 SCR 809.

financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.

I am satisfied that a communication which does not make specific reference to legal advice is nevertheless privileged if it falls within the continuum of communication within which the legal advice is sought or offered: see *Manes and Silver, supra*, p. 26. If the rule were otherwise, a disclosure of such documents would tend in many cases to permit the opposing side to infer the nature and extent of the legal advice from the tenor of the documents falling within this continuum. Thus, the intent of the rule would be frustrated.⁹⁰

Although specifically referencing in-house counsel, this would apply to all lawyers who provide business advice in addition to legal advice.

Despite the willingness of Courts to construe “legal advice” broadly, the prudent lawyer will want to avoid as much as possible any potential ambiguity on the nature of the advice or the lawyer’s role in providing it. When providing legal as opposed to business advice to a client, a lawyer should strive to be clear about their role in advising, and as much as possible indicate explicitly when they are providing legal advice.

The American Bar Association Business Law section provides the following guidance:

These principles highlight the need for the attorney to be aware of the role he or she is playing – the privilege may exist as to one conversation when donning the hat of legal advisor and disappear in the next, where business advice is sought. To ensure privilege is maintained, the attorney should try to keep the roles from overlapping by offering legal advice and business advice separately when possible, be clear when legal advice is being rendered, and make sure the client understands that simply forwarding confidential information to the attorney does not make it privileged. If the client needs a contract to be reviewed for business concerns (e.g., financial analysis) as well as legal implications, advise the client to send separate e-mails to the finance team and the legal team rather than sending a general request for review to everyone in a single e-mail. The more explicit the request and rendering of legal advice, the easier it will be to assert the privilege.⁹¹

⁹⁰ In order from top: *Samson Indian Nation and Band v Canada*, [1995] 2 FCR 762 at para 8, 125 DLR (4th) 294 (CA); *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at 876, 141 DLR (3d) 590; *No 1 Collision Repair & Painting (1982) Ltd v Insurance Corp of B*, 18 BCLR (3d) 150, 1996 CanLII 2311 at para 5 (SC). As discussed by Logan & Dew, *supra* note 88 at 1.1.7.

⁹¹ Jackie Unger, “Maintaining the Privilege, A Refresher on Important Aspects of the Attorney-Client Privilege” (31 October 2013), online: *American Bar Association: Business Law Today* <https://www.americanbar.org/groups/business_law/publications/blt/2013/10/01_unger/>.

3.3.3 Confidentiality, Lawyer Client Privilege, and Reporting Wrongdoing

Lawyers are under a duty to protect the interests of their client. In business contexts, the client is often a corporate entity. As the following discussion indicates, a lawyer that notices wrongdoing on the part of one of the corporations' directors, officers, employees or agents has an obligation to report that wrongdoing within the corporation. This reporting usually requires the lawyer to bring the matter to a more senior individual in the corporation, particularly if an individual to whom the lawyer normally reports commits the wrongdoing. This is often referred to as an "up the ladder" reporting obligation. As lawyers have a duty of confidentiality, reporting of wrongdoing must be internal, except in rare circumstances. It is not a violation of solicitor-client privilege because the communication is still with the client.

Some jurisdictions allow for external reporting when a lawyer believes that a serious crime is about to be committed.⁹² Where the client has not waived privilege, this is a violation of solicitor/client privilege, and as such, any confidential information that is reported should be the minimum necessary to prevent the crime.

3.3.3.1 US

Following the Enron scandal, the US implemented the *Sarbanes-Oxley Act of 2002* (SOX). A primary objective of SOX was to address major corporate and accounting scandals and promote lagging investor confidence in the stock market. Section 307 of the SOX requires lawyers to internally report up the ladder (to the CEO or even the board of directors or audit committee) evidence of material violations of federal and state securities laws and other fraudulent acts.⁹³

The ABA Model Rules of Professional Conduct state that lawyers have a duty to protect the corporation's interests:

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including,

⁹² Both the US and Canada allow lawyers to divulge otherwise privileged information in order to prevent a serious crime. The UK does not have a similar exception to allow for a breach of solicitor-client privilege. The US and Canadian rules permitting this are set out and discussed specifically in Section 3.3.1.

⁹³ Woolley et al, *supra* note 14 at 566.

if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

- (c) Except as provided in paragraph (d), if
 - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
 - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.⁹⁴

There is *no professional duty to report* wrongdoing outside of the corporation; rather, a lawyer *may* report wrongdoing externally:

[T]o prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.⁹⁵

In the wake of the Enron scandal, the SEC attempted to *require* lawyers who practice before it to report knowledge of their client's wrongdoing. The American Bar Association and many others vehemently opposed this stance, claiming solicitor/client privilege must prevail.⁹⁶ As a result, of the resounding opposition to the SEC's proposed requirements for external

⁹⁴ ABA Model Rules (2020), *supra* note 7, Rule 1.13.

⁹⁵ *Ibid*, Rule 1.6.

⁹⁶ US, Securities Exchange Commission, *Final Rule: Implementation of Standards of Professional Conduct for Attorneys*, (RIN 3235-AI72) (Securities Exchange Commission, 2003), online: <<https://www.sec.gov/rules/final/33-8185.htm>>.

reporting, the SEC implemented provisions that allow, but do not require, lawyers to report material violations of the SEC rules to them.⁹⁷ The SEC also included a provision that requires subordinate lawyers to report evidence of a material violation of the SEC rules to their supervising attorney.⁹⁸

It is important to note that the SEC Rules apply only to practice before the Securities and Exchange Commission. The rules are not the same as the American Bar Association Rules, for example, the SEC's "up the ladder" rule is more stringent than the American Bar Association's. Under the ABA rule, attorneys have an "out" if they conclude that a referral would not be in the best interests of the organization. This is not provided for in the SEC Rules. The ABA rule, moreover, applies only when an attorney "knows" of an actual or intended violation. The SEC rule does not require knowledge of facts or conclusions of law, but only "evidence of a material violation."⁹⁹

3.3.3.2 UK

While there are no explicit rules that permit or require lawyers to report wrongdoing in the corporate context, lawyers in the UK may have a common law duty to their client to report wrongdoing "up the ladder" to a higher ranking official or to the board of directors.¹⁰⁰ If the board of directors are the wrongdoers, the lawyer may be obligated to report to the general meeting of the shareholders.¹⁰¹ However, although there have been cases about how directors are liable for failing to prevent co-directors from breach of fiduciary duty or other wrongdoing, the courts have not specifically addressed the lawyer's obligation to disclose wrongdoing of executives and directors.¹⁰²

The UK House of Lords, in *Three Rivers Council and others v Governor and Company of the Bank of England (Three Rivers)*, explains that if legal professional privilege exists, it is absolute and cannot be overridden for public policy concerns; the only way around it is if the client (or individual entitled to it) waives the privilege or it is overridden by statute.¹⁰³ The court has found that a balancing act between legal professional privilege and the public interest is not required because legal professional privilege is the "dominant public interest" and "the

⁹⁷ *Ibid*, 17 CFR § 205.5.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*, §205.2(e).

¹⁰⁰ Joan Loughrey, *Corporate Lawyers and Corporate Governance* (New York: Cambridge University Press, 2011) at 119.

¹⁰¹ *Ibid*. This stems from the principle established in *Barron v Potter*, [1914] 1 Ch 895, and *Foster v Foster*, [1916] 1 Ch 532, that the general meeting of shareholders has the ability to act when the board of directors is unable or incapable of acting. In *Foster v Foster*, the board of directors was unable to act due to conflict of interest.

¹⁰² Loughrey, *supra* note 100 at 120.

¹⁰³ *Three Rivers District Council and others v Governor and Company of the Bank of England*, [2004] UKHL 48 at paras 10 and 25, [2005] 4 All ER 948. Note that in-house counsel in the UK maintain legal professional privilege with their client. This is, however, contrary to the EU Rule. As per the European Court of Justice decision in *Akzo Nobel Chemicals Limited & anor v European Commission* (Case C-550/07 P), solicitor-client privilege does not extend to in-house counsel and their client.

balance must always come down in favour of upholding the privilege.”¹⁰⁴ The court’s strict interpretation of the scope of legal professional privilege does not allow for the disclosure of otherwise privileged communications in order to prevent a crime from being committed. Under the rule in *Bullivant v Att-Gen of Victoria*, legal professional privilege extends to information given to a client on how to avoid committing a crime.¹⁰⁵ Legal professional privilege also extends to communications informing a client that their actions may result in prosecution, as per *Butler v Board of Trade*.¹⁰⁶ However, legal professional privilege may not extend to documents, which form part of the crime itself or to communication that occurs in order to obtain advice with the intent of committing an offence.¹⁰⁷ In order to disclose otherwise privileged communications, lawyers must show they have *prima facie* evidence their client is involving them in a fraud without their consent.¹⁰⁸

In 2002, the UK passed the *Proceeds of Crime Act (POCA)*.¹⁰⁹ POCA created criminal penalties for certain regulated sectors, including lawyers, who do not act on their knowledge or suspicion that their client is engaged in money laundering. It requires lawyers to disclose their suspicion to the National Crime Agency without indicating to their client that the disclosure has been made.¹¹⁰ There are similar reporting provisions in the United Kingdom *Terrorism Act*.¹¹¹

The required disclosure under POCA likely prevails over any broad duty of confidentiality that a lawyer may have. However, they do not prevail over legal professional privilege. Lawyers are not required to disclose information that would be privileged under legal professional (legal advice or litigation) privilege, or information acquired in “privileged circumstances” as defined in the legislation. While the definition of “privileged circumstances” overlaps considerably with legal professional privilege, they are not identical, and care should be taken to consider both.

3.3.3.3 Canada

The Canadian rules vary slightly from province to province. However, the Federation of Law Societies *Model Code* contains a version of an “up the ladder rule” in Rule 3.2-8. This applies to lawyers in jurisdictions that have adopted it in their codes of conduct:

¹⁰⁴ *R v Derby Magistrates’ Court*, [1995] 4 All ER 526, [1995] 3 WLR 681. The SCC came to the same conclusion in *R v Fink*, 2002 SCC 61, 216 DLR (4th) 257.

¹⁰⁵ *Bullivant v Att-Gen of Victoria*, [1901] AC 196. This is different than giving advice on how to avoid getting caught after committing a crime: UK, The Law Society, “Responding to a financial crime investigation” (22 January 2020), online:

<<https://www.lawsociety.org.uk/topics/anti-money-laundering/responding-to-a-financial-crime-investigation>>.

¹⁰⁶ *Butler v Board of Trade*, [1971] Ch 680, [1970] 3 WLR 822.

¹⁰⁷ *R v Cox & Railton* (1884), 14 QBD 153.

¹⁰⁸ *O'Rourke v Darbshire*, [1920] UKHL 730, [1920] AC 581.

¹⁰⁹ *Proceeds of Crime Act (UK)*, 2002, c 29 [POCA], online:

<<https://www.legislation.gov.uk/ukpga/2002/29/contents>>.

¹¹⁰ POCA, *ibid*, ss 330 and 333.

¹¹¹ *Terrorism Act (UK)*, 2000, c 11, s 19, online:

<<https://www.legislation.gov.uk/ukpga/2000/11/section/19>>.

3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7:

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
- (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.¹¹²

The Supreme Court of Canada differs from the UK's traditional and more absolute judicial approach to applying legal professional privilege. The SCC has allowed for limited exceptions to its application. Where an exception exists, the scope of the privileged communication to be disclosed is to be interpreted as narrowly as reasonably possible. Where a former client alleges misconduct by their former lawyer, the privilege may be set aside to protect the lawyer's self-interest.¹¹³ If a client seeks legal advice for an unlawful purpose, privilege will not exist.¹¹⁴ Where privilege may be set aside, no requirement has been placed on the lawyer to disclose the confidential information. Rather, a permissive "may disclose" allows the lawyer to exercise his or her discretion in the matter.

In *Smith v Jones*, the Supreme Court of Canada provided guidance on where solicitor/client privilege may be overridden for public policy concerns.¹¹⁵ The Court advised that an exception to the privilege be allowed where "public safety is involved and death or serious bodily harm is imminent."¹¹⁶ The test from *Smith v Jones* was that (1) the harm had to be targeted at an identifiable group, (2) the risk was of serious bodily harm or death, and (3) the harm was imminent.¹¹⁷ In *Smith v Jones*, solicitor/client privilege was claimed for a

¹¹² FLSC Model Code (2020), *supra* note 7, Rule 3.2.-8.

¹¹³ *R v Dunbar* (1982), 138 DLR (3d) 331, 68 CCC (2d) 13 (Ont CA).

¹¹⁴ *R v McClure*, 2001 SCC 14 at para 36, [2001] 1 SCR 445. See also *Descoteaux v Mierzwnksi*, [1982] SCJ No 43, [1982] 1 SCR 860, 141 DLR (3d) 590.

¹¹⁵ *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385.

¹¹⁶ *Ibid* at para 35.

¹¹⁷ Although serious economic harm is not included in this test, law societies will allow lawyers to disclose aspects of otherwise confidential or privileged information if the lawyer is at risk (i.e., when the lawyer faces allegations of misconduct or is not getting paid, etc.).

doctor's report that was completed for the purpose of assisting in the preparation of the defence or with sentencing submissions. The psychiatrist felt that the accused was likely to commit further crimes based on the assessment, and sought to have the report considered by the Court in sentencing. As the report was cloaked by solicitor/client privilege, the Court set out a test for where solicitor/client privilege may be overridden for public policy concerns.

The Supreme Court of Canada has also allowed solicitor/client privilege to be set aside where an accused's innocence is at stake.¹¹⁸ Additionally, there are limited exceptions to solicitor/client privilege where the interests of the lawyer are at stake; this may occur where the lawyer is collecting fees or is defending against a client's claim of professional misconduct,¹¹⁹ for example, in the anti-corruption context.¹²⁰

3.3.4 Litigation Privilege

Litigation privilege as it is called in Canada and the United Kingdom has evolved from lawyer/client privilege. In the United States, a similar evolution occurred in what the US Supreme Court recognized as the "work product doctrine."¹²¹ This privilege or doctrine protects all records created for the purpose of litigation that is pending or reasonably anticipated. While the focus of lawyer/client privilege is to protect *communications* for the purpose of obtaining or providing legal advice, litigation privilege extends to protect *documents* or records, defined broadly. There need be no communication between lawyer and client. The classic example, a lawyer's litigation brief may never have been seen by the lawyer's client, or anyone but the lawyer.

Litigation privilege, applies to communications or documents created primarily for the purpose of current or anticipated litigation. It extends to communications beyond just the lawyer and client, and encompasses any experts the lawyer may retain to learn about the issues as well as other third parties who may assist in preparing for litigation. It may arise for a corporate lawyer where the company has been charged or where litigation is pending in regards to their own alleged corrupt acts or the corruption of another company (for example, a civil suit for loss of a contract). A corporate lawyer may have to assist the litigation team by sending documents or informing them of the company's anti-corruption compliance program. Although the corporate lawyer would not be the litigator in charge of the litigation, their communications to the litigation team would be protected under the

¹¹⁸ *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445.

¹¹⁹ Graham, *supra* note 41 at 272-274; Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 4th ed (Thomson Carswell, 2006) at 3-15 – 3-19. See e.g. *R v Dunbar* (1982), 138 DLR (3d) 331, 68 CCC (2d) 13 (Ont CA).

¹²⁰ For US law on this topic see: 17 CFR § 240.10b-5 (1951), 15 USC § 78t(e), *Sarbanes-Oxley Act of 2002*, 15 USC 7201, 116 Stat 745 § 307 (2002), 17 CFR § 205, and Securities Exchange Commission, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans*, (Securities Exchange Commission, 2006), § 102(e) online: <<https://www.sec.gov>>. For more information on UK Securities Regulation, see Loughrey, *supra* note 100. For more information on Canadian securities regulation, see David Johnston, Kathleen Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (LexisNexis, 2014) and Mark Gillen, *Securities Regulation in Canada*, 4th ed (Toronto: Thomson Reuters, 2019). Note that Canada's securities law varies provincially.

¹²¹ *Hickman v Taylor*, 329 US 516, (1946).

litigation privilege. Equally important, the litigation team may need various expert reports. Those reports will also be protected by the litigation privilege.

The litigation privilege also extends to documents prepared or communicated between the client and third parties. This sets it apart from the duty of confidentiality, and lawyer/client privilege, as both of these require a lawyer/client relationship.

In Canada, as the discussion in Section 3.3.2 indicates, lawyer/client privilege has evolved from a rule of evidence to a substantive rule of law protected in the Canadian *Charter of Rights and Freedoms*. However, litigation privilege remains a rule of evidence. Thus, while lawyer/client privilege can only be breached in circumstances that pass *Charter* scrutiny, litigation privilege can be subject to change and limitation by rules of discovery in a particular jurisdiction.¹²²

¹²² *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] SCR 319 at paras 60-61.

CHAPTER 9

COMPLIANCE PROGRAMS, RISK ASSESSMENTS, AND DUE DILIGENCE

JOHN BOSCARIOL AND GERRY FERGUSON*

* The authors thank Erin Halma and Dmytro Galagan for their research and writing assistance on the 2018 edition and Ljiljana Stanich and Alexa Benzinger for their research assistance on the 2022 edition.

CONTENTS

- 1. INTRODUCTION**
- 2. RELATIONSHIP BETWEEN DUE DILIGENCE, COMPLIANCE PROGRAMS, AND RISK ASSESSMENTS**
- 3. COMPLIANCE PROGRAMS**
- 4. RISK ASSESSMENTS**
- 5. DUE DILIGENCE REQUIREMENTS**
- 6. POTENTIAL LIABILITY OF LAWYERS**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

Lawyers play an essential role in facilitating both national and international business transactions. As noted in Chapter 8, in doing so lawyers must comply with a number of legal, professional, and ethical responsibilities. This includes ensuring that their business clients are advised as to how to comply with the laws and regulations to avoid corruption in their business transactions. A lawyer has a duty to undertake risk assessments to determine the potential for corrupt behaviours, although it does not always need to be a full systemic risk assessment, as outlined in Section 4.

Corruption, or a real risk of corruption, may arise in a multitude of circumstances. Lawyers must be aware of those circumstances and be careful not to assist their client, wittingly or unwittingly, in the violation of these anti-corruption laws. Although corruption may arise in virtually any situation or transaction, there are a number of specific areas where the risk of corruption is greater. Some of these areas are addressed in separate chapters of this book. For example,

- Public procurement and public-private partnerships (P3s): Chapter 12
- Clients' lobbying of public officials: Chapter 11
- Political and campaign contributions: Chapter 14
- Conflicts of interest: Chapter 10
- Facilitation payments: Chapter 2
- Money laundering in business transactions¹ including real estate² and luxury items: Chapter 4.

Other special risk areas for corruption include:

- Transactions in extractive industries, aeronautics and defence industry, public infrastructure (e.g., roads, bridges, etc.), pharmaceuticals, foreign aid and development assistance, art markets, sports governing bodies, etc.
- In acquisitions and mergers, it is critical to determine whether the target of an acquisition has engaged in corrupt practices in the past, as the acquiring corporation may be liable for past acts of corruption after a merger.

¹ The Law Society of British Columbia has incorporated new rules for lawyers when dealing with trust funds and private loans to help stem money laundering in the province and to prevent lawyers from becoming “collateral damage”: Law Society of British Columbia, *Law Society Rules*, Vancouver: LSBC, 2021, Division 11, 3-100 - 3-110, online: <<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/>>.

² Lawyers involved in real estate must be extra-vigilant: real estate transactions are commonly used to launder money, particularly in hot housing markets. Solicitors in particular can play a large role in interrupting the cycle, through acting as gatekeepers and verifying the identity of the client: “Three Ways to Stop Money Laundering through Real Estate” (6 September 2019), online: *Transparency International* <https://www.transparency.org/news/feature/three_ways_to_stop_money_laundering_through_real_estate>.

- The use of third-party agents, especially in global transactions.
- Transactions that involve gifts, entertainment, travel expenses, vague consulting agreements, foreign subsidiaries and joint ventures.

With so many risks of corruption arising in business transactions, it is not surprising that corporations and other commercial organizations develop: (1) anti-corruption compliance programs, which are dependent in part on (2) corruption risk assessments, and (3) require due diligence standards and practices to avoid the risks of corruption. The next three sections of this chapter will focus on these three essential anti-corruption tools.

2. RELATIONSHIP BETWEEN DUE DILIGENCE, COMPLIANCE PROGRAMS, AND RISK ASSESSMENTS

Due diligence, anti-corruption compliance programs, and risk assessments are distinct but interrelated concepts. “Due diligence” can be viewed as a generic legal concept. It means using reasonable care and taking into account all the surrounding circumstances to avoid breaking the law or causing harm to others in carrying out one’s business. It is relevant in criminal law, regulatory law, and civil liability. Due diligence by an accused is not a substantive defence to the commission of a subjective *mens rea* offence such as bribery, but it is a relevant mitigating factor that can affect the nature of the charge and the sentence or sanction.³ For strict liability regulatory offences in Canada⁴ and the UK⁵ (including section 7 of the UK *Bribery Act*, 2010), due diligence provides a defence. However, due diligence is not a defence to regulatory offences in the US and liability can be found even where companies have implemented compliance programs to prevent regulatory offences from occurring.⁶ Due diligence is also a defence to civil actions based on negligence or malpractice.

In the context of assisting a client to avoid the commission of corruption offences, careful creation and implementation of an anti-corruption compliance program that is geared to the size and nature of the business has quickly become the expected norm of due diligence. Due diligence or reasonable care must be used in designing an anti-corruption program, and due diligence must be used in ensuring that the program is implemented, monitored and evaluated from time to time. In this context, due diligence requires compliance with a number of steps and safeguards specific to the particular business activity in question.

³ Due diligence acts as a substantive defence in the UK under section 7 of the *Bribery Act*. In Canada and the US, due diligence is not a substantive defence to charges of bribery or corruption.

⁴ *R v Sault Ste Marie*, [1978] 2 SCR 1299, 85 DLR (3d) 161.

⁵ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127. Note that in the UK the defence of due diligence must be included in the statutory scheme to be available to the defendant charged with a regulatory offence.

⁶ See Mark Pieth & Radha Ivory, “Emergence and Convergence: Corporate Criminal Liability Principles in Overview” in Mark Pieth & Radha Ivory, eds, *Corporate Criminal Liability: Emergence, Convergence, and Risk* (New York: Springer, 2011) 3 at 22-23.

An anti-corruption compliance program will set out the steps that are reasonably required to avoid corruption in the course of one's business. Those reasonable steps will be based on the actual risk of corruption arising in the client's business transactions. Thus, the first step in developing an effective anti-corruption compliance program is to conduct a thorough risk assessment. To achieve the standard of due diligence, the risk assessment must be designed and carried out with reasonable care based on all the circumstances including the risk of corruption occurring, the nature and extent of harm if it does occur, and the cost and effectiveness of procedures to minimize or eliminate that risk.

As enforcement against corrupt conduct becomes more frequent and the penalties sought increase in amount, the cost of any corrupt act has greatly increased. As such, companies seek guidance on complying with the law in order to avoid prosecution and fines. Two differing approaches on the type of guidance or regulations governments exist: rules-based theory and principles-based theory.⁷ The rules-based theory suggests that governments and enforcement agencies should set out the rules that companies need to play by.⁸ This would effectively set a minimum standard for organizations to comply with and would provide certainty for companies. A significant issue with this approach is that such rules tend to be inflexible and unable to address changing situations as they arise. In addition, this approach can result in creative interpretations of the rules that ignore the spirit of the rules and allow individuals to bend them in their favour. The principles-based theory focuses on principles that governments would like to see corporations uphold.⁹ This provides more flexibility in a court's interpretation of whether or not the company was in compliance, but provides less certainty to the corporation as to whether their compliance program is adequate to avoid criminal or regulatory liability.¹⁰

3. COMPLIANCE PROGRAMS

An increasing global expectation exists for companies to create and enforce an anti-corruption compliance program within their company. Although such programs are often not a legislative requirement, they are becoming a standard factor that enforcement bodies and courts consider when deciding whether to charge a company, or if charges are laid, in setting the penalty for a convicted organization. Under section 7(2) of the UK *Bribery Act 2010*, the implementation of "adequate procedures" provides a substantive defence for the corporation to a charge under section 7(1) (see Chapter 2, Section 2.4.3(i)). The courts and enforcement agencies consider whether there is a program in place and evaluate its effectiveness in preventing corrupt acts. These programs are seen as critical to ensuring that

⁷ See generally, Todd Archibald & Kenneth Jull, *Profiting from Risk Management and Compliance* (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2020).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ For more information on rules-based versus principles-based regulation, see Cristie Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55 McGill LJ 257, and Cristie Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45 Am Bus LJ 1. These papers do not address corruption directly, but some of the points addressed provide insight into the debate between rules-based and principles-based regulation.

corporations are complying with anti-corruption and anti-bribery laws. The primary purpose of these programs is to reduce the risk of corrupt acts taking place in an organization.

Developing internal controls to address the risk of corruption within a corporation is key. These controls must involve the board of directors, they must contribute to the development of a company-wide culture of compliance, and they must include internal policies and enforcement mechanisms.¹¹ Diversity of membership on the board is also vital, as it can better respond to the diverse cultural, social, and regulatory factors that operate within corrupt transactions.¹²

In light of the legal ramifications of creating and enforcing a sound anti-corruption program, lawyers advising business clients have an important role to play in informing clients of the practical utility of having such programs and ensuring that the client's program is up to date and meets minimum international standards. Enforcement agencies and courts have repeatedly advised that anti-corruption efforts should be custom-designed for the organization and should consider the particular risks to that organization. The United Nations Office on Drugs and Crime (UNODC) has produced a guide on compliance programs that states "an ounce of prevention is worth a pound of cure, and for business organizations, this is achieved through an effective internal programme for preventing and detecting violations."¹³ A strong, effective program protects the company and the shareholders from directors, managers, or employees who are in a position to put the organization at risk. Although an effective compliance program cannot protect against all corrupt acts, largely due to *respondeat superior* (the vicarious liability of companies for the acts of their employees in the course of business) and the risk of hiring rogue employees, it can help to effectively manage and minimize risk.¹⁴ For more information on the relevance of compliance programs in sentencing, refer to Chapter 7, Sections 4 to 6.

There are two approaches to corporate responsibility for self-regulation under anti-corruption law. The first is for the state to place a legal requirement on organizations to develop a compliance program and then enforce any breaches. An alternative is for the state to publicize best practices with notice to organizations that they may have to justify any departures from those practices.¹⁵ The US, UK, and Canada have yet to specifically make the absence of a compliance program a crime or regulatory offence; however, compliance programs are effectively necessary due to the enforcement of anti-corruption legislation, the

¹¹ Poonam Puri & Andrew Nichol, "The Role of Corporate Governance in Curbing Foreign Corrupt Business Practices" (2015) 53 Osgoode Hall LJ 164.

¹² *Ibid.*

¹³ UNODC, *A Resource Guide on State Measures for Strengthening Corporate Integrity* (New York: UN, 2013) at 1, online (pdf):

<https://www.unodc.org/documents/corruption/Publications/2013/Resource_Guide_on_State_Measures_for_Strengthening_Corporate_Integrity.pdf>.

¹⁴ Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Cheltenham: Edward Elgar Publishing, 2014) at 304.

¹⁵ Archibald & Jull, *supra* note 7.

consideration of compliance programs in sentencing and, in the case of the UK, the substantive defence of adequate due diligence.

3.1 International Frameworks

3.1.1 UNCAC

As previously noted, the United Nations Convention Against Corruption (UNCAC) came into force on December 14, 2005, and is the broadest and most widely agreed to anti-corruption measure.¹⁶ As of February 6, 2020, UNCAC has been ratified by 187 member states.¹⁷ UNCAC does not specifically require its ratifying parties to provide guidelines on anti-corruption compliance programs. Instead, Article 12 states that “each party shall take measures ... to prevent corruption involving the private sector” and lists possible measures, including:

Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State.¹⁸

While not specifically requiring State Parties to provide guidance to businesses on what constitutes an effective anti-corruption compliance program, it does encourage parties to promote the use of good commercial practices. UNODC published a *Resource Guide on State Measures for Strengthening Corporate Integrity (Integrity Guide)*, which indicates that governments should consider providing guidance to the private sector on legal compliance responsibilities.¹⁹ It suggests that the core elements of an effective anti-corruption compliance program include: executive leadership, anti-corruption policies and procedures, training and education, advice and reporting channels, effective responses to problems, a risk-based approach, and continuous improvement via periodic testing and review.²⁰

UNODC has also published a guidance document for parties to utilize in filling out their self-assessment checklists for the implementation of Chapters II (preventative measures) and V (asset recovery). The document encourages countries to report on whether they are in

¹⁶ “United Nations Convention Against Corruption” (last visited 16 July 2021), online: UNODC <<https://www.unodc.org/unodc/en/corruption/uncac.html>>.

¹⁷ “Signature and Ratification Status” (updated to 6 February 2020), online: UNODC <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>.

¹⁸ *United Nations Convention Against Corruption*, 9 to 11 December 2003, A/58/422, art 12 s 2(b) (entered into force 14 December 2005) [UNCAC], online (pdf):

<https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

¹⁹ UNODC, *supra* note 13 at 1.

²⁰ *Ibid* at 13-14.

compliance, what anti-corruption measures they have undertaken, what measures have been effective, how they have been implemented, and much more.²¹

3.1.2 OECD Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), which came into force on February 15, 1999, has been ratified by 35 OECD countries and 8 non-member countries (Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Lithuania, Russia, and South Africa).²² It does not place any requirements on State Parties to provide guidance on key aspects of effective compliance programs for the private sector. Furthermore, it does not require states to implement laws that require organizations to implement effective compliance programs. However, in 2009, the OECD Recommendations for Further Combating Bribery of Foreign Public Officials (OECD Recommendations) were adopted by all 41 states that had ratified the OECD Convention. Recommendation III requests that its members encourage companies to develop and implement adequate internal controls and compliance programs, and provides companies with *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.²³

3.1.3 Key Elements of Compliance Guidelines

The international community has created various tools to guide companies in the prevention of corruption within their organizations. These tools recognize the complexity of identifying and combatting corruption and address the need for a multi-faceted approach with the involvement of the entire organization. To aid companies in their anti-corruption policies, the following organizations have published guidelines to assist companies in the implementation of effective compliance programs:²⁴

- The Asia-Pacific Economic Cooperation (APEC) has released the *Anti-Corruption Code of Conduct for Business*.²⁵

²¹ UNODC, *Guidance to filling in the revised draft self-assessment checklist on the implementation of chapters II (Preventive measures) and V (Asset recovery) of the United Nations Convention against Corruption* (2016), online (pdf):

<<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/20-24June2016/V1603598e.pdf>>.

²² OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, S Treaty Doc No 105-43 (entered into force 15 February 1999), online: <<http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>>.

²³ OECD, Working Group on Bribery, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), online (pdf): <<https://www.oecd.org/daf/anti-bribery/44176910.pdf>>.

²⁴ See OECD, UNODC & World Bank, *Anti-Corruption Ethics and Compliance Handbook for Business*, (2013), online (pdf): <<https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf>> for an overview of the principles in the various compliance programs and guidelines for implementing a successful anti-corruption compliance program.

²⁵ Asia-Pacific Economic Cooperation, SOM Steering Committee on Economic and Technical Cooperation (SCE), Anti-Corruption and Transparency Working Group (ACTWG), *APEC Code of*

CHAPTER 9 COMPLIANCE PROGRAMS, RISK ASSESSMENTS, & DUE DILIGENCE

- Transparency International (TI) has released *Business Principles for Countering Bribery*.²⁶
- Transparency International-Canada (TI Canada) has released the *Anti-Corruption Compliance Checklist*.²⁷
- The Organisation for Economic Co-operation and Development (OECD) has produced the *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.²⁸
- The World Bank created the *Integrity Compliance Guidelines*²⁹ and the *Anti-Corruption Ethics and Compliance Handbook for Business*.³⁰
- The World Economic Forum Partnering Against Corruption Initiative (PACI) created the *Principles for Countering Bribery*.³¹
- The International Chamber of Commerce (ICC) has produced the *Rules on Combating Corruption*.³²
- The International Organization for Standardization (ISO) has developed and published ISO 37001 anti-bribery management system (ABMS) standard for organizations.³³

These guidelines and principles provide organizations with suggestions on how to create and maintain anti-corruption programs that fall within expectations under the OECD Convention and UNCAC. Lawyers who are assisting a client in drafting or amending its compliance program should familiarize themselves with these guidelines. For in-house

Conduct for Business, APEC# 213-AC-01.1 (September 2012), online:

<<https://www.apec.org/Publications/2013/01/Implementing-the-APEC-Anti-Corruption-Code-of-Conduct-for-Business>>.

²⁶ Transparency International, *Business Principles for Countering Bribery*, 3d ed (October 2013), online: <http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery>.

²⁷ Transparency International Canada, *Anti-Corruption Compliance Checklist*, 3rd ed (2014), online (pdf):

<https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/t/5e3b0cb565c5eb6706d398d2/1580928184625/2014-TI-Canada_Anti-Corruption_Compliance_Checklist-Third_Edition-20140506.pdf>.

²⁸ OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance*, (18 February 2010), online (pdf): <<http://www.oecd.org/daf/anti-bribery/44884389.pdf>>.

²⁹ World Bank, *Integrity Compliance Guidelines*, (2010), online (pdf):

<<https://wallensteinlawgroup.com/wp-content/uploads/2017/12/WBG-Integrity-Compliance-Guidelines-full.pdf>>.

³⁰ OECD, *supra* note 24,

³¹ World Economic Forum, Partnering Against Corruption Initiative, *Global Principles for Countering Corruption*, Industry Agenda (2016), online (pdf):

<http://www3.weforum.org/docs/WEF_PACI_Global_Principles_for_Countering_Corruption.pdf>.

³² International Chamber of Commerce, Commission on Corporate Responsibility and Anti-Corruption, *ICC Rules on Combating Corruption*, (2011), online (pdf):

<<https://cdn.iccwbo.org/content/uploads/sites/3/2011/10/ICC-Rules-on-Combating-Corruption-2011.pdf>>.

³³ "ISO 37001 – Anti-bribery management systems" (last visited 16 July 2021), online: *International Organization for Standardization* <<http://www.iso.org/iso/iso37001>>.

lawyers, the Association of Corporate Counsel (ACC) has prepared a *How-To Manual on Creating and Maintaining an Anti-corruption Compliance Program*.³⁴

Organizations in the public, private, and voluntary sectors may obtain independent certification of compliance of their ABMS with the ISO 37001 standard and require their major contractors, suppliers and consultants to provide evidence of compliance.³⁵ In relation to the organization's activities, this standard addresses:

- bribery in the public, private and not-for-profit sectors;
- bribery by the organization;
- bribery by the organization's personnel acting on the organization's behalf or for its benefit;
- bribery by the organization's business associates acting on the organization's behalf or for its benefit;
- bribery of the organization;
- bribery of the organization's personnel in relation to the organization's activities;
- bribery of the organization's business associates in relation to the organization's activities;
- direct and indirect bribery (for instance, a bribe offered or accepted through or by a third party).³⁶

To help prevent, detect and deal with bribery, ISO 37001 requires the organization to:

1. Implement the anti-bribery policy and supporting anti-bribery procedures (ABMS);
2. Ensure that the organization's top management has overall responsibility for the implementation and effectiveness of the anti-bribery policy and ABMS, and provides the appropriate commitment and leadership in this regard;
3. Ensure that responsibilities for ensuring compliance with the anti-bribery policy and ABMS are effectively allocated and communicated throughout the organization;

³⁴ Kristen Collier Wright, Wally Dietz & Lindsey Fetzer, "How-To Manual on Creating and Maintaining an Anti-corruption Compliance Program" (2015) 33:5 ACC Docket 38, online (pdf): <<https://www.bassberry.com/wp-content/uploads/ACC-Docket-June-2015.pdf>>.

³⁵ "International Standard ISO 37001 Anti-bribery Management Systems Standard" (last visited 16 July 2021), online: *Global Infrastructure Anti-Corruption Centre* <<http://www.giaccentre.org/ISO37001.php>>.

³⁶ International Organization for Standardization, *ISO 37001:2016(en) Anti-bribery management systems – Requirements with guidance for use*, s 1 (Scope), online: <<https://www.iso.org/obp/ui/#iso:std:iso:37001:ed-1:v1:en>>.

4. Appoint a person(s) with responsibility for overseeing anti-bribery compliance by the organization (compliance function);
5. Ensure that controls are in place over the making of decisions in relation to more than low bribery risk transactions. The decision process and the level of authority of the decision-maker(s) must be appropriate to the level of bribery risk and be free of actual or potential conflicts of interest;
6. Ensure that resources (personnel, equipment and financial) are made available as necessary for the effective implementation of the ABMS;
7. Implement appropriate vetting and controls over the organization's personnel designed to ensure that they are competent, and will comply with the anti-bribery policy and ABMS, and can be disciplined if they do not comply;
8. Provide appropriate anti-bribery training and/or guidance to personnel on the anti-bribery policy and ABMS;
9. Produce and retain appropriate documentation in relation to the design and implementation of the anti-bribery policy and ABMS;
10. Undertake periodic bribery risk assessments and appropriate due diligence on transactions and business associates;
11. Implement appropriate financial controls to reduce bribery risk (e.g. two signatures on payments, restricting use of cash, etc.);
12. Implement appropriate procurement, commercial and other non-financial controls to reduce bribery risk (e.g. separation of functions, two signatures on work approvals, etc.);
13. Ensure that all other organizations over which it has control implement anti-bribery measures which are reasonable and proportionate to the nature and extent of bribery risks which the controlled organization faces;
14. Require, where it is practicable to do so, and would help mitigate the bribery risk, any business associate which poses more than a low bribery risk to the organization to implement anti-bribery controls which manage the relevant bribery risk;
15. Ensure, where practicable, that appropriate anti-bribery commitments are obtained from business associates which pose more than a low bribery risk to the organization;
16. Implement controls over gifts, hospitality, donations and similar benefits to prevent them from being used for bribery purposes;
17. Ensure that the organization does not participate in, or withdraws from, any transaction where it cannot appropriately manage the bribery risk;

18. Implement reporting (whistle-blowing) procedures which encourage and enable persons to report suspected bribery, or any violation of or weakness in the ABMS, to the compliance function or to appropriate personnel;
19. Implement procedures to investigate and deal appropriately with any suspected or actual bribery or violation of the ABMS;
20. Monitor, measure and evaluate the effectiveness of the ABMS procedures;
21. Undertake internal audits at planned intervals which assess whether the ABMS conforms to the requirements of ISO 37001 and is being effectively implemented;
22. Undertake periodic reviews of the effectiveness of the ABMS by the compliance function and top management;
23. Rectify any identified problem with the ABMS, and improve the ABMS as necessary.³⁷

In general, the keys to success promoted by various anti-corruption compliance guidelines tend to fall within the following six categories: (1) clear policy from the top (2) communication and training (3) developing and implementing an anti-corruption program (4) incentivizing and promoting compliance (5) detecting and reporting violations, and (6) continual testing and improvement.³⁸ We will briefly comment on each of these categories.

(1) Clear policy from the top

An effective compliance program requires commitment from the top level of the organization. A strong program may be prone to failure if senior management is not committed to its implementation. Senior management establish the culture of ethics for the organization, and without a zero tolerance policy on corruption, it is unlikely that the program will be effective in combatting corrupt transactions. The policy should be clear and spoken from one voice, so there is no confusion about the company's expectations and definition of corruption. Senior management's support and commitment to the program should be an "ongoing demonstration of the company's norms and values."³⁹ They must make it clear that the company's zeal for more business and profit does not mean getting more business by the use of bribery.

³⁷ Global Infrastructure Anti-Corruption Centre, *supra* note 35.

³⁸ TI Canada suggests that a corporate anti-corruption compliance program may be developed and implemented in the following six steps: (1) commit to the anti-corruption program from the top (2) assess the current status and risk environment (3) plan the anti-corruption program (4) act on the plan (5) monitor controls and progress, and (6) report internally and externally on the program. See Transparency International Canada, *supra* note 27, at 5-6.

³⁹ OECD, *supra* note 24. For more information on the importance of corporate culture in combatting corruption, see David Hess & Cristie Ford, "Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem" (2008) 41 Cornell Intl LJ 301.

Commitment from the “top” includes adequate funding and staffing. Adequate resources not only ensure that the compliance program has teeth, but that management’s supportive words about the compliance program are backed by meaningful action.⁴⁰ While the sufficiency of resources will depend on the size, structure, and risk profile of the particular company, a large organization is generally expected to devote more resources to their compliance program than smaller ones.⁴¹ In assessing adequacy, human resources, financial resources, and access resources should be considered.⁴²

(2) Communication and training

Communication and training are among the most important and most visible aspects of compliance. Without proper communication and training, an organization’s compliance is likely only a “paper program.”⁴³ Companies are required to communicate and train their employees on their compliance programs and on anti-corruption laws.

Training must be appropriately tailored to the particular compliance risks a company faces and easily accessible in order to be effective. Different business units and different employee circumstances may require different training. Companies should tailor training to the position of the employee: different aspects of corruption law will apply to employees in accounting versus employees in sales, which means different controls to prevent and report corruption will be required for each group.⁴⁴ Training should also consider the level of the employee, as higher-level managers, who often set the tone for the office or department, may require more extensive training and knowledge of anti-corruption initiatives than lower level employees.

Training should account for linguistic and other barriers, including with respect to access to technology.⁴⁵ For example, communication and training must be in the local language of the employee in order to be effective. Orthofix International was targeted by the DOJ for failing to adequately communicate compliance programs with its employees. In its enforcement action against the company, the DOJ stated “Orthofix International, … failed to engage in any serious form of corruption-related diligence before it purchased [the subsidiary]. Although Orthofix International promulgated its own anti-corruption policy, that policy

⁴⁰ Peter Brady and John Boscariol, “Anti-corruption Compliance Program Structures: Making Pre-Fab Requirements for your Own” in Global Compact Network Canada ed, *Designing an Anti-Corruption Compliance Program*, 22 at 25.

⁴¹ US Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs* (updated June 2020) at 10, online: *Department of Justice* <<https://www.justice.gov/criminal-fraud/page/file/937501/download>>; International Organization for Standardization, *supra* note 36 at A.6.1.

⁴² International Organization for Standardization, *supra* note 33 at ch A.7: Resources and A.6.2; US Department of Justice, *supra* note 41 at 10; Brady & Boscariol, *supra* note 40 at 25.

⁴³ Ray Haywood, “The Importance of Training to Your Anti-Bribery and Corruption Program” in Global Compact Network Canada ed, *Designing an Anti-Corruption Compliance Program*, 90 at 94.

⁴⁴ Asia-Pacific Economic Cooperation, *supra* note 25, s 4(h); World Economic Forum Partnering against Corruption Initiative, *supra* note 31, s 5.4.1; World Bank, *supra* note 29, s 7; US Department of Justice, *supra* note 41 at 4-5.

⁴⁵ US Department of Justice, *supra* note 41 at 4-5.

was neither translated into Spanish nor implemented at [the subsidiary].”⁴⁶ The extent of live training (as compared to passive training through e-learning or online delivery systems) may be used as a direct measure to test whether a corporation is serious about its program, or if it is merely a “paper program.”

In addition, training should include references to the various controls and policies to familiarize employees with these policies and procedures. Training should be required on an ongoing basis (with periodic repeat training sessions) for all employees, officers, directors, and, where appropriate, agents and business partners.⁴⁷

(3) Developing and implementing programs

An effective anti-corruption program should be specifically tailored to the risks the company faces. Controls should be in place to reduce, to a reasonable level, the chance that corrupt transactions occur and to ensure that employees are not given unreasonable opportunities to participate in corrupt acts.⁴⁸ Characteristics of a well-designed compliance program include consistency with applicable laws, adaptation to specific requirements, participation of stakeholders, shared responsibility, accessibility, readability, promotion of a trust-based internal culture, applicability, continuity, and efficiency.⁴⁹

TI’s *Business Principles for Countering Bribery* state that the Board of Directors, or equivalent body, is responsible for implementing and overseeing the compliance program.⁵⁰ The CEO is responsible for the implementation and adherence to the program.⁵¹ The Board of Directors and/or CEO should enlist various experts, such as lawyers, accountants and compliance officers, to design and implement the program. Additionally, managers and staff, particularly those faced with bribery demands or forms of corruption, may provide assistance in the development of the program. In medium-sized or large companies, the Board of Directors, or similar governing body, should create a special internal unit to develop and implement the compliance program.⁵²

A primary aspect of a company’s compliance program is that it implements adequate financial controls and follows generally accepted accounting standards. The complexity of these features will depend on the risk level and size of the company. Payments of a certain

⁴⁶ Koehler, *supra* note 14. See also: *United States v Orthofix International*, NV, 4:12-CR-00150-RAS-DDB-1, online: <<https://www.justice.gov/criminal-fraud/case/united-states-v-orthofix-international-nv-court-docket-number-412-cr-00150-ras>>.

⁴⁷ International Chamber of Commerce, *supra* note 32, art 10(j); Transparency International, *supra* note 26, s 6.6.2; OECD, *supra* note 28, s 8.

⁴⁸ This section will address several areas that compliance programs should cover. Depending on the company, the compliance program will be expanded or reduced to suit the risks it faces and the types of transactions it enters into.

⁴⁹ UNODC, *supra* note 13 at 28-29. The *Guide* describes each of these characteristics in more detail.

⁵⁰*Ibid* at 29; Transparency International, *supra* note 26, s 6.1.

⁵¹ *Ibid*.

⁵² Stefania Giavazzi, Francesca Cottone & Michele De Rosa, “The ABC Program: An Anti-Bribery Compliance Program Recommended to Corporations Operating in a Multinational Environment” in Stefano Manacorda, Francesco Centonze & Gabrio Forti, eds, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Springer International Publishing, 2014), 125 at 140 [ebook].

type, or over a certain amount, could require multiple authorizations to ensure that they are in line with company policies. Procedures must prohibit and prevent actions such as the creation of off-the-book accounts, the making of inadequately identified transactions, the recording of non-existent expenditures, the use of false documents, the recording of liabilities with incorrect identification and the intentional and unlawful destruction of bookkeeping records.⁵³ Accounting controls should not only prevent wrongful transactions and other forms of wrongdoing, but should also assist in bringing wrongdoing to light through regular audits.⁵⁴

Compliance programs should also address gifts and entertainment expenses, particularly for government officials. Company policy should outline appropriate levels for gift or entertainment expenses, as well as any exceptions for allowable expenses. These expenses may require multiple levels of approval and increased disclosure as the size and nature of the gift reasonably dictates. Suggested best practice requires prior written approval by the direct supervisor for receipt or offer of gifts, with consideration of the aggregate amount of gifts or promotional expenses provided to or received from the public official in the recent past.⁵⁵ A company should not only accurately record in a transparent manner any gifts or other benefits provided or received, but also gifts offered but not accepted.⁵⁶

Charitable and political donations should also be addressed in the compliance program. The company may wish to set out various approval levels; for example, greater donations might require approval from a more senior individual within the company. Public disclosure is suggested for both charitable and political donations (unless secrecy or confidentiality is legally required under local law).⁵⁷ Any political donations must be carried out in accordance with applicable laws, which vary greatly from jurisdiction to jurisdiction. Preliminary checks are suggested for charitable donations to ensure the charity is legitimate and not affiliated with public officials with whom the company deals.⁵⁸ Suggested minimum standards for charitable donations include:

- All contributions must be approved by senior management, with evidence provided of the nature and scope of the individual contribution.
- The beneficiary must show that it has all relevant certifications and has satisfied all requirements for operating in compliance with applicable laws.
- An adequate due diligence review on the beneficiary entity must be carried out.

⁵³ UNCAC, *supra* note 18, art 12.3.

⁵⁴ World Bank, *supra* note 29, s 6.1.

⁵⁵ Giavazzi, Cottone & De Rosa, *supra* note 52 at 151.

⁵⁶ *Ibid.*

⁵⁷ Transparency International, *supra* note 26 at 5.3.2 & 5.4.2.

⁵⁸ Giavazzi, Cottone & De Rosa, *supra* note 52 at 159.

- Contributions shall be made only in favor of well-known, reliable entities with outstanding reputations for honesty and correct business practices, and which have not been recently incorporated.
- There should be no donations to charities “suggested” by a public official and no donations to charities controlled by public officials.
- Contributions must be properly and transparently recorded in the company’s books and records.
- The beneficiary entity shall guarantee that contributions received are recorded properly and transparently in its own books and records.⁵⁹

The compliance program must also address contracts for services and procurement policies. Contracts should include “express contractual obligations, remedies, and/or penalties in relation to misconduct.”⁶⁰ Additionally, various approval levels may be needed for contracts with third parties depending on the size or nature of the contract. Higher risk areas or contracts for large amounts should normally require more approvals than standard low-value contracts. Project financing should normally require additional safeguards to ensure that all applicable laws are complied with.

Conflicts of interest should be addressed by the compliance program:

The enterprise should establish policies and procedures to identify, monitor and manage conflicts of interest which may give rise to a risk of bribery – actual, potential or perceived. These policies and procedures should apply to directors, officers, employees and contracted parties such as agents, lobbyists and other intermediaries.⁶¹

Human resource policies and practices, concerning hiring, remuneration, and incentivizing employees need to be considered as an aspect of the compliance program. It is particularly important to include a policy that “no employee will suffer demotion, penalty, or other adverse consequences for refusing to pay bribes even if such refusal may result in the enterprise losing business.”⁶²

(4) Incentivizing and promoting compliance

Compliance with anti-corruption programs should be adequately incentivized and promoted in order to ensure that employees are more likely than not to avoid corrupt transactions. Employees carrying out compliance functions with a high degree of diligence should be recognized, and employees reporting policy breaches should be rewarded.⁶³ As part of the compliance culture, human resource departments should encourage ethical

⁵⁹ *Ibid* at 159-160.

⁶⁰ World Bank, *supra* note 29, s 6.2.

⁶¹ Transparency International, *supra* note 26 at 5.1.

⁶² *Ibid* at 6.3.3.

⁶³ World Bank, *supra* note 29, s 8.1; US DOJ, *supra* note 41 at 12, 2(c).

hiring and promotion techniques and measures.⁶⁴ This area requires careful implementation because incentivizing employees often results in adverse effects for anti-corruption (e.g., rewards for high sales or punishment for low sales may incentivize employees to reach sales targets, regardless of the means employed). Companies should ensure that they are complying with local law in structuring their incentive schemes. They also should test their program to ensure that it does not promote corrupt behaviour.

Discipline for non-compliance is equally essential to a comprehensive compliance program. To demonstrate a compliance program has ‘teeth,’ there should be discipline for non-compliance, which is proportionate with the misconduct, including the possibility of termination.⁶⁵ Misconduct at all levels of the company (including officers and directors) must be met by appropriate measures, and discipline should be enforced consistently across the organization, and seen to be enforced.⁶⁶

(5) Detecting, reporting, and investigating violations

A compliance program is more effective if it also works to detect and report violations. Employees will not be properly incentivized to stop their corrupt behaviour if an organization is not actively seeking to detect violations. As corrupt individuals will be able to find a way around any scheme, the compliance program must include active detection and reporting of violations to deter engagement in corrupt practices.

Compliance advice should be available to employees, and mechanisms should be put in place to allow employees and business partners to seek preliminary consultation as to whether certain practices conform with the policies.

An effective compliance program includes measures to encourage employees to report potential violations of policy, and ensures they feel able to report repercussions without reprisals. Confidential reporting and independent, effective investigation processes are essential. Employees must be confident in anonymous reporting mechanisms as well as the ability of the organization to protect them from retaliation.⁶⁷ All reported misconduct and violations of the compliance program should be investigated.⁶⁸ Investigations of compliance breaches should be conducted in an independent, timely and objective manner, by personnel with relevant experience to ensure they are properly scoped and pursued. They must also be conducted throughout the company, including at management and executive levels, and consider systemic issues and root causes in its analysis, while making recommendations at all levels.⁶⁹

⁶⁴ World Bank, *supra* note 29, s 2; International Chamber of Commerce, *supra* note 32, art 8; Transparency International, *supra* note 26, s 6.3.1; World Economic Forum Partnering against Corruption Initiative, *supra* note 31, s 5.3.1.

⁶⁵ World Bank, *supra* note 29, s 8.2; OECD, *supra* note 28, s 10.

⁶⁶ World Bank, *supra* note 29, s 8.2.

⁶⁷ Transparency International, *supra* note 29, s 6.5.1; World Economic Forum Partnering against Corruption Initiative, *supra* note 31, s 5.5.2; World Bank, *supra* note 29, s 9.3.

⁶⁸ World Bank, *supra* note 29, s 10.1.

⁶⁹ World Bank, *supra* note 29, s 8.2.

(6) Continual testing and improvement

Compliance programs should evolve with companies and their work environments. Without continually testing the program for effectiveness and improving any weaknesses, a company's compliance program can quickly become outdated. For example, the use of technology and the Internet has completely changed what an effective compliance program should look like. Additionally, the company's area of business may change and require new mechanisms for preventing, detecting, and reporting corrupt acts.

An anti-corruption compliance program may be evaluated in two ways: (1) the suitability of the program design and (2) the operational effectiveness of the controls in place.⁷⁰ External counsel may have to undertake more due diligence when performing tests of a compliance system, since they may be less aware of the actual operating practices of the company. External counsel may also be accused of trying to gold plate compliance systems by making them more complex than necessary. On the other hand, internal counsel must be aware of the problem of cognitive dissonance and its tendency to promote assumptions that the status quo is effective.

3.1.4 TI's Assurance Framework

In 2012, TI published an *Assurance Framework* aimed at assisting enterprises in receiving "independent assurance of their anti-bribery programmes."⁷¹ In its guidelines on the *Bribery Act 2010*, the UK Ministry of Justice recommends the use of external verification or independent assurance to achieve the measures necessary to prevent bribery.⁷² Independent assurance, defined by the AA1000 Assurance Standard 2008, is

the methods and processes employed by an assurance practitioner to evaluate an organization's public disclosures about its performance as well as underlying systems, data and processes against suitable criteria and standards in order to increase the results of the assurance process in an assurance statement credibility of public disclosure.⁷³

Benefits of conducting independent assurance of anti-corruption compliance programs include the following:

- Strengthening its programme by identifying areas for improvement;
- Providing confidence to the board and management of the adequacy of its anti-bribery programme;

⁷⁰ Jermyn Brooks, Susan Côté-Freeman & Peter Wilkinson, *Assurance Framework for Corporate Anti-Bribery Programmes*, (Transparency International, 2012) at 9.

⁷¹ *Ibid* at 5.

⁷² UK, Ministry of Justice, *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)* (London: Her Majesty's Stationery Office, 2012) [UK Min J Guidance (2012)] at 31.

⁷³ Brooks, Côté-Freeman & Wilkinson, *supra* note 70 at 6.

- Increasing the credibility of its public reporting on its anti-bribery programme;
- Maintaining and/or enhancing its reputation as an enterprise committed to high standards of integrity and transparency;
- Contributing to a case for mitigation of sentencing in the event of a bribery incident in jurisdictions where this applies;
- Helping restore market confidence following the discovery of a bribery incident; and
- Meeting any future pre-qualification requirements.⁷⁴

Lawyers may serve as assurance practitioners to oversee the assurance process. In this capacity, they are able to test and review the effectiveness of the anti-corruption compliance program and assist the company in identifying any risks that still need addressing.

3.2 US Framework

3.2.1 FCPA

The *Foreign Corrupt Practices Act (FCPA)* does not explicitly require companies to have an anti-corruption compliance program. Even though there is no affirmative defense for having an active and effective anti-corruption compliance program under the *FCPA*, enforcement agencies consider compliance programs to be a necessary mechanism and, as explained more fully in Chapter 6, Section 6.1.5.2 and Chapter 7, Section 6, will treat companies that follow a reasonable compliance program far more leniently.

3.2.2 Guidelines and Interpretation

The DOJ often sets specific requirements for compliance programs in companies that have agreed to a resolution under the *FCPA*. These resolutions provide further illustration as to what the DOJ considers reasonable standards for company compliance. Concerning DPAs and NPAs,⁷⁵ the DOJ has stated:

DPAs and NPAs benefit the public and industries by providing guidance on what constitutes improper conduct.... Because the agreements typically provide a recitation of the improper conduct at issue, the agreements can serve as an educational tool for other companies in a particular industry.⁷⁶

⁷⁴ *Ibid* at 7.

⁷⁵ DPA refers to deferred prosecution agreement. NPA refers to non-prosecution agreement.

⁷⁶ Koehler, *supra* note 14 at 313. For more information on the use of DPAs and NPAs, see: US Government Accountability Office, *Corporate Crime: DOJ Has Taken Steps to Better Track its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* (GA-10-110) (US Government Accountability Office, 2009).

Though these settlement agreements are related to potential *FCPA* charges against specific companies, they can, however, be useful in tailoring a compliance program to the specific needs of other organizations and to keep them abreast of new DOJ requirements.

SEC enforcement orders provide another resource for companies charged under the *FCPA*. These orders indicate areas of a business or industry where the SEC has pursued charges in the past and may continue to do so in the future. For example, in 2014 Avon Products Inc. (Avon) was charged with violating the *FCPA* because it failed to implement controls to prevent and detect bribe payments in the form of gifts at its Chinese subsidiary.⁷⁷ In addition to a \$135 million fine for SEC violations and criminal charges, Avon was required to have its compliance program reviewed by an independent compliance monitor for 18 months and self-report on its compliance efforts for an additional 18 months.⁷⁸ In September 2016, Och-Ziff Capital Management Group agreed to a nearly \$200 million settlement with the SEC for paying bribes to secure mining rights and corruptly influencing public officials in Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo.⁷⁹ The SEC order found that Och-Ziff failed, in particular, to devise and maintain an adequate system of internal controls to prevent corrupt payments to foreign government officials.⁸⁰ As part of the settlement, Och-Ziff agreed to implement enhanced internal accounting controls and policies, designate a Chief Compliance Officer who, for a period of five years, would not simultaneously hold any other officer position at Och-Ziff, and to retain an independent monitor for a period of no less than 36 month.⁸¹ The SEC's enforcement actions against Avon and Och-Ziff speak to the importance of implementing an effective compliance program.

3.2.3 DOJ and SEC Resource Guide

The DOJ and SEC view a corporate compliance program as essential to ensuring compliance with the *FCPA*, as the program will assist in detection and prevention of violations. The DOJ and SEC have recently updated and expanded their *A Resource Guide to the US Foreign Corrupt Practices Act (Resource Guide)*,⁸² released in 2012, to assist organizations in their compliance with the *FCPA*. The *Resource Guide* provides information for all sizes and types of businesses on implementing effective anti-corruption programs within their organization.

⁷⁷ US Securities Exchange Commission, Press Release, 2014-285, "SEC Charges Avon with *FCPA* Violations" (17 December 2014), online: <<http://www.sec.gov/news/pressrelease/2014-285.html>>.

⁷⁸ *Ibid.*

⁷⁹ US Securities and Exchange Commission, Press Release, 2016-203, "Och-Ziff Hedge Fund Settles *FCPA* Charges" (29 September 2016), online: <<https://www.sec.gov/news/pressrelease/2016-203.html>>.

⁸⁰ US Securities and Exchange Commission, *Order Instituting Administrative and Cease-and-Desist Proceedings pursuant to Section 21C of the Securities Exchange Act of 1934, and Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, Imposing Remedial Sanctions and a Cease-and-Desist Order, and Notice of Hearing* (Administrative Proceeding File No. 3-17595), at 5, online (pdf): <<https://www.sec.gov/litigation/admin/2016/34-78989.pdf>>.

⁸¹ *Ibid* at 32-33, 36-44.

⁸² US, Department of Justice & Securities Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act*, 2nd ed (US Government Printing Office, 2020) [DJSEC Resource Guide (2020)], online (pdf): <https://fcpablog.com/wp-content/uploads/2020/07/fcpa-guide-2020_final.pdf>.

New sections added in the updated *Resource Guide* focus on the development and implementation of compliance programs, including:

- Confidential Reporting and Internal Investigation
- Continuous Improvement: Periodic Testing and Review, Investigation, Analysis
- Investigation, Analysis, and Remediation of Misconduct
- Evaluation of Corporate Compliance Programs
- Other Guidance on Compliance and International Best Practices.

The *Resource Guide* also indicates that companies with adequate compliance programs will fare better even if they, despite their compliance program, somehow violate the FCPA. The implementation and enforcement of an adequate compliance program is a major factor in encouraging the DOJ and SEC to resolve charges through a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA).⁸³ As noted, having an effective compliance program will also influence (1) whether a DPA or NPA is made, (2) the terms of the corporate probation and (3) the amount of the fine.⁸⁴ The DOJ and SEC look for three basic requirements when evaluating a compliance program: (1) effective design of the program (2) good faith application of the program (including with respect to adequate resourcing), and (3) actual effectiveness in practice.⁸⁵ At the time of sentencing, a culpability score is assigned to the company.⁸⁶ This score is multiplied against the original fine determination and can reduce the fine to 5% of the original fine or increase it by four times the original fine. One aspect for determining the culpability score is the organization's compliance program (see Chapter 7, Sections 4.5 and 4.6).

According to the *Resource Guide*, “effective compliance programs are tailored to the company’s specific business and to the risks associated with that business. They are dynamic and evolve as the business and the markets change.”⁸⁷ When implemented throughout the entire organization, a program that is carefully calculated to address the specific risks faced by the business will help “prevent, detect, remediate, and report misconduct, including FCPA violations.”⁸⁸ The *Resource Guide* stresses the importance of tailoring the compliance program to fit the needs of the organization:

One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to

⁸³ *Ibid* at 57.

⁸⁴ *Ibid* at 57.

⁸⁵ *Ibid* at 57.

⁸⁶ *Ibid* at 70.

⁸⁷ *Ibid* at 56.

⁸⁸ *Ibid* at 57.

resellers and distributors may indicate that a company's compliance program is ineffective.⁸⁹

Implementing an effective compliance program requires an assessment of the types of risks a company faces and an analysis of the best use of compliance dollars to prevent corruption in the organization. The *Resource Guide* stresses the importance of the following aspects in an effective compliance program:

- Commitment from Senior Management and a Clearly Articulated Policy Against Corruption
- Code of Conduct and Compliance Policies and Procedures
- Oversight, Autonomy, and Resources
- Risk Assessment
- Training and Continuing Advice
- Incentives and Disciplinary Measures
- Third Party Due Diligence and Payments
- Confidential Reporting and Internal Investigation
- Continuous Improvement: Periodic Testing and Review
- Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration
- Investigation, Analysis, and Remediation of Misconduct.⁹⁰

Additionally, the *Resource Guide* alerts companies to the international organizations' guidelines previously discussed.

3.2.4 DOJ Evaluation of Corporate Compliance Programs

In April 2019, the DOJ released an updated document to assist prosecutors in making informed decisions as to whether an organization's compliance program was effective at the time of the offense and/or at the time of a charging decision/resolution. The document will assist the prosecution in determining the appropriate course of action, which could include prosecution, monetary penalties, or compliance obligations to be included in a corporate criminal resolution. The document also details three fundamental questions a prosecutor must ask when evaluating an organization:

- 1) Is the corporation's compliance program well designed?
- 2) Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively? and
- 3) "Does the corporation's compliance program work" in practice?

⁸⁹ *Ibid* at 60.

⁹⁰ *Ibid* at 58-67.

The document goes on to list various factors to be considered under each question, including training, communication, policies and procedures, risk management programs, and more.⁹¹

3.2.5 DOJ Sentencing Guidelines

The US Sentencing Commission's *Guidelines Manual* (the *Guidelines*) set out seven minimum standards for complying with due diligence requirements and promoting an ethical organizational culture. As these are the DOJ's own guidelines and not legislation or regulations, they are not binding; however, the DOJ frowns upon deviation from these guidelines absent a very good reason to do so. The *Guidelines* specify that the organizations must:

- establish standards and procedures to prevent and detect criminal conduct;
- ensure that the compliance program is coming from the top down throughout the organization;
- make reasonable efforts to ensure that personnel with substantial authority are not known to have engaged in illegal activities;
- make reasonable efforts to communicate standards and procedures to personnel with substantial authority and the governing body;
- take reasonable steps to monitor compliance with the program and audit the program for effectiveness;
- promote and enforce the program throughout the organization and appropriately incentivize compliance; and
- respond appropriately when criminal conduct is detected, including making any necessary modifications to the compliance program.⁹²

The *Guidelines* are a starting point for organizations to determine what is required for an adequate compliance program, including: (i) industry practice and government regulation (ii) an organization's size, and (iii) similar misconduct.⁹³ The *Guidelines* were created to guide prosecutors in seeking the appropriate punishment for corporations, and have become an important benchmark for US corporations in crafting corporate governance standards and avoiding prosecution. These guidelines constitute a minimum requirement and thus do not necessarily reflect best practices. More information about these guidelines can be found in Chapter 7, Section 4.

⁹¹ US Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs* (updated June 2020), online: <<https://www.justice.gov/criminal-fraud/page/file/937501/download>>.

⁹² United States Sentencing Commission, *Guidelines Manual* (2016), c 8, §8B2.1, online: <<http://www.ussc.gov/guidelines/2016-guidelines-manual>>.

⁹³ *Ibid*, c 8, Commentary to §8B2.1, para 4(B).

3.3 UK Framework

3.3.1 *Bribery Act 2010*

Section 7(1) of the *Bribery Act* creates a strict liability offence if an organization fails to prevent bribery by a person associated with it, while section 7(2) provides a complete defence to this offence if the organization has “adequate procedures” in place. Section 7 provides:

- (1) A relevant commercial organization (C) is guilty of an offence under this section if a person associated (A) with C bribes another person intending -
 - (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.⁹⁴

Under section 7, “businesses who fail to have adequate procedures in place and whose ‘associated persons’ commit bribery are at risk of being prosecuted.”⁹⁵ The effect of this provision is that anti-bribery compliance programs are mandatory for all “relevant commercial organizations” if they want to avoid liability for bribery offences committed by persons associated with the organization. Section 9 of the *Bribery Act* requires the Secretary of State to “publish guidance about procedures that relevant commercial organizations can put in place to prevent persons associated with them from committing bribery.”⁹⁶ The guidelines were published in April 2011.

In December 2016, Sweett Group PLC pleaded guilty to failing to prevent an act of bribery committed by its subsidiary, Cyril Sweett International Limited, in order to secure a contract with Al Ain Ahlia Insurance Company (AAAI) for the building of the Rotana Hotel in Abu Dhabi.⁹⁷ In February 2016, Sweett Group PLC was sentenced and ordered to pay £2.25 million, thus becoming the first company to be fined under section 7 of the *Bribery Act*.⁹⁸ The SFO’s successful prosecution of Sweett Group speaks to the importance of implementing an adequate anti-corruption compliance program.

⁹⁴ *Bribery Act 2010* (UK), c 23, s 7.

⁹⁵ Colin Nicholls et al, *Corruption and Misuse of Public Office*, 3rd ed (New York: Oxford University Press, 2017) at 78-79.

⁹⁶ *Bribery Act*, *supra* note 94, s 9.

⁹⁷ UK Serious Fraud Office, News Release, “Sweett Group PLC pleads guilty to bribery offence” (18 December 2015), online: SFO News Releases <<https://www.sfo.gov.uk/2015/12/18/sweett-group-plc-pleads-guilty-to-bribery-offence/>>.

⁹⁸ UK Serious Fraud Office, News Release, “Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction” (19 February 2016), online: SFO News Releases <<https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>>.

3.3.2 Guidelines and Interpretation

UK case law provides insight on the interpretation of the phrase “carries on business” in section 7. The courts have found that a singular transaction, if essential to the carrying on of business or carried out in the course of business, can constitute carrying on business under section 7.⁹⁹ The courts have also found a business is carried on in the case of a company engaged only in collecting debts owed and paying off creditors.¹⁰⁰

On March 30, 2011, the Ministry of Justice (MOJ) published statutory *Guidance*, which came into force on July 1, 2011.¹⁰¹ On the same day, the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS) published the *Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP (Joint Prosecution Guidance)* to ensure consistency in prosecutions.¹⁰²

3.3.3 Bribery Act 2010: Guidance

The MOJ *Guidance* provides insight into the objectives of the *Bribery Act 2010*, particularly in regard to section 7:

The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.¹⁰³

The MOJ *Guidance* sets out six principles to inform the evaluation of a company’s compliance program: (1) proportionate procedures (2) top level commitment (3) risk assessment (4) due diligence (5) communication, and (6) monitoring and review.¹⁰⁴ The principles are intended to focus on the outcome of preventing bribery and corruption and should be applied flexibly, as commercial organizations encounter a wide variety of circumstances that place them at risk.¹⁰⁵

(1) Proportionate Procedures

This principle requires that the organization’s anti-bribery procedures be proportionate to the bribery risks the organization faces and proportionate to the “nature, scale and complexity of the commercial organization’s activities.”¹⁰⁶ The use of the term “procedure”

⁹⁹ *Morphitis v Bernasconi*, [2003] EWCA Civ 289 at paras 42-49, [2003] 2 WLR 1521.

¹⁰⁰ *Re Sarflax Ltd* [1979] Ch 592 (Ch D) 993, 1 All ER 529.

¹⁰¹ UK Min J Guidance (2012), *supra* note 72.

¹⁰² Nicholls et al, *supra* note 95 at 130.

¹⁰³ UK Min J Guidance (2012), *supra* note 72 at 8.

¹⁰⁴ *Ibid* at 20.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid* at 21.

encompasses both the organization's policies and the implementing procedures for those policies. The level of risk the organization faces may be affected by factors such as the size of the organization, and the type and nature of the persons associated with it.¹⁰⁷ In the commentary to the *Guidance*, the MOJ suggests topics that will normally be included in anti-bribery policies, as well as procedures that could be implemented to prevent bribery.

(2) Top Level Commitment

This principle requires commitment by the board of directors or equal top-level management of the organization to the prevention of bribery by persons within or working with their organization.¹⁰⁸ It also states that top-level management should "foster a culture within the organization in which bribery is never acceptable."¹⁰⁹

(3) Risk Assessment

This principle requires the organization to conduct periodic assessments of the internal and external risks that the organization faces.¹¹⁰ These assessments should be informed and documented.¹¹¹ Risk assessments will be discussed more fully in Section 4.

(4) Due Diligence

This principle requires the organization to apply appropriate due diligence procedures when its employees and agents are performing services for or on behalf of the organization.¹¹² Due diligence will be discussed more fully later in Section 5.

(5) Communication (including training)

This principle requires the organization to ensure that its anti-corruption policies and procedures are known and understood throughout the organization.¹¹³ Internal and external communications and training are required.¹¹⁴ External communications are suggested in order to assure people outside the organization of the organization's commitment to compliance with anti-bribery laws, as well as to discourage people intending to engage in bribery from approaching the organization.¹¹⁵ Training is necessary to inform employees of what bribery is and should be tailored to the risks involved in the employee's position.¹¹⁶

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* at 23.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid* at 25.

¹¹¹ *Ibid.*

¹¹² *Ibid* at 27.

¹¹³ *Ibid* at 29.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* at 29-30.

¹¹⁶ *Ibid* at 30.

(6) Monitoring and Review

This principle requires the organization to monitor and review its procedures so that it can make any necessary changes.¹¹⁷ The MOJ *Guidance* suggests that organizations may want to involve external verification or assurance of the effectiveness of their compliance procedures.¹¹⁸

3.3.4 *Bribery Act 2010: Joint Prosecution Guidance*

The SFO and the CPS developed the *Joint Prosecution Guidance* to ensure consistent enforcement of the *Act* across jurisdictions. The *Joint Prosecution Guidance* sets out factors that weigh against or in favour of prosecution. For example, prosecution will be favoured if a company has “clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed.”¹¹⁹ Non-prosecution will be favoured if these same procedures and policies have been followed.¹²⁰

The *Joint Prosecution Guidance* addresses defences to section 7 offences. The defendant organization must show the existence of adequate procedures on a balance of probabilities. The courts will consider the adequacy of a company’s procedures on a case-by-case basis because adequate procedures are entirely dependent on the risks faced by and the nature and size of each company. Prosecutors are required to take into account the MOJ *Guidance* when assessing whether the organization’s anti-corruption procedures are adequate.

3.3.5 *Bribery Act 2010: SFO Operational Handbook*

In January 2020, the SFO published new guidance on how it assesses the effectiveness of compliance programs. There are various stages where the SFO will review a company’s compliance, including at the time of the alleged offending, when a decision is being made on whether to charge the company, and in the future when introducing and maintaining an effective compliance program.

When assessing the effectiveness of an organization’s compliance program, the SFO will attempt to answer the following questions:

- 1) If the prosecution is in the public interest;
- 2) If the organization should be invited into DPA negotiations, and if so, what conditions should be included;
- 3) If the organization has a defence of “adequate procedures” against a charge under section 7 of the *Bribery Act*; and

¹¹⁷ *Ibid* at 31.

¹¹⁸ *Ibid.*

¹¹⁹ UK, *Bribery Act 2010: Joint prosecution guidance of the Director of the Serious Fraud Office and Director of Public Prosecutions* (London: Her Majesty’s Stationery Office, 2011) at 9.

¹²⁰ *Ibid.*

- 4) If the existence and nature of the compliance programme is a relevant factor for sentencing considerations.

The guidance goes into detail on the six principles laid out in the former, 2011 guidance, including the importance of proportionate procedures, top-level commitment, risk assessment, due diligence, communication and training and monitoring and review.¹²¹

3.4 Canadian Framework

3.4.1 CFPOA

The *Corruption of Foreign Public Officials Act* (CFPOA) does not create a legal requirement for organizations to implement an anti-corruption compliance program. Nevertheless, many organizations are looking for guidance from the government on how to comply with the CFPOA.¹²² The Canadian government's guidance on the CFPOA is, however, brief and general, and does not address the creation of adequate compliance programs.¹²³ Unlike the US and UK, there is no meaningful prosecutorial guidance on either the content or prosecutorial impact of reasonable anti-corruption compliance programs (see Chapter 6, Section 6.3). At this time, Canadian companies have to rely on the courts' interpretation of the legislation in order to determine Canadian standards for implementing effective anti-corruption programs. However, to date, there is only one case (*Niko Resources*) where a Canadian court has indicated what a reasonable compliance program would look like for a mining company carrying on business in Bangladesh.

Global Compact Network Canada has published a resource guide for Canadian businesses on designing anti-corruption compliance programs.¹²⁴ The document sets out a list of "requirements" for business, developed through a review of relevant government documents, judicial cases, and other resources, both Canadian and American.¹²⁵

The requirements include board level oversight and senior-level personnel assigned for oversight and implementation of anti-corruption programs. To ensure the effectiveness of these requirements, the relevant compliance officers must be senior members of the organization, independent, and well resourced.¹²⁶

¹²¹ Serious Fraud Office, *SFO Operational Handbook: Evaluating a Compliance Programme* (2020), online (pdf): <<https://www.willkie.com/-/media/pwa/articles/latest-attachments/2-2020/01-january/20200123-sfo-handbook-compliance-programme-guide.pdf>>.

¹²² Norm Keith, *Canadian Anti-Corruption Law and Compliance*, 2nd ed (Toronto: LexisNexis, 2017) at 268.

¹²³ Department of Justice, *The Corruption of Foreign Public Officials Act: A Guide* (Ottawa: Department of Justice, 1999), online (pdf): <<http://publications.gc.ca/collections/Collection/J2-161-1999E.pdf>>.

¹²⁴ Global Compact Network Canada, "Designing an anti-corruption compliance program", online (pdf): <<https://globalcompact.ca/designing-an-anti-corruption-compliance-program-a-guide-for-canadian-businesses/>>. *please note: the link to these chapters are currently broken. They may be repaired in the future*

¹²⁵ *Ibid* at 22.

¹²⁶ *Ibid* at 22-25.

3.4.2 Judicial Guidance

In 2011, Niko Resources Ltd. was charged with bribery under the *CFPOA* after a six-year investigation. The company pled guilty, was fined CDN\$9.5 million, placed on probation for three years, and required to undertake independent audits and undergo court supervision. In its probation order, the Alberta Court of Queen's Bench worked with the US DOJ in drafting the terms of the probation order, particularly the compliance program requirements. It provides some guidance on how Canadian courts may view an effective anti-corruption compliance program. Although it is a trial level decision and therefore has limited binding effect, courts will examine the decision in the future when deciding what constitutes an adequate anti-corruption compliance program. Clearly, the Court in *Niko Resources* relied to some degree on US standards for compliance programs, as it adopted terminology found in US DPAs in relation to compliance programs. The Alberta Court of Queen's Bench required the following from Niko Resources as part of its probation order:

- internal accounting controls for maintaining fair and accurate books and records;
- a rigorous anti-corruption compliance code designed to detect and deter violations of *CFPOA* and other anti-corruption laws, which includes:
 - a clearly articulated written policy against violations of the *CFPOA* and other anti-bribery laws;
 - strong, explicit and visible support from senior management;
 - compliance standards and procedures that apply to all directors, officers, employees, and outside parties acting on behalf of the company; and
 - policies governing gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorships, facilitation payments and solicitation and extortion.
- conducting risk assessment in order to develop these standards and procedures based on specific bribery risks facing the company and taking into account a number of specified factors, including the company's geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, and involvement in joint venture agreements;
- reviewing and updating anti-corruption compliance measures at least annually;
- assigning anti-corruption compliance responsibility to senior corporate executive(s) with direct reporting to independent monitoring bodies, such as internal audit or the Board of Directors;

- a system of financial and accounting procedures designed to ensure fair and accurate books and records and that they cannot be used to effect or conceal bribery;
- periodic training and annual certification of directors, officers employees, agents and business partners;
- systems for providing anti-corruption guidance and advice within the company and to business partners, confidential reporting of possible contraventions, protection against retaliation, and responding to reports and taking appropriate action;
- disciplinary procedures for violations of anti-corruption laws and policies;
- due diligence and compliance requirements for the retention and oversight of agents and business partners, including the documentation of such due diligence, ensuring they are aware of the company's commitment to anti-corruption compliance, and seeking reciprocal commitments;
- standard provisions in agreements with agents and business partners to prevent anti-corruption violations – representations and undertakings, the right to audit books and records of agents and business partners, and termination rights in the event of any breach of anti-corruption law or policy; and
- periodic review and testing of anti-corruption compliance systems.¹²⁷

In early 2015, SNC-Lavalin and two of its subsidiaries, SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. were each charged with one count of corruption under section 3(1)(b) of the *CFPOA* and one count of fraud under section 380(1)(a) of the *Criminal Code*. These charges arose out of its 2001-2011 dealings in Libya during the reign of the Gaddafi regime.

In late 2019, SNC-Lavalin Construction Inc. pled guilty to the section 280(1) *Criminal Code* charge. As part of the plea arrangement, the remainder of the charges against it and the other SNC-Lavalin entries were dropped and a Probation Order including requirements for anti-corruption compliance measures was imposed. The Probation Order was effective for three years from the date of its issuance (December 18, 2019).

Although the guilty plea and conviction was in respect of fraud under section 380 of the *Criminal Code* rather than an offence under *CFPOA*, the conditions of the Probation Order mirror those in *Niko Resources*, discussed previously. This is an indication that the approach followed by the Crown in *Niko Resources* almost a decade ago, in consultation with the US authorities, remains highly relevant today. The *Niko Resources* and SNC-Lavalin orders together provide helpful guidance for companies on the expectations of Canadian

¹²⁷ John Boscariol, "A Deeper Dive Into Canada's First Significant Foreign Bribery Case: *Niko Resources Ltd*", Case Comment (2011), online: *McCarthy Tetrault* <http://mccarthy.ca/article_detail.aspx?id=5640>.

enforcement authorities regarding appropriate measures for compliance with anti-corruption laws.

The Probation Order requires, among other things, the following key internal controls and procedures:

- reviews of the company's existing internal controls, policies and procedures on a no less than annual basis, with updates as appropriate;
- a system of internal financial and accounting controls and procedures sufficient to keep fair and accurate books, records and accounts to ensure that bribery is not concealed;
- a rigorous anti-corruption compliance code, standards and procedures to detect and deter violations of anti-corruption laws covering both the company's personnel and its business partners (agents, intermediaries, consultants, and other representatives) involved in sales, business development, marketing or other customer interfaces, or government relations, and governing:
 - gifts, hospitality, entertainment and expenses;
 - customer travel;
 - political contributions;
 - charitable donations and sponsorships;
 - facilitation payments; and
 - solicitation and extortion;
- conducting risk assessments in order to develop anti-corruption standards and procedures based on specific bribery risks facing the company and taking into account a number of factors, including:
 - geographical organization;
 - interactions with various types and levels of government officials;
 - industrial sectors of operation;
 - involvement in joint venture agreements;
 - importance of licenses and permits in its operations;
 - degree of governmental oversight and inspection; and
 - volume and importance of goods and personnel clearing through customs and immigration.
- mechanisms to ensure effective communication of the company's anti-corruption policies, standards and procedures to all directors, officers, employees, agents and business partners, including periodic training and annual certifications;

- providing guidance and advice to directors, officers, employees, agents and business partners on anti-corruption compliance, including urgent advice and advice in foreign jurisdictions;
- system of confidential reporting and protection against retaliation for reporting;
- effective oversight of agents and business partners, including proper documentation of risk-based due diligence on retention and oversight of these third parties, as well as measures to ensure they are aware of the company's commitment to anti-corruption compliance, and seeking reciprocal commitments;
- standard provisions in agreements with agents and business partners to prevent violations of the anti-corruption laws, including anti-corruption representations and undertakings, rights to conduct audits of books and records, and termination rights in the event of any breach of anti-corruption law or policy; and
- periodic review and testing of anti-corruption compliance code, systems and procedures designed to evaluate and improve their effectiveness, taking into account relevant developments.¹²⁸

In addition, the Probation Order requires the appointment of an independent monitor, at SNC-Lavalin Construction Inc.'s expense, who is required to report on the company's compliance and remediation progress during the three-year period of the Probation Order.

In other cases involving offences under the *CFPOA*, Canadian courts have not imposed corporate compliance programs as part of their sentences. The best guidelines for Canadian companies in relation to adequate compliance programs are found in Niko and in the SNC Probation Order. However, it is unclear how compliance programs will impact prosecutorial decisions and sentence mitigation. For more information about Canadian cases involving the *CFPOA*, see Chapter 7, Section 6.

3.4.3 Remediation Agreement Regime

In 2018, Canada amended the *Criminal Code* to provide for a process whereby a corporation may be able to avoid prosecution for certain economic crimes, including bribery and accounting offences under *CFPOA*, by entering a remediation agreement (RA), which is broadly similar to the deferred prosecution agreements available in other jurisdictions.

A prosecutor may enter into negotiations for an RA if:

- there is a reasonable prospect of conviction for the alleged offence;
- the alleged offence is one for which an RA may be negotiated; and

¹²⁸ John Boscariol, Andrew Matheson & Oksana Migitko, "SNC-Lavalin Probation Order Sets Out Key Anti-Corruption Compliance Measures," Case Comment (2020), online: *McCarthy Tetrault* <<https://www.mccarthy.ca/en/insights/blogs/terms-trade/snc-lavalin-probation-order-sets-out-key-anti-corruption-compliance-measures>>.

CHAPTER 9 COMPLIANCE PROGRAMS, RISK ASSESSMENTS, & DUE DILIGENCE

- it is in the public interest and appropriate in the circumstances to issue an invitation to negotiate an RA, rather than proceed with a traditional prosecution.¹²⁹

A full law enforcement investigation must be undertaken in order to assess whether the threshold of a reasonable prospect of conviction has been met. In particular, internal or private investigations are not sufficient.¹³⁰

Certain mandatory clauses are required in an RA, including:

- a statement of facts and undertaking by the organization not to make or condone any public statement contradicting those facts;
- the organization's admission of responsibility;
- disclosure obligations in respect of related wrongdoings and persons involved;
- an obligation to cooperate in investigations and prosecutions in Canada, or elsewhere if the prosecutor "considers it appropriate";
- a deadline to meet the terms of the agreement;
- sanctions, including a non-tax-deductible penalty, a victim surcharge equivalent to 30% of the penalty (inapplicable in respect of foreign corruption offences), forfeiture of any property, benefit, or advantage obtained directly or indirectly from the commission of the offence, and reparations to victims, if applicable;
- an indication of the use that can be made of information obtained as a result of the agreement; and
- notice of the prosecutor's right to vary or terminate the agreement with the approval of the court.¹³¹

In addition, the RA may contain optional clauses requiring the organization to implement or improve compliance measures, the reimbursement of costs incurred by the prosecutor in administering the RA, and/or the appointment of an independent monitor to report on the performance of the RA.¹³²

As Canada has not yet entered into any RAs, the precise implementation of these requirements and structure of an RA in practice remain unclear.

¹²⁹ *Criminal Code*, RSC 1985 c C-46, ss 715.32 (1)-(3); Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook: Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act, Section 3.21 Remediation Agreements*, (23 January 2020), online: Public Prosecution Service of Canada <<https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html>>.

¹³⁰ Public Prosecution Service of Canada, *supra* note 129.

¹³¹ *Criminal Code*, *supra* note 129, s 715.34 (1).

¹³² *Ibid*, s 715.34 (3).

3.4.4 Critiques of Compliance Programs

As guidelines and frameworks to prevent corruption are becoming more prevalent, there is criticism that increased enforcement is resulting in wasteful over-compliance. Instead of investing in efficient compliance programs, companies are implementing programs intended only to impress prosecutors.¹³³ US Senators Amy Klobuchar and Christopher Coons argue that over-compliance can negatively impact the economy through decreasing product development, export production, and expansion of the workforce.¹³⁴

Another criticism is that the US's over enforcement of the *FCPA* has caused compliance fatigue:

Rules and controls and training programs are essential in any organization but at some point, the burdens imposed by intricate matrices of rules, complete reporting and approval processes, and seemingly never-ending training requirements become a net drag on the business.... A system that is overly-controlled, that has passed its optimal point of compliance activities, will engender backlash and bewilderment from those who are being controlled. Managers and other employees will balk at the sclerotic network of rules and processes, and they won't – and in many instances may not be able to – comply. Rules and signoffs will be overlooked and training courses never taken.¹³⁵

As governments seek compliance with their laws, attention must be directed to the question of whether laws and enforcement actions are having their intended effect: are they actually reducing the prevalence of global corruption? Continual analysis of the most effective ways to prevent corruption is required to ensure that governments are not using excessive enforcement orders to serve a political agenda. The United States' zealous enforcement practices under the *FCPA* may be achieving the opposite result than was intended; putting excessive pressure on companies to settle, through non-prosecution or deferred prosecution agreements, resulting in very little case law. This creates a state of legal uncertainty which, in turn, pressures companies to settle rather than pursue litigation. Maintaining an adversarial relationship between government and businesses may be counter-productive, as both need to work together to combat global corruption.¹³⁶

A further problem with anti-corruption compliance programs is the issue of program design: the program designers tend to be "external to the context of deployment and use."¹³⁷ "Disciplinary externality" occurs when the designer is not the person who will be implementing the program and has a different work background than those who will be

¹³³ Miriam Baer, "Insuring Corporate Crime" (2008) 83 Indiana LJ 1035 at 1036.

¹³⁴ Koehler, *supra* note 14 at 331.

¹³⁵ Mike Koehler, "Compliance Fatigue?" (19 July 2013), online (blog): *FCPA Professor* <<https://fcpacprofessor.com/compliance-fatigue/>>.

¹³⁶ Steven R Salbu, "Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense" (2018) 55:3 Am Bus LJ 475.

¹³⁷ Richard Heeks & Harald Mathisen, "Understanding success and failure of anti-corruption initiatives" (2012) 58 Crime L & Soc Change 533 at 543.

implementing the program.¹³⁸ Work background includes factors like the educational background, departmental culture and “language” spoken by the designer and implementer.¹³⁹ “Country externality” occurs when a program designer is from a different country than those implementing and using the program, and may result in incompatibility with the political, social, and economic conditions of the country of implementation.¹⁴⁰

Finally, the over-emphasis on “transparency” may be ineffective. It is notable that transparency measures may lead to the diffusion of responsibility, where those disclosing their bias feel they are free to act on it once it has been disclosed. Further, a phenomenon called “moral licensing” may cause people to become more likely to act on their biases, as a director may use one ‘good’ act to justify increased bad behaviour. These two phenomena highlight the fact that transparency is not an end in itself. More follow-up work will need to be done following disclosures.¹⁴¹

4. RISK ASSESSMENTS

Risk assessments are premised on the concept that “[p]reventing and fighting corruption effectively, and proportionately, requires an understanding of the risks an enterprise may face.”¹⁴² Risk assessment is a necessary starting point for all anti-corruption compliance programs, as well as a way to review the success of an existing program and assess where changes are needed. Risk assessments examine an organization’s exposure to internal and external risks of corruption and bribery.¹⁴³ An overview of risk areas allows the company to determine necessary compliance measures and target high-risk business sectors or countries. Robert Tarun and Peter Tomczak describe how organizations can use risk assessments as a tool:

A risk assessment is designed to among other things evaluate the compliance roles and activities of the board of directors, the chief executive officer, chief financial officer, general counsel, and the internal audit staff and the company as a whole; review international operations and contracts, anti-corruption training, and due diligence in hiring and mergers and acquisitions; and then weigh the multinational company’s country risks,

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ Vera Cherepanova, “Uh oh. Transparency can cause more corporate crime” (14 January 2020), online (blog): *The FCPA Blog* <<https://fcpablog.com/2020/01/14/uh-oh-transparency-can-cause-more-corporate-crime/>>.

¹⁴² United Nations Global Compact, Anti-Corruption Risk Assessment Taskforce, *A Guide for Anti-Corruption Risk Assessment*, (New York: UN Global Compact, 2013) at 10, online (pdf): <https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FAnti-Corruption%2FRiskAssessmentGuide.pdf>.

¹⁴³ UK Min J Guidance (2012), *supra* note 72 at 25.

regional and/or in-country management weaknesses, and prior enforcement history issues.¹⁴⁴

A risk assessment seeks to promote informed decision-making.¹⁴⁵ Effective risk assessments are seen to fulfill four goals:

- (1) Identify areas of business and activities that are at risk of corruption;
- (2) Evaluate and analyze the risks identified and prioritize all relevant risks of corruption;
- (3) Carry out a gap analysis of the current internal standard of procedures, systems, and controls; and
- (4) Undertake a root cause analysis of internal and external causes.¹⁴⁶

Risk assessments not only provide the company with an overview of risks in order to prevent those risks from materializing, but also demonstrate to law enforcement personnel that the company is proactively seeking to comply with the law.¹⁴⁷ As with an anti-corruption compliance program, the nature and scope of the risk assessment should be proportionate to the size, activities, customers and markets of the organization. A risk assessment will help determine the scope and nature of the company's anti-corruption compliance program, ensuring that resources are allocated to major risk areas and spent where they produce the greatest benefit. As enforcement agencies do not look fondly on "cookie cutter" compliance programs or compliance programs that are only found on paper, it is important that any investments made in a compliance program produce effective results while consuming resources that match the benefit gained. Effective anti-corruption compliance programs require an up-to-date and accurate understanding of the risks the company encounters. Risk assessments should not be a one-time event; regular reviews should be made to ensure that resources are properly deployed to deal with evolving risks.¹⁴⁸ Not only does a corporation's business evolve, but the external environment evolves as governments and laws change. The OECD Recommendations provide guidance on the use of risk assessments for companies:

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as

¹⁴⁴ Robert W Tarun & Peter P Tomczak, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 5th ed (Chicago: American Bar Association, 2018) at 152-153.

¹⁴⁵ OECD, *supra* note 24 at 10.

¹⁴⁶ Giavazzi, Cottone & De Rosa, *supra* note 52 at 129.

¹⁴⁷ Jeffrey Harfenist & Saul Pilchen, "Anti-Corruption Risk Assessments: A Primer for General Counsels, Internal Auditors, and Other Compliance Personnel" (2010) 2 Fin Fraud LR 771 at 773.

¹⁴⁸ United Nations Global Compact, *supra* note 142.

necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.¹⁴⁹

4.1 What Risk Areas Are Being Assessed?

According to the UK MOJ *Guidance*, there are ten types of risk that fall into two broad categories: external risk and internal risk. The external risks that should be assessed during the risk assessment are: country risk, sectoral risk, transaction risk, business opportunity risk, and business partnership risk.¹⁵⁰ Country risk is affected by such factors as government structure, the role of the media and whether the country has implemented and enforced effective anti-corruption legislation.¹⁵¹ Sectoral risk recognizes that different sectors or industries are at a higher risk of corruption than others are. For example, corruption is more prevalent in extractive industries. Certain types of transactions also entail higher risks of corruption. Campaign donations and charitable donations are transactions that have traditionally been prone to corruption. Business opportunity risk is heightened when working with a multitude of contractors or intermediaries on projects that do not have clear objectives. Business partnership risk refers to the increased risk that comes with working with intermediaries or partners, especially when utilizing the connections they have. This risk is especially high when their connections are with prominent public officials. These external risks require risk assessments when companies engage in business in a new country or acquire another company. Risk assessments may also be appropriate prior to starting a large-scale project.

The UK MOJ has also identified a number of internal risk factors: (1) deficiencies in employee training, skills and knowledge (2) a bonus culture that rewards excessive risk taking (3) lack of clarity in policies on hospitality and promotional expenditures and political or charitable contributions (4) lack of clear financial controls, and (5) lack of a clear anti-bribery message from top-level management.¹⁵² When conducting a risk assessment, these risks may be rated by their probability of occurrence and the potential impact if the risk were to come to fruition (this is called inherent risk). Companies should then assess the controls required to reduce these risks.

Tarun and Tomczak's *Foreign Corrupt Practices Act Handbook* outlines 15 key risk factors that should be considered in a risk assessment prior to the acquisition and merger of another company. These are:

- (1) A presence in a BRIC country and other countries where corruption risk is high;
- (2) An industry that has been the subject of recent anti-bribery or FCPA investigations;

¹⁴⁹ OECD, *supra* note 23 at Annex II.

¹⁵⁰ UK Min J Guidance (2012), *supra* note 72.

¹⁵¹ For more information on countries' risks of corruption, see Transparency International's rating system.

¹⁵² UK Min J Guidance (2012), *supra* note 72 at 26.

- (3) Significant use of third party agents;
- (4) Significant contracts with a foreign government or instrumentality;
- (5) Significant revenue from a foreign government or instrumentality;
- (6) Substantial projected revenue growth in a foreign country;
- (7) High amount or frequency of claimed discounts, rebates, or refunds in a foreign country;
- (8) Substantial system of regulatory approvals in a foreign country;
- (9) History of prior government anti-bribery or FCPA investigations or prosecutions;
- (10) Poor or no anti-bribery or FCPA training;
- (11) Weak corporate compliance program and culture, in particular from legal, sales, and finance perspectives at the parent level or in foreign country operations;
- (12) Significant issues in past FCPA audits;
- (13) The degree of competition in the foreign country;
- (14) Weak internal controls at the parent or in foreign country operations; and
- (15) In-country managers who appear indifferent or uncommitted to US laws, the FCPA, and/or anti-bribery laws.¹⁵³

The International Chamber of Commerce's guide on anti-corruption third party due diligence for small and medium-size enterprises considers the following five factors necessary in risk assessments:

- (1) whether the third party is an entity owned or controlled by the government or a public official, or whether the third party will be interacting with public officials in order to perform the contract;
- (2) the country the third party is based in and the country where the services are being performed;
- (3) the industry the third party operates in;
- (4) the value of the contract; and
- (5) the nature of the work or services to be performed.¹⁵⁴

¹⁵³ Tarun & Tomczak, *supra* note 144 at 199.

¹⁵⁴ International Chamber of Commerce, *ICC Anti-corruption Third Party Due Diligence: A Guide for Small- and Medium-sized Enterprises*, Document 195-64 Rev2 (2015), at 8-9, online: <<https://iccwbo.org/publication/icc-anti-corruption-third-party-due-diligence/>>.

4.2 Conducting an Effective Risk Assessment

At its most basic, a risk assessment involves determining the risks a company is willing to live with, as elimination of all risks is impossible. It then involves valuing the risks faced by the company based on probability of occurrence and the consequences of the risk being realized. This process reveals a company's inherent risk. A risk assessment should then evaluate what actions can be taken to mitigate those risks, and the costs associated with doing so. The company will then consider the residual risk (inherent risk less the mitigated risk), which will likely never reach zero. If the company's residual risk is higher than the risk the company is willing to tolerate, the company will need to add additional protections or reconsider the protections it has in place.¹⁵⁵

When assessing risks, companies should consult a variety of sources to ensure that risk areas are not overlooked. UNODC has suggested five ways to determine the risks a company faces.¹⁵⁶ The first is to determine the legal requirements applicable to the company's operations, remembering that highly bureaucratic processes entail greater risks of corruption, particularly with regard to bribery and/or facilitation payments.¹⁵⁷ Second, the company should consult with its internal and external stakeholders, such as employees and business partners.¹⁵⁸ These stakeholders are likely able to identify risks of corruption that may have been initially overlooked, and may provide valuable insight on ways to mitigate the risk. Third, the company should consider previous corruption cases to see where other companies failed or had weaknesses.¹⁵⁹ Fourthly, a company may wish to hire external consultants; these consultants can provide a fresh set of eyes and point out risks that have been overlooked by internal controls and reviews.¹⁶⁰ Lastly, companies should review risk assessment guidelines to incorporate best practices into their assessments.¹⁶¹

When assessing risks involving third parties, Ernst & Young advises that organizations understand the qualifications and associations of the third party, analyze the business rationale for including a third party, monitor all relationships with third parties once they begin, perform continual background investigations of new and existing third parties, and be alert about companies that have minimal public information.¹⁶²

Companies may consider engaging external experts and consultants to conduct an effective risk assessment. For instance, TRACE International, a non-profit business association founded in 2001 by in-house anti-bribery compliance experts, provides its members with anti-bribery compliance support, and TRACE Incorporated offers risk-based due diligence,

¹⁵⁵ For more information on conducting a risk assessment, see the *Anti-Corruption Ethics and Compliance Handbook for Business*, *supra* note 24, published by the OECD, UNODC and The World Bank.

¹⁵⁶ UNODC, *supra* note 13 at 10.

¹⁵⁷ *Ibid* at 10.

¹⁵⁸ *Ibid* at 11.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid*.

¹⁶¹ *Ibid*.

¹⁶² Dinesh Moudgil, "Assessing third party risks in a shrinking world" (2015). *please note: this article published originally by EY is no longer available online*

anti-bribery training and advisory services to both members and non-members.¹⁶³ In collaboration with the RAND Corporation, TRACE International developed the TRACE Matrix, a global business bribery risk index for compliance professionals. The index scores 199 countries in four domains—business interactions with the government, anti-bribery laws and enforcement, government and civil service transparency, and capacity for civil society oversight—and may be used by businesses to understand the risks of business bribery in a particular country.¹⁶⁴

4.3 US

The DOJ and SEC see risk assessments as an essential component of an effective anti-corruption compliance program.¹⁶⁵ Both organizations stress the importance of implementing a risk-based compliance program and risk-based due diligence.

The SEC published its guidance on their examination priorities in 2020. They emphasized the importance of strong compliance programs and identified potential risk factors, including products and services offered, compensation and funding arrangements, prior examination observations and conduct, disciplinary history of associated individuals and companies, changes in firm leadership or personnel, and access to investor assets.¹⁶⁶

4.4 UK

Principle 3 of the UK MOJ's *Guidance* provides insight into what constitutes an "adequate process" for risk assessment in order to form a full defence to strict liability under section 7 of the *Bribery Act*:

The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.¹⁶⁷

The *Guidance* suggests that a common sense approach should be taken to this principle to ensure that efforts are proportionate.¹⁶⁸ In order to comply with the principle, assessments for multinational firms should be performed, at a minimum, annually. To be informed, assessments require top-level management oversight and the input of various legal, compliance, financial, audit, sales, and country managers. Documentation is required to prove that the risk assessment took place, particularly if the adequacy of the risk assessment

¹⁶³ "About TRACE" (last visited 21 July 2021), online: *TRACE* <<https://www.traceinternational.org/about-trace>>.

¹⁶⁴ "TRACE Bribery Risk Matrix" (last visited 21 July 2021), online: *TRACE* <<https://www.traceinternational.org/trace-matrix>>.

¹⁶⁵ DJSEC Resource Guide (2020), *supra* note 82 at 58.

¹⁶⁶ US Securities and Exchange Commission, Office of Compliance Inspections and Examinations, *2020 Examination Priorities* (Washington, DC: US Securities and Exchange Commission, 2020), online (pdf): <<https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf>>.

¹⁶⁷ UK Min J Guidance (2012), *supra* note 72 at 25.

¹⁶⁸ Nicholls et al, *supra* note 95 at 134.

comes into question. The *Guidance* goes on to say that risk assessment procedures will generally include the following characteristics:

- oversight of the risk assessment by top-level management;
- appropriate resourcing – this should reflect the scale of the organization's business and the need to identify and prioritize all relevant risks;
- identification of the internal and external information sources that will enable risk to be assessed and reviewed;
- due diligence inquiries; and
- accurate and appropriate documentation of the risk assessment and its conclusions.¹⁶⁹

Transparency International UK has published a *Global Anti-Bribery Guidance*. The section on risk assessment advises corporations to focus on three key elements: the highest risk areas, to evaluate bribery risks realistically, and to ensure that risk assessment is a repeated process. In their view, a best practice risk assessment procedure gives a company a systematic and objective view of bribery risks. This guidance identifies six stages of risk assessment:

- 1) Ensure top level commitment and oversight;
- 2) Plan, scope, and mobilise, including appointing the project lead, defining stakeholders, allocating team responsibilities, and identifying information sources;
- 3) Gather information on inherent bribery risks that the company could be exposed to;
- 4) Identify the activities and risk factors that could increase the company's exposure to bribery risk;
- 5) Evaluate and prioritize the risks; and
- 6) Use the output of risk assessment to review the company's anti-bribery programme and the extent to which modifications need to be made.¹⁷⁰

4.5 Canada

The Court in *Niko Resources* required the company to complete a risk assessment:

The company will develop these compliance standards and procedures, including internal controls, ethics and compliance programs, on the basis of a risk assessment addressing the individual circumstances of the company, in particular foreign bribery risks facing the company, including, but not limited to, its geographical organization, interactions with various types

¹⁶⁹ UK Min J Guidance (2012), *supra* note 72 at 25.

¹⁷⁰ Transparency International UK, "Global Anti-Bribery Guidance – Risk Assessment" (last visited 21 July 2021), online: <<https://www.antibriberyguidance.org/guidance/4-risk-assessment/guidance#body>>.

and levels of government officials, industrial sectors of operation, involvement in joint venture agreements, importance of licenses and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.¹⁷¹

Canadian legislation and Canadian courts have not provided any guidelines on implementing risk assessments as part of a compliance program; however, *Niko Resources* shows the Court's inclination to assess the compliance procedures in place on the basis of the risk assessment the company is expected to complete. *Niko Resources* demonstrates that Canadian prosecutors may work with the US DOJ and use standard aspects of American orders to make recommendations to the courts regarding ways companies can be directed to comply with CFPOA.¹⁷²

A guidance document created by Global Compact Network Canada goes into more detail on what effective compliance programs in Canada can look like. They suggest that Canadian organizations begin their assessment by conducting a baseline risk assessment, including the following: the level of risk associated with the country where the organization is located, the extent of contact with government officials, the company's area of business, the current state of the business, and the level of control the company has over their operations/assets (for example, are they involved in joint ventures or do they rely heavily on third parties or intermediaries?), etc. Next, companies should conduct interviews and document reviews to determine their greatest areas of risk and do follow up work to implement preventative measures.¹⁷³

5. DUE DILIGENCE REQUIREMENTS

As already noted, a risk assessment is one of the first steps to take in fulfilling due diligence requirements for various transactions. The risk assessment will help focus the due diligence procedures efficiently and effectively. Risk-based due diligence, the process of assessing the level of risk posed to determine the level of due diligence requirements,¹⁷⁴ should be conducted at a minimum during mergers and acquisitions and when working with third-party intermediaries.¹⁷⁵

¹⁷¹ John Boscariol, "Canada: Anti-Corruption Compliance Message Received? Risk Assessment is Your Next Step" (12 August 2012), online: *McCarthy Tetrault* <https://www.mccarthy.ca/article_detail.aspx?id=5985>.

¹⁷² Boscariol, *supra* note 127.

¹⁷³ Global Compact Network Canada, *supra* note 124.

¹⁷⁴ *Ibid.*

¹⁷⁵ This is not to suggest that due diligence should only be conducted in these scenarios. Investments, contracts with governments and large sales or service contracts also may require due diligence procedures.

5.1 Third Party Intermediaries

Companies often use third parties to conceal corrupt acts, particularly bribes to foreign officials.¹⁷⁶ Because many countries make companies liable for the acts of their agents, it is important to conduct adequate due diligence on third party intermediaries, particularly when working in high risk environments or on high-risk transactions. The essential purpose of due diligence in relation to third party intermediaries is to increase knowledge of the third party.¹⁷⁷ The DOJ and SEC guidelines indicate three criteria in undergoing due diligence on third party intermediaries. First, companies need to understand “the qualifications and associations of its third party partners” and particularly, any relationship with foreign officials. Second, companies should understand the business rationale for including a third party intermediary in the transaction and define the role the third party will serve. Third, a company should conduct ongoing monitoring of its third party relationships. The World Economic Forum suggests four steps in conducting risk-based due diligence on third parties. The first is to understand third parties and determine which ones should be subject to due diligence procedures; the second is to assess the level of risk associated with the third party; the third is to conduct the due diligence; and lastly, the process should be managed to identify and mitigate risks.¹⁷⁸

The International Chamber of Commerce suggests that, for small and medium sized entities, anti-corruption third party due diligence may be conducted without the use of external consultants.¹⁷⁹ It lists the following six “pillars” upon which background information should be sought: (1) beneficial ownership (2) financial background and payment of contract (3) competency of third party (4) history of corruption and adverse news (from public records resources) (5) reputation (consulting third party’s commercial references), and (6) approach to ethics and compliance.¹⁸⁰ In particular, to establish competency of the third party, a company should ask whether the third party has

- (1) experience in the industry and the country where the services are to be provided;
- (2) the necessary qualifications and experience to provide the services;
- (3) provided a competitive estimate for the services to be provided;
- (4) a business presence in the country where the services are to be provided;
- (5) been recommended by a public official;
- (6) requested urgent payments or unusually high commissions;
- (7) requested payments to be made in cash, to a third party, or to a different country;

¹⁷⁶ DJSEC Resource Guide (2020), *supra* note 82 at 60.

¹⁷⁷ World Economic Forum, Partnering Against Corruption Initiative, *Good Practice Guidelines on Conducting Third-Party Due Diligence*, (Geneva: World Economic Forum, 2013) at 7, online (pdf): <http://www3.weforum.org/docs/WEF_PACI_ConductingThirdPartyDueDiligence_Guidelines_2013.pdf>.

¹⁷⁸ *Ibid.*

¹⁷⁹ International Chamber of Commerce, *supra* note 154 at 8-9.

¹⁸⁰ *Ibid* at 14.

- (8) suggested they know the “right people” to secure the contract; and
- (9) has been selected in a transparent way.¹⁸¹

Some benefits to an effective third-party management framework can include the ability to manage risks, early detection of issues, deterrence, minimizing costs, maintaining standardization, preserving third party due diligence information, enhancing transparency, offering flexibility, and driving compliance.¹⁸²

5.2 Transparency Reporting Requirements in Extractive Industries

5.2.1 Extractive Industries Transparency Initiative

The Extractive Industries Transparency Initiative (EITI)¹⁸³ is a “global standard to promote the open and accountable management of oil, gas and mineral resources.”¹⁸⁴ The standard requires implementing countries to disclose certain information regarding the governance of oil, gas, and mining revenues because poor natural resource governance has frequently led to corruption and conflict.¹⁸⁵ The EITI is an international multi-stakeholder initiative involving representatives from governments, companies, local civil society groups, and international NGOs.¹⁸⁶ The aim of the EITI is to “strengthen government and company systems, inform public debate and promote understanding.”¹⁸⁷

In order to be an EITI member, a country must fulfill the seven requirements of EITI, briefly summarized as follows:¹⁸⁸

1. Oversight by a multi-stakeholder group

The multi-stakeholder group must involve the country’s government and companies as well as “the full, independent, active and effective participation of civil society.” The multi-stakeholder group must agree to and maintain a work plan that includes clear objectives for EITI implementation and a timetable that meets the deadlines established by the EITI Board.¹⁸⁹

¹⁸¹ *Ibid* at 17.

¹⁸² Dinesh Moudgil, “Managing third party risks through enhanced due diligence” (2017). *Please note: this article originally published by EY is no longer available online*

¹⁸³ The full EITI standard can be found at “EITI Standard 2019” (February 2019), online: *EITI* <<https://eiti.org/document/standard>>.

¹⁸⁴ “What we do” (last visited 21 July 2021), online: *EITI* <<https://eiti.org/About>>.

¹⁸⁵ Christina Berger, ed, 2019 *Progress Report*, (Oslo, Norway: EITI, 2019) online (pdf): <https://eiti.org/files/documents/eiti_progress_report_2019_en.pdf>.

¹⁸⁶ EITI International Secretariat, *EITI Board Manual*, (Oslo, Norway: EITI International Secretariat, 2020) at 2, online (pdf):

<https://eiti.org/files/documents/eiti_board_manual_updated_16_march_2020.pdf>.

¹⁸⁷ “What we do”, *supra* note 184.

¹⁸⁸ *The EITI Standard 2019*, 2nd ed (Oslo, Norway: EITI International Secretariat, 2019), online (pdf): <https://eiti.org/files/documents/eiti_standard_2019_en_a4_web.pdf>.

¹⁸⁹ *Ibid* at 10-14.

2. Legal and institutional framework, including allocation of contracts and licenses

An implementing country must disclose information about the legal framework and fiscal regime relating to its extractive industries. It must also disclose information relating to licences, contracts, beneficial ownership of companies, and state participation in the extractive industries. Implementing countries must maintain a publicly accessible register for licenses awarded to companies involved in the extractive industries.¹⁹⁰

An important development in the EITI Standards after the leaking of the Panama Papers in 2016 is the disclosure of beneficial ownership. According to the 2019 *Progress Report*, “the 52 EITI countries are making progress towards the January 1, 2020 deadline for publishing beneficial ownership information for oil, gas and mining activities.”¹⁹¹ Disclosure of beneficial ownership for all companies, regardless of what sectors of the economy they operate in, is discussed in more detail in Chapter 5, Section 6.1.2.

3. Exploration and production

The third EITI requirement stipulates that implementing countries must report on the exploration for and production of oil, gas, and mineral resources.¹⁹²

4. Revenue collection

This requirement necessitates the disclosure of government revenue from the extractive industries as well as material payments to the government by companies involved in the extractive industries. A credible Independent Administrator must then reconcile these revenues and payments. Implementing countries must produce their first EITI report within 18 months of becoming a Candidate and must produce subsequent reports annually.¹⁹³

5. Revenue allocations

Requirement 5 provides for disclosure of the allocation of revenue generated by the extractive industries.¹⁹⁴

6. Social and economic spending

Implementing countries are required to disclose certain relevant information when companies involved in the extractive industries must make material social expenditures because of legal or contractual obligations. Implementing countries

¹⁹⁰ *Ibid* at 15-20.

¹⁹¹ Berger, *supra* note 185 at 30.

¹⁹² The EITI Standard 2019, *supra* note 188 at 21.

¹⁹³ *Ibid* at 22-26.

¹⁹⁴ *Ibid* at 27-28.

must also disclose information relating to quasi-fiscal expenditures and the impact of the extractive industries on the economy.¹⁹⁵

7. Outcomes and impact

Requirement 7 seeks to promote public awareness and understanding of the extractive industry data. It also encourages public debate about the effective use of resource revenues. This section sets out requirements for the form, accessibility, and promotion of the information set out in the EITI reports of implementing countries. It also mandates a review of the outcome and impact of EITI implementation.¹⁹⁶

Compliance and deadlines for implementing countries

This final requirement sets out in detail the timeframes set out by the EITI Board for the completion of the various actions required by the EITI, such as the publication of EITI Reports.¹⁹⁷

When a country pledges to adhere to the EITI standard, it will be deemed a “Candidate” and have 2.5 years in order to meet all seven EITI requirements. The country will then be evaluated independently. If the country has met all requirements, it will be deemed “Compliant,” and from then on, it will be re-evaluated every three years.¹⁹⁸

As of June 2016, fifty-one countries, including the US and UK, had implemented the EITI Standard. However, only 31 countries were deemed EITI compliant at that time.¹⁹⁹ Canada has not signed on to become an EITI Candidate, but it is an EITI “supporting country.”²⁰⁰ Canada’s legislation mandating reporting by the extractive industries, described in Section 5.5, provides a similar level of reporting to the EITI standards.

5.3 US

In the United States, section 1504 of the 2010 *Dodd-Frank Act* added section 13(q) to the 1934 *Securities Exchange Act*, which now requires “resource extraction issuers” (all US and foreign companies engaged in the commercial development of oil, natural gas or minerals) to include in their annual reports to the SEC, information relating to any payment made by them, their subsidiary or an entity under their control, to the United States federal government or any foreign government for the purpose of the commercial development of oil, natural gas or minerals.²⁰¹ The reports must specify the type and total amount of such payments made (i) for each project and (ii) to each government.

¹⁹⁵ *Ibid* at 29-30.

¹⁹⁶ *Ibid* at 31-33.

¹⁹⁷ *Ibid* at 34-40.

¹⁹⁸ EITI, *Fact Sheet* (2018), online: <<https://eiti.org/publication-types-public/fact-sheets>>.

¹⁹⁹ *Ibid*.

²⁰⁰ *Ibid*.

²⁰¹ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, HR 4173, s 1504, online (pdf): <<https://www.govinfo.gov/content/pkg/COMPS-9515/pdf/COMPS-9515.pdf>>.

CHAPTER 9 COMPLIANCE PROGRAMS, RISK ASSESSMENTS, & DUE DILIGENCE

The SEC first adopted the rules implementing section 13(q) in August 2012, but the US District Court for the District of Columbia vacated them in July 2013. The SEC adopted the revised version of the rules on June 27, 2016.²⁰² Under the rules, resource extraction issuers are required to disclose payments that are:

- (i) made to further the commercial development (exploration, extraction, processing, export or acquisition of a license for any such activity) of oil, natural gas or minerals;
- (ii) not *de minimis* (i.e. any payment, whether made as a single payment or a series of related payments, which equals or exceeds \$100,000 during the same fiscal year); and
- (iii) within the types of payments specified in the rules, namely:
 - (a) taxes;
 - (b) royalties;
 - (c) fees (including license fees);
 - (d) production entitlements;
 - (e) bonuses;
 - (f) dividends;
 - (g) payments for infrastructure improvements; and
 - (h) community and social responsibility payments, if required by law or contract.²⁰³

Resource extraction issuers are required to comply with the new SEC rules starting with their fiscal year ending no earlier than September 30, 2018.²⁰⁴

5.4 UK

The United Kingdom's Extractive Industries Transparency Initiative Multi Stakeholder Group (MSG) is charged with implementing the EITI in the UK. The UK has no legislation requiring companies to disclose payments, making the UK EITI a voluntary process. Her Majesty's Revenue and Customs department can only disclose information from extractive companies who give their consent. A total of 41 oil and gas companies and 17 mining and quarrying companies participated in compiling the UK EITI's third report, published in

²⁰² US Securities and Exchange Commission, *Disclosure of Payments by Resource Extraction Issuers*, 17 CFR Parts 240 and 249b, Release No 34-78167, File No S7-25-15, online (pdf): <https://www.sec.gov/rules/final/2016/34-78167.pdf>. See also US Securities and Exchange Commission, Press Release, "SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act" (27 June 2016), online: <https://www.sec.gov/news/pressrelease/2016-132.html>.

²⁰³ US Securities and Exchange Commission, *Disclosure of Payments*, *supra* note 202 at 25-28.

²⁰⁴ *Ibid* at 28.

2018.²⁰⁵ The report included detailed information about revenues received by UK Government Agencies from extractive companies in 2016. An independent administrator has been able to reconcile all material differences between extractive industry payments to and repayments by UK Government agencies in 2016.²⁰⁶

5.5 Canada

In Canada, the *Extractive Sector Transparency Measures Act (ESTMA)*, which came into force on June 1, 2015, requires specified companies involved in the extractive sector to report payments made to domestic and foreign governments.²⁰⁷ The stated purpose of the *ESTMA* is:

to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities. Those measures are designed to deter and detect corruption including any forms of corruption under any of sections 119 to 121 and 341 of the *Criminal Code* and sections 3 and 4 of the *Corruption of Foreign Public Officials Act*.²⁰⁸

The *ESTMA* applies to a corporation, trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals, either directly or through a controlled organization. Each corporate entity is also (1) listed on a stock exchange in Canada or (2) has a place of business in Canada, does business in Canada or has assets in Canada, and based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (a) it has at least \$20 million in assets, (b) it has generated at least \$40 million in revenue, and (c) it employs an average of at least 250 employees.²⁰⁹ Thus, an entity that has its shares listed on any stock exchange in Canada will be subject to the *ESTMA* reporting requirements even if it does not do business, does not have assets in Canada or does not meet the size-related criteria.

An entity must report every payment, whether monetary or in kind, that is made to a single payee in relation to the commercial development of oil, gas or minerals and that totals, as a single or multiple payments, CDN\$100,000 or more within one of the following categories:

- (1) Taxes (other than consumption taxes and personal income taxes);

²⁰⁵ United Kingdom Extractive Industries Transparency Initiative (UK EITI), *UK EITI Report for 2016*, (2018), at 10, online (pdf): <<https://eiti.org/sites/default/files/documents/uk-eiti-payments-report-2016.pdf>>.

²⁰⁶ *Ibid.*

²⁰⁷ *Extractive Sector Transparency Measures Act*, SC 2014, c 39, [ESTMA] s 376, online: <<http://laws-lois.justice.gc.ca/eng/acts/E-22.7/FullText.html>>.

²⁰⁸ *Ibid.*, s 6.

²⁰⁹ *Ibid.*, ss 2 "entity", 8(1).

- (2) Royalties;
- (3) Fees (including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licences, permits or concessions);
- (4) Production entitlements;
- (5) Bonuses (including signature, discovery and production bonuses);
- (6) Dividends (other than dividends paid to payees as ordinary shareholders); and
- (7) Infrastructure improvement payments.²¹⁰

The term “payee” in the *ESTMA* includes:

- (a) any government in Canada or in a foreign state;
- (b) a body that is established by two or more governments; or
- (c) any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph (a) or a body referred to in paragraph (b).²¹¹

Reports are due within 150 days after the end of the financial year and must include an attestation made by a director or officer of the entity, or an independent auditor or accountant, that the information in the report is true, accurate and complete.²¹² An entity must keep records of its payments for a seven-year period from the day on which it provides the report.²¹³

Non-compliance with the *ESTMA* and its reporting and record-keeping obligations is punishable on summary conviction by a fine of up to CDN\$250,000.²¹⁴ As each day of non-compliance forms a new offence, an unreported payment could result in a multimillion-dollar liability. However, section 26(b) of the *ESTMA* creates a defence to liability if the person or entity “establishes that they exercised due diligence” to prevent the commission of the offence.

In 2018, the Ministry of Natural Resources released a *Guidance*²¹⁵ and *Technical Reporting Specifications*²¹⁶ to the *ESTMA*. Since the *ESTMA* came into force in 2015 it has not required

²¹⁰ *Ibid*, ss 2 “payment”, 9(2).

²¹¹ *Ibid*, s 2 “payee”.

²¹² *Ibid*, ss 9(1), (4).

²¹³ *Ibid*, s 13.

²¹⁴ *Ibid*, s 24.

²¹⁵ Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Guidance* (2016), online (pdf): <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/estma/pdf/ESTMA%20Guidance%20-%20Version%202_1%252C%20July%202018.pdf>.

²¹⁶ Ministry of Natural Resources Canada, *Extractive Sector Transparency Measures Act – Technical Reporting Specifications*, v 2, Cat No. M34-28/1-2018E-PDF (2018), online (pdf): <<https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/Technical%20Reporting%20Specifications%20-%20Version%202.pdf>>.

companies to provide reports with respect to the financial year in progress on that day or any previous financial year, and the companies are expected to submit their first *ESTMA* reports no later than 2017.²¹⁷ The provisions of the *ESTMA* also do not apply to the payments made to Aboriginal governments in Canada before June 1, 2017.²¹⁸

While the *ESTMA* has a similar purpose to that of the EITI, it is unlikely that some of the reporting requirements in the *ESTMA* meet the more stringent requirements of the EITI. As mentioned earlier, Canada has never, however, pledged to adhere to EITI. Given that *ESTMA*'s reporting requirements are mandatory at the firm or entity level, and that EITI is voluntary and implementing countries often lack domestic enabling legislation making its requirements enforceable at entity level, in certain respects the *ESTMA* regime may be more stringent.

The Canadian government has also published a Corporate Social Responsibility Checklist for Canadian mining companies.²¹⁹ The document provides comprehensive guidance to companies on conducting an initial assessment, developing programs on land access, immigration, community health, environmental impacts, cultural heritage, social investment, land procurement, human rights concerns, and more. The document also outlines how companies can self-evaluate to determine if their programs are working.

Natural Resources Canada also has a Sale Questions Checklist, available online, to assist companies in identifying suspicious sales transactions.²²⁰ Some questions include: if the customer fits the usual profile, if the transaction is unusually large or small, and if the mode of payment is consistent with typical practice.

5.6 Mergers and Acquisitions

Due diligence (DD) is widely recognized as an important factor in any merger or acquisition (M&A) transaction.²²¹ When conducting anti-corruption due diligence, a core aim is to determine the extent to which operations and revenues of the target business have been

²¹⁷ *ESTMA*, *supra* note 207, s 30.

²¹⁸ *Ibid*, s 29.

²¹⁹ "Corporate Social Responsibility (CSR) Checklist for Canadian Mining Companies Working Abroad" (14 January 2019), online: *Natural Resources Canada* <<https://www.nrcan.gc.ca/science-data/science-research/earth-sciences/earth-sciences-resources/earth-sciences-federal-programs/corporate-social-responsibility-csr-checklist-canadian-mining-companies-working-abroad/17152>>.

²²⁰ "Sales Questions Checklist" (10 October 2017), online: *Natural Resources Canada* <<https://www.nrcan.gc.ca/explosives/resources/brochures/9953>>.

²²¹ Peter Wilkinson, *Anti-Bribery Due Diligence for Transactions: Guidance for Anti-Bribery Due Diligence in Mergers, Acquisitions and Investments*, ed by Robert Barrington (London: Transparency International UK, 2012) at 14, online (pdf):

<https://www.transparency.org.uk/sites/default/files/pdf/publications/Anti-Bribery_Due_Diligence_for_Transactions_1_0.pdf>. This guide by Transparency International provides details on each stage in the due diligence process. The checklist provides non-comprehensive guidance to companies in conducting adequate anti-bribery due diligence in the context of mergers and acquisitions.

distorted by bribery and to flag any corruption risks the successor may be liable for.²²² A further aim is to mitigate potential risks and to begin a monitoring program for the target to ensure the acquisition's compliance with anti-corruption laws.²²³ Transparency International outlines the following ten good practice principles for anti-bribery due diligence in mergers, acquisitions and investments:

1. The purchaser (or investor) has a public anti-bribery policy;
2. The purchaser ensures it has an adequate anti-bribery program that is compatible with the *Business Principles for Countering Bribery* or an equivalent international code or standard;
3. Anti-bribery due diligence is considered on a proportionate basis for all investments;
4. The level of anti-bribery due diligence for the transaction is commensurate with the bribery risks;
5. Anti-bribery due diligence starts sufficiently early in the due diligence process to allow adequate due diligence to be carried out and for the findings to influence the outcome of the negotiations or stimulate further review if necessary;
6. The partners or board provide commitment and oversight to the due diligence reviews;
7. Information gained during the anti-bribery due diligence is passed on efficiently and effectively to the company's management once the investment has been made;
8. The purchaser starts to conduct due diligence on a proportionate basis immediately after purchase to determine if there is any current bribery and if so, takes immediate remedial action;
9. The purchaser ensures that the target has or adopts an adequate anti-bribery program equivalent to its own; and
10. Bribery detected through due diligence is reported to the authorities.²²⁴

The six stages to the due diligence process are: (1) initiating the process (2) initial screening (3) detailed analysis (4) decision (5) post-acquisition due diligence, and (6) post-acquisition integration and monitoring.²²⁵ Transparency International's *Anti-Bribery Due Diligence for Transactions: Guidance for Anti-Bribery Due Diligence in Mergers, Acquisitions and Investments*, also provides the following checklist of 59 indicators to be used as an aid in anti-bribery due diligence at 14-18:

²²² *Ibid* at 6.

²²³ *Ibid*.

²²⁴ *Ibid* at iv.

²²⁵ *Ibid* at 8.

BEGINNING OF EXCERPT

Bribery due diligence process

1. Is the bribery DD integrated into the DD process from the start?
2. Have milestones been set for the bribery DD?
3. Is the timetable adequate for effective anti-bribery DD?
4. Have the deal and DD teams been trained in their company's anti-bribery programme including the significance of relevant legislation?
5. Have the deal and DD teams been trained in anti-bribery DD?
6. Is there a process implemented for co-ordination across functions?
7. Has legal privilege been established with use of general counsel and external legal advisers?
8. Is there a process for dealing with any bribery discovered during the DD?
9. Is the person responsible for anti-bribery due diligence at a sufficiently senior level to influence the transaction's decision-makers?

...

Geographical and sectoral risks

10. Is the target dependent on operations in countries where corruption is prevalent?
11. Does the target operate in sectors known to be prone to high risk of bribery?
12. Are competitors suspected to be actively using bribery in the target's markets?

...

Business model risks

13. Does the organizational structure of the target foster an effective anti-bribery programme or present risks?
14. Is the target dependent on large contracts or critical licenses?
15. Does the target implement an adequate anti-bribery programme in its subsidiaries?
16. Is the target reliant on agents or other intermediaries?
17. Has the target been assessed for its exposure to use of intermediaries that operate in countries and sectors prone to corruption risks?

18. Does it have policies and effective systems to counter risks related to intermediaries?
19. Does the target require contractual anti-bribery standards of its suppliers?
20. Does the target's organizational structure present bribery risks – e.g. diversified structure?
21. Is the target reliant on outsourcing and if so do the contracted outsourcers show evidence of commitment and effective implementation of the target's anti-bribery programme?

...

Legislative footprint

22. Is the target subject to the UK Bribery Act and/or the US FCPA?
23. Are there equivalent laws from other jurisdictions that are relevant?

...

Organisational

24. Does the target's board and leadership show commitment to embedding anti-bribery in their company?
25. Does the target exhibit a culture of commitment to ethical business conduct? (Use evidence such as results of employee surveys)
26. Has the senior management of the target carried out an assessment of bribery risk in the business?
27. Have there been any corruption allegations or convictions related to members of the target's board or management?
28. Have the main shareholders or investors in the target had a history of activism related to the integrity of the target?
29. Have there been any corruption allegations or convictions related to the main shareholders or investors in the target?
30. Does the target have an active audit committee that oversees anti-corruption effectively?

...

Anti-bribery programme

31. Does the target have an anti-bribery programme that matches that recommended by Transparency International UK?

32. Is the anti-bribery programme based on an adequate risk-based approach?
33. Is the anti-bribery programme implemented and effective?

...

Key bribery risks

34. Has the target been assessed for its exposure to risk of paying large bribes in public contracts or to kickbacks?
35. Has the target been assessed for risks attached to hospitality and gifts?
36. Has the target been assessed for risks attached to travel expenses?
37. Has the target been assessed for risks attached to political contributions?
38. Has the target been assessed for risks attached to charitable donations and sponsorships?
39. Has the target been assessed for risks attached to facilitation payments?

(Foreign) public officials (FPOs)

40. Is there an implemented policy and process for identifying and managing situations where FPOs are associated with intermediaries, customers and prospects?
41. Have any FPOs been identified that are associated with intermediaries, customers and prospects?
42. Is there an implemented policy and process for identifying and managing situations where FPOs are associated with intermediaries, customers and prospects?
43. Have any FPOs been identified that present particular risk?
44. Is there evidence or suspicion that subsidiaries or intermediaries are being used to disguise or channel corrupt payments to FPOs or others?

Financial and ledger analysis

45. Have the financial tests listed on page 11 [of this Transparency International’s “Anti-Bribery Due Diligence for Transactions” Guidance] been carried out?
46. Are the beneficiaries of banking payments clearly identifiable?
47. Is there evidence of payments being made to intermediaries in countries different to where the intermediary is located and if so are the payments valid?

48. Is there evidence of regular orders being placed in batches just below the approval level?
49. Are payments rounded, especially in currencies with large denominations?
50. Are suppliers appointed for valid reasons?
51. Is there evidence of suppliers created for bribery e.g. just appointed for the transaction, no VAT registration?
52. Is there evidence of special purpose vehicles created to act as channels for bribery?

...

Incidents

53. Has a schedule and description been provided of pending or threatened government, regulatory or administrative proceedings, inquiries or investigations or litigation related to bribery and other corruption?
54. Has the target provided a schedule of any internal investigations over the past five years into bribery allegations?
55. Has the target been involved in any bribery incidents or investigations not reported by the target?
56. Has the target sanctioned any employees or directors in the past five years for violations related to bribery?
57. Has the target sanctioned any business partners in the past five years for violations related to bribery?
58. Is there an implemented policy and process for reporting bribery when discovered during due diligence?

Audit reports

59. Has the target provided any reviews, reports or audits, internal and external, carried out on the implementation of its anti-bribery programme? [footnotes omitted]

END OF EXCERPT

Failure to conduct adequate due diligence when purchasing a company may result in charges under anti-corruption legislation. In February 2015, the SEC announced charges against Goodyear Tire & Rubber Company for violations of the FCPA by subsidiaries in Kenya and Angola. The SEC Order indicates that Goodyear did not conduct adequate due diligence when it purchased its Kenyan subsidiary and did not implement adequate anti-corruption controls after the acquisition:

Goodyear did not detect or prevent these improper payments because it failed to conduct adequate due diligence when it acquired Treadsetters, and failed to implement adequate FCPA compliance training and controls after the acquisition.²²⁶

Pre-acquisition due diligence is not always possible, particularly in hostile takeovers. The DOJ has indicated that companies who are unable to perform adequate pre-acquisition due diligence may still be rewarded for due diligence efforts conducted post-acquisition.²²⁷ Investigating for corruption prior to acquisition is not sufficient to be in compliance with the FCPA. The DOJ and SEC have indicated they will also evaluate the extent the acquiring company integrated internal controls into the acquired company.²²⁸

The UK MOJ *Guidance*, in Principle 4 on Due Diligence, states:

The commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.²²⁹

The MOJ encourages companies to carefully consider the bribery risks that transactions pose to the company and assess the requisite due diligence procedures for ensuring that the company is aware of the risks and has a plan to deal with any risks that materialize.

5.7 Economic Sanctions and Due Diligence

As discussed in Chapter 5, there is a close connection between anti-corruption efforts and economic sanctions laws. Canada, the United States, the United Kingdom, the European Union and a number of others have adopted sanctions laws that enable them to target those involved in acts of corruption.

In October of 2017, Canada amended its sanctions laws to significantly broaden the circumstances in which the government could implement sanctions against other countries, organizations, and individuals associated with those countries. These new grounds are (i) gross and systematic human rights violations in a foreign state and (ii) acts of significant corruption.

Anti-bribery and economic sanctions due diligence frequently go hand-in-hand when assessing a proposed transaction such as acquiring another company, making a private equity investment, engaging in debt financing, or entering into a joint venture with a business partner. In these circumstances, especially when the operations or assets are located

²²⁶ US Securities and Exchange Commission, *USA before the SEC in the Matter of Goodyear Tire & Rubber Company*, no 74356, Feb 24, 2015, at 3, online (pdf): <<https://www.sec.gov/litigation/admin/2015/34-74356.pdf>>.

²²⁷ DJSEC Resource Guide (2020), *supra* note 82 at 62.

²²⁸ *Ibid.*

²²⁹ UK Min J Guidance (2012), *supra* note 72 at 27.

abroad, it is prudent to carefully scrutinize potential exposure under these sanctions measures.

At the present time, Canada imposes economic sanctions measures of varying degrees on activities directly or indirectly involving the following countries as well as individuals or entities based in such countries:

Belarus, Burma (Myanmar), Central African Republic, China, Democratic Republic of the Congo, Iran, Iraq, Lebanon, Libya, Mali, Nicaragua, North Korea, Russia, Saudi Arabia, Somalia, South Sudan, Sudan, Syria, Ukraine, Tunisia, Venezuela, Yemen, and Zimbabwe.

Canada also imposes sanctions against listed terrorist entities, including Al-Qaida, ISIL (Da'esh), and the Taliban. Although in most cases, individuals and entities that are listed under these sanctions and anti-terrorism measures are located outside Canada, in some instances these can include persons located in Canada, as is the case regarding the recent listing of the Proud Boys.

Any involvement of these countries or any person that has been listed or designated under these sanctions measures (or any entity owned or controlled by them), in proposed transactions or other activities of the Company should raise a red flag for further investigation to ensure compliance.

Global Affairs Canada administers these sanctions measures and is responsible for processing applications for permits to allow activities otherwise prohibited under these economic sanctions programs to proceed. The Royal Canadian Mounted Police and the Canada Border Services are responsible for the enforcement of these sanctions programs. Violations are subject to criminal prosecution and fines and/or imprisonment.

Given their broad extraterritorial reach, US economic sanctions compliance is frequently an important part of any due diligence review, even if the principal parties are Canadian or other companies from non-US jurisdictions. The US Treasury Department's Office of Foreign Assets Control, along with other US agencies such as the US Department of Justice, administer and enforce US sanctions on both a civil and criminal basis. They have a significant enforcement record of settlements and prosecutions involving multi-million dollar penalties.

5.7.1 Canadian Sanctions Legislation

The prohibitions and obligations under these economic sanctions generally apply to persons in Canada and Canadians outside Canada and are set out in the following statutes and regulations issued thereunder:

- *United Nations Act* – used by Canada to implement into its domestic law economic sanctions mandated by the United Nations Security Council (Central African Republic, Democratic Republic of the Congo, Iran, Iraq, Lebanon, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Yemen, Al-Qaida and Taliban, Suppression of Terrorism);

GLOBAL CORRUPTION

- *Special Economic Measures Act* – autonomous economic sanctions imposed by Canada (Belarus, Burma (Myanmar), China, Iran, Libya, Nicaragua, North Korea, Russia, South Sudan, Syria, Ukraine, Venezuela, and Zimbabwe);
- *Freezing Assets of Corrupt Foreign Officials Act* – imposes prohibitions on dealings with listed former leaders and senior officials, and their associates and family members, suspected of misappropriating state funds or obtaining property inappropriately (Ukraine, Tunisia);
- *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* - prohibits dealings with listed individuals involved in gross violations of internationally recognized human rights or acts of significant corruption (Russia, Venezuela, Saudi Arabia, Myanmar, South Sudan); and
- Part II.1 of the *Criminal Code* – prohibits activities associated with terrorism, including dealings involving listed terrorist organizations and entities.

Depending upon the sanctioned country, entity or individual involved, the measures can restrict the import, export, and transfer of goods and technology, as well as the movement of people and money, the provision or acquisition of financial or other services, and investment.

5.7.2 Monitoring and Reporting Obligations

Certain sanctions measures require banks and other financial services companies to monitor—i.e., “determine on a continuing basis”—whether they are in possession or control of property that is owned, held or controlled by or on behalf of a listed person. These include banks, insurance companies, loan and trust companies as well as entities authorized under provincial legislation to engage in the business of dealing in securities or to provide portfolio management or investment counselling services. In certain circumstances, these firms are also required to report sanctions screening results on a monthly basis to their Canadian or provincial regulators.

Separately, all persons in Canada and Canadians outside Canada must disclose, without delay to the Royal Canadian Mounted Police or the Director of the Canadian Security Intelligence Service: (i) the existence of any property in their possession or control that they have reason to believe is owned, held or controlled by or on behalf of a listed or designated person, and (ii) any information about a transaction or proposed transaction in respect of such property.

5.7.3 Economic Sanctions Due Diligence

Some key questions that should be addressed for economic sanctions due diligence on transactions with another company or target include the following:

1. What measures are in place to ensure that the Target (including all entities owned or controlled by it) and its employees, officers, directors and agents comply with economic sanctions laws? The Target should provide copies

- of all relevant codes of conduct, compliance policies, procedures, guidelines and internal controls.
2. Does the Target engage in any activities involving, directly or indirectly, parties located in or connected with countries, individuals or entities that are listed, designated or otherwise targeted under economic sanctions laws?
 3. What process is in place at the Target for screening individuals and entities (whether vendors, customers, suppliers, joint venture partners, consultants, brokers, agents or other business partners of the Target, and entities that own or control them) against the lists of individuals and entities designated or listed under economic sanctions laws?
 4. What is the training process for employees, officers, directors and agents on compliance with economic sanctions laws and related policies, including frequency of training, most recent sessions, certification, etc.? The Target should provide copies of training materials used for these purposes.
 5. Have any of the Target's employees, officers, directors or agents ever been disciplined, including up to termination, for actual or suspected violations of economic sanctions laws or the Company's policies or procedures in respect of the same? If so, the Target should provide details.
 6. What are the Target's whistleblowing mechanisms that allow employees, officers, directors and agents to report suspected violations of economic sanctions and related policies on a confidential and non-retaliatory basis. The Target should describe and provide any relevant documentation pertaining to all such reports that it has received.
 7. What, if any, suits, actions, reviews, investigations, inquiries, litigation, enforcement, penalties or proceedings by or before any governmental authority, customer, business partner or any arbitrator, or any internal investigations, are there involving the Target or any of its directors, officers, employees or agents regarding compliance with economic sanctions laws and policies, including any, to the knowledge of the Target, that are pending or threatened? The Target should provide copies of any reports or other written communication issued to or by the Target, including any disclosures to governmental authorities, in respect of actual or potential violations of economic sanctions laws or policies, and any related investigations and proceedings.

5.8 Internal Investigation of Corruption

When senior officials or the board of a company suspect that the company may have been involved in corruption in one or more of its transactions, they may choose to conduct an internal investigation. As noted in Chapter 6 (on investigation and prosecution of corruption), there are various reasons to conduct an internal investigation:

- To convince enforcement bodies to use prosecutorial discretion not to bring charges;
- To gather evidence and prepare a defence or negotiation strategy for prosecutions, enforcement actions and/or litigation with shareholders;
- To fulfill management's fiduciary duty to the company's shareholders and satisfy shareholder concerns;
- To assess the effectiveness of internal accounting procedures.

To the extent that the internal investigation results will be handed over to the relevant enforcement body as part of a company's attempts to negotiate a favourable resolution with the prosecutor, it is strongly advisable to hire an experienced and respected external lawyer to conduct or manage the internal investigation. An external counsel's investigation will be given far greater credibility by the relevant law enforcement agencies than a similar investigation conducted by in-house counsel or the company's regular external counsel.

Chapter 6, Section 4.2 sets out five basic steps to follow when counsel is advising the board on undertaking an internal investigation in cases of alleged corruption.

6. POTENTIAL LIABILITY OF LAWYERS

Lawyers may be liable civilly, criminally or administratively for their acts or omissions concerning a client's business activities. Criminal provisions on conspiracy, aiding, abetting, and counselling apply to lawyers assisting their clients in illegal transactions. Accessory liability is also applicable in private law actions in tort and contract.²³⁰ Furthermore, legal malpractice is a tort available to individuals injured by the acts or omissions of their lawyers. Civil liability may arise for economic loss due to a lawyer's intentional or negligent involvement in corrupt transactions. Lastly, regulatory agencies, such as securities commissions, of other securities regulators have a variety of possible responses for lawyers' participation in regulatory violations related to corrupt transactions that include: a warning or caution, an imposition of conditions on the practitioners' continued work in the field, an order to resign or a fine for violation of an applicable regulatory rule.

6.1 Criminal Liability

As discussed in Chapter 3, the US, UK, and Canada have criminal provisions that could result in a lawyer being criminally liable for membership or participation in a conspiracy to commit an offence of corruption for aiding, abetting or counselling a crime committed by a client. For instance, when the former Nigerian State governor James Ibori pleaded guilty in the United Kingdom to conspiracy to defraud and money-laundering offences, his London solicitor Bhadresh Gohil was also convicted of money laundering. To divert funds from the sale of shares in a state-owned telecommunications company, Ibori's lawyer established

²³⁰ Paul Davies, *Accessory Liability* (Portland, Oregon: Hart Publishing, 2015).

Africa Development Finance consulting company. Since both the consultancy and the solicitor charged fees for fictitious services, \$37 million in proceeds were diverted to them.

The judge, who sentenced Mr. Gohil to 10 years of imprisonment, described him as the architect of this scheme.²³¹

6.2 Accessory Liability in Civil Actions

Accessory or assistance liability in tort law may result in civil liability for lawyers who assist clients in committing a tort in relation to a corrupt transaction.²³² The client and lawyer are referred to as joint tortfeasors. This concept originated alongside accessory liability in criminal proceedings, but the criminal and civil actions have since diverged.²³³ Accessory liability is a subset of joint tortfeasor law and is divided into its own subsets.²³⁴ This section provides only a brief overview of the topic.

6.2.1 US

A leading case in the US on accessory liability is *Halberstam v Welch*.²³⁵ The US Supreme Court described it as being a “comprehensive opinion on the subject.”²³⁶ Other leading cases applying this doctrine tend to be statutory securities cases.²³⁷ Generally, accessory liability in the US requires that the accessory “knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.”²³⁸

6.2.2 UK

A leading UK case, *Sea Shepherd UK v Fish & Fish Ltd*, sets out the test for finding a defendant liable as a joint tortfeasor where the defendant:

- (1) Has assisted in the commission of the tort by another person;
- (2) The tort is pursuant to a common design; and

²³¹ UNODC, *Digest of Asset Recovery Cases*, (New York: United Nations, 2015), at 11, 22, online (pdf): <https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf>.

²³² *Ibid.* For more details about civil actions for compensation of damages in tort in the context of asset recovery, see Chapter 5, Section 2.4.5.1(a).

²³³ Paul Davies, “Accessory Liability for Assisting Torts” (2011) 70:2 Cambridge LJ 353 at 353.

²³⁴ For a general overview on various subsets of Accessory Civil Liability, see Martin Kenney, “British Virgin Islands: Accessory Civil Liability,” (11 November 2008), online: *Mondaq* <<https://www.mondaq.com/wealth-management/63836/accessory-civil-liability>>.

²³⁵ *Halberstam v Welch*, 705 F2d 472, 489 (DC Cir 1983).

²³⁶ *Central Bank of Denver, NA v First Interstate Bank of Denver, NA*, 511 US 164 (1994) at 181.

²³⁷ *Ibid.*

²³⁸ Restatement (Second) of Torts §876(b) (1977). For additional material on this topic, see W Keeton et al, eds, *Law of Torts*, 5th ed (West Group, 1984).

(3) An act is done that is tortious.²³⁹

Lord Sumpton noted:

In both England and the United States, the principles [of joint tortfeasorship] have been worked out mainly in the context of allegations of accessory liability for the tortious infringement of intellectual property rights.²⁴⁰

Civil law has tended to require procurement as an element to establish accessory liability.²⁴¹ In *CBS Songs v Amstrad Consumer Electronics plc*, a UK Court found that procurement was more than merely “inducement, incitement, or persuasion.” Advice alone would not result in a finding of accessory liability; more active participation would be required.²⁴²

6.2.3 Canada

Canadian courts have adopted and applied the English definition of joint tortfeasors. They have not defined the minimum “degree of participation” required for the secondary tortfeasor to be liable for the primary tort.²⁴³ However, Canadian courts have said that a “concerted action to a common end”²⁴⁴ is required. Although this has not been defined by the courts either, the statement suggests that some act must be committed to put the tort in motion or to substantially assist in its commission, as it did in England. Additionally, a new nominate tort based on the failure to exercise human rights due diligence may result in civil liability for lawyers who assist clients in committing a tort in relation to a corrupt transaction.²⁴⁵ This would apply if the corrupt transaction involves the violation of human rights.

6.3 Tort of Legal Malpractice

Legal malpractice actions are an option for dissatisfied clients or third parties seeking private redress for harm attributable to a lawyer’s violation of his or her duties to a client or the legal profession.²⁴⁶ The tort may occur when a lawyer is professionally negligent, breaches a contract and/or breaches his or her fiduciary duty to a client. Legal malpractice requires a

²³⁹ Sarah Johnson & Alastair Shaw, “UK Supreme Court confirms test for joint liability in tort” (3 April 2015), online: <<https://www.lexology.com/library/detail.aspx?g=de836eb8-3c22-4a20-a6c5-8f5b9cc3e3ba>>.

²⁴⁰ *Sea Shepherd UK v Fish & Fish Ltd*, [2015] UKSC 10, [2015] WLR 694 at para 40.

²⁴¹ Davies, *supra* note 233.

²⁴² *CBS Songs v Amstrad Consumer Electronics plc*, [1988] AC 1013, [1988] UKHL 15. For additional materials on this topic, see Hazel Carty, “Joint Tortfeasance and Assistance Liability” (1999) 19 Leg Stud 494.

²⁴³ John Fleming, *Law of Torts*, 5th ed (Sydney: Law Book Company, 1977) at 237-38.

²⁴⁴ *Ibid.* See also Philip H Osborne, *Law of Torts*, 6th ed (Toronto: Irwin Law, 2020) at 63-64.

²⁴⁵ For more information on the potential creation of a new nominate tort see the excerpt in Chapter 5 on *Nevesun* and Section 6.5 of this chapter.

²⁴⁶ R Bruce Anderson, *Encyclopedia of White-Collar and Corporate Crime*, 2nd ed by Lawrence Salinger (Sage Publications, 2013) *sub verdo* “legal malpractice.”

harmed party with standing to show that malpractice occurred, and that as a result of that malpractice, the harmed party suffered damages.²⁴⁷ In doing so, the harmed party must show that but for the lawyer's malpractice, the harm would not have occurred or would have been less. As stated in *Hummer v Pulley, Watson, King & Lischer, PA*, "[i]n a legal malpractice case, a plaintiff is required to prove that he would not have suffered the harm alleged absent the negligence of his attorney."²⁴⁸

Professional negligence is a common action in the category of legal malpractice. The UK case *Ross v Cauters* states that solicitors owe a duty of care to their clients and to third parties who could reasonably be expected to suffer loss or damage.²⁴⁹ This has generally been accepted in the US and Canada. This duty could apply to a lawyer who negligently advises that the client's conduct does not constitute an offence of corruption when in fact, it does, or that a client's anti-corruption compliance program and its implementation are adequate, when they clearly are not. Malpractice actions may also be possible if a lawyer fails to disclose the actual or planned corrupt conduct of an employee, agent or officer to more senior officers or the board of directors. In-house counsel in particular may have clauses in their employment contracts requiring certain actions if they encounter corruption in the organization. Failure to act in the way outlined in their employment contract on uncovering corruption may result in a breach of contract claim against the lawyer. The Supreme Court of Canada in *Central Trust Co v Rafuse*²⁵⁰ held that the standard of care for solicitors is that of "the reasonably competent solicitor, ordinarily competent solicitor and the ordinarily prudent solicitor."²⁵¹ This follows the English authorities, which state that the standard of care is one of "reasonable competence and diligence."²⁵²

6.4 Shareholders' or Beneficial Owners' Actions Against the Corporation's Lawyer

6.4.1 US

In *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l BV v Schreiber*, the Court of Appeal for the Second Circuit allowed the shareholders of the defendant company to maintain an action for legal malpractice against the company's legal counsel.²⁵³ The company had been found criminally liable under the FCPA for paying a bribe after counsel advised that the bribe could be paid through the company's subsidiary to avoid liability under the FCPA. The defendant argued that no such cause of action existed

²⁴⁷ *Ibid.*

²⁴⁸ *Hummer v Pulley, Watson, King & Lischer, PA*, 157 NC App 60, 577 SE 2d 918 (2003).

²⁴⁹ *Ross v Cauters*, [1979] 3 All ER 580, [1979] 3 WLR 605.

²⁵⁰ *Central Trust Co v Rafuse*, [1986] SCJ No 52, [1986] 2 SCR 147.

²⁵¹ *Ibid* at para 48.

²⁵² For more information, see: Halsbury's Laws of Canada (online), *Legal Profession*, (IV(5)(2)(a)) (2013 reissue). English authorities include *Fletcher & Son v Jubb, Booth & Helliwell*, [1920] 1 KB 275 (CA); *Groom v Crocker*, [1939] 1 KB 194, [1938] 2 All ER 394 (CA).

²⁵³ *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l BV v Schreiber*, 327 F (3d) 173 (2d Cir 2003). For more details about civil actions based on the FCPA

violations in the context of asset recovery see Chapter 5, Section 2.4.5.3(a).

in law, but the Court rejected that argument in a pre-trial motion and allowed the shareholders to continue their action against the lawyer defendant.

6.4.2 UK

In the UK, Zambia's Attorney General launched a private law claim against two UK lawyers and their firms for their participation in "allegedly giving dishonest assistance in the misappropriation" of public funds.²⁵⁴ This claim was for "dishonest assistance" and conspiring in corrupt acts; it was not a claim for professional negligence. The Attorney General alleged that the lawyers had assisted the former president of Zambia, Frederick Chiluba, in corrupt acts and the misappropriation of public funds. The Attorney General of Zambia was successful at the lower court level, but on appeal the action failed because the court found that the lawyers had not crossed the line from incompetence to dishonesty.²⁵⁵ The test applied is known as the "fool or knave test" and is a difficult test to meet when trying to prove legal malpractice. Despite the Court of Appeals decision, Chiluba's lawyer, Mohammed Iqbal Meer, was suspended from the practice of law for three years for failure to uphold professional standards.²⁵⁶

In contrast, in the Kuwaiti Investment Organization (KIO) case, Spanish attorney Juan Jose Folchi Bonafonte, was held civilly liable for assisting to divert funds from the KIO's subsidiary, Grupo Torras (GT). Sheikh Fahad, a member of the Kuwaiti royal family of Al-Sabah and the chairman of the KIO between 1984 and 1992, made a number of questionable investments causing a loss of \$4 billion to the KIO, of which \$1.2 billion were attributable to fraud, embezzlement, and misappropriation.²⁵⁷ The England and Wales Court of Appeal commented on Mr. Folchi's involvement in this matter as a lawyer in the following manner:

The [trial] judge was not prepared to hold that Mr Folchi was a conspirator. But his findings of fact about what Mr. Folchi did know, or shut his eyes to, take his conclusion out of the sphere of hypothesis. The assistance that Mr. Folchi gave in all the transactions was crucial and without it they could not have taken place as they did. He was just as much a linchpin in giving dishonest assistance as he would have been if he was a conspirator. It was the obvious duty of an honest lawyer to make more enquiries as to why very large sums of money were being dealt with in highly questionable ways, and to stop the transactions if he did not receive satisfactory explanations. Mr. Folchi repeatedly failed in his duty and in consequence GT suffered losses.²⁵⁸

²⁵⁴ Jean-Pierre Brun et al, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets*, (Washington, DC: World Bank Publications, 2014) at 122-3. See also *Zambia v Meer Care & Desai (a firm) & Ors*, [2007] EWHC 952 (Ch) and *Zambia v Meer Care & Desai (a firm) & Ors*, [2008] EWCA Civ 1007.

²⁵⁵ *Ibid* at 124.

²⁵⁶ UNODC, *supra* note 231 at 21.

²⁵⁷ *Ibid* at 9, 21-22.

²⁵⁸ *Khaled Naser Hamoud Al-Sabah and Juan Jose Folchi Bonafonte v Grupo Torras SA*, [2000] EWCA Civ J 1102-9.

6.4.3 Canada

The common law in Canada provides some limited avenues of redress against lawyers for aggrieved investors. Lawyers may be liable to their corporate clients for misrepresentations or negligence. As stated by Mark Gillen:

If the client is found liable for a misrepresentation in the prospectus, the client could sue the lawyer for negligent advice or assistance in the preparation of the prospectus. The lawyer may also have a duty to the public requiring the lawyer to discourage the client from distributing securities under a misleading prospectus and possibly requiring the lawyer to disclose, or "blow the whistle", where a client persists with the use of a misleading prospectus.²⁵⁹

However, often a corporation is unable or unwilling to pursue its lawyers for unlawful or negligent acts or omissions, particularly if the board of directors is involved in them. Shareholders who wish to pursue corporate lawyers for the torts committed against the company have an additional hurdle in seeking to hold the corporate lawyer liable; they must first establish that a duty of care is owed by the corporate lawyer to the shareholder, rather than just to the corporate client. After establishing the duty of care, they must show that the lawyer breached that duty.

This duty of care is difficult to establish because lawyers owe an overriding duty to their client, and any duty to a third party may come into conflict with their duty to their client. Policy reasons, such as the fear of liability to an indeterminate class for an indeterminate amount, may prevent the court from finding a duty to shareholders. Even if the duty is established, Canadian courts rarely find a breach of the duty of care on the part of lawyers. Generally, the court finds that the lawyer took reasonable care to fulfill the duty or that the circumstances did not give rise to reasonable suspicion, which would require increased due diligence on the part of the lawyer.

In *CC&L Dedicated Enterprise Fund v Fisherman*, an Ontario court found that “*a prima facie* duty of care exists when a lawyer makes representations to the investing public for the purpose of furthering the investments in their client.”²⁶⁰ In *Filipovic v Upshall*, the Court found that the lawyer “stood in a sufficient relationship of proximity with the plaintiffs to engender a duty of care on their part.”²⁶¹ In *Filipovic*, the shareholders confirmed the corporate solicitors’ appointments to the corporation, knew the solicitors from previous dealings, and wrote their cheques directly to the solicitors on the instructions of the promoters of the investment. The court found that the duty of care “flowed through the company to the shareholders, but did not arise independent of the company itself.”²⁶² However, in *Filipovic*, the court found that the solicitors discharged their duty in a

²⁵⁹ Mark Gillen, *Securities Regulation in Canada*, 4th ed (Toronto: Thomson Reuters, 2019)

²⁶⁰ *CC&L Dedicated Enterprise Fund v Fisherman* (2001), 18 BLR (3d) 240, 2001 CanLII 28387 (Ont Sup Ct).

²⁶¹ *Filipovic v Upshall* (1998), 19 RPR (3d) 88 (Ont Ct J (Gen Div)), affirmed by the CA at [2000] OJ No 2291.

²⁶² *Ibid* at para 64.

"reasonably competent and professional manner."²⁶³ In coming to this decision, the court considered the fact that the solicitors had worked with the principals before with no history of dishonesty and that the solicitors took instructions from the principals of the company, who would reasonably have the authority claimed. The court also found a lack of circumstances that would reasonably raise the solicitors' suspicions.

6.5 Case for a New Nominate Tort

A Conflict of Laws Approach for a New Nominate Tort

by Joannie Fu

JD University of Victoria 2021

The current state of law and interaction with various private international law factors demonstrate the imperative need for a new nominate tort, which would provide better consolidation and efficacy for plaintiff-victims bringing forward a claim against a Canadian legal entity, including lawyers who assist clients in committing a tort in relation to a corrupt transaction.²⁶⁴

The biggest hurdle to overcome in private international law without the creation of a new nominate tort is choice of law. Choice of law considers which jurisdiction's law would be applied. In tort cases, the principle *lex loci delicti* would be applied, or "law of the place of the wrong". This may present difficulties for the claimant, especially if the law of the place of the wrong may be unfavourable towards them. However, *lex loci delicti* is not absolute in the international realm for tortious cases. There is a narrow door open for *lex fori*, or the "law of the forum", in an international context per *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*.²⁶⁵ In writing for the majority, Justice La Forest notes that *lex loci delicti* is the governing law within Canada, however in the context of international claims this "could give rise to injustice" thus "in certain circumstances [La Forest] is not averse to retaining a discretion in the court to apply [Canada's] own law to deal with such circumstances".²⁶⁶ Through that narrow door of discretion, the common-law may be pushed. Thus, a policy argument would be that because a Canadian company is conducting business abroad, there should be a corresponding application of Canadian values abroad. It would be a poor reflection of Canada's public image if its corporations and the lawyers working for them are not held liable for flagrant violations of human rights. Another way to impose responsibility is to advance an argument that the CORE and CUSMA imposed a legal duty on Canadian legal entities to act with due diligence when conducting activities abroad. Thus, a local defendant, who could potentially be a

²⁶³ *Ibid* at para 67.

²⁶⁴ Recent jurisprudence suggests that there is a move towards holding Canadian entities responsible for actions committed abroad: see for example, *Garcia v Tahoe Resources Inc*, 2017 BCCA 39. A lawyer who was an accessory in assisting in the commitment of a tort abroad could potentially also be held liable.

²⁶⁵ *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022.

²⁶⁶ *Ibid*.

corporate lawyer, would become a “concurrent tortfeasor” through the lack of human rights due diligence.²⁶⁷ Thus, even without a new nominate tort based on customary international law (CIL), there are strong arguments that choice of law should be *lex fori*.

If actual evidence can be found that the local defendant conspired, facilitated, or arranged the violation abroad, the plaintiff could use *lex loci delicti* and make an argument that the wrong occurred in Canada. In this case, the corporate lawyer would become a “joint tortfeasor” in principal violation or vicariously liable.²⁶⁸ The Court may focus on the actions of a lawyer based in Canada through an analysis of its actions and whether they were sufficiently diligent in avoiding the violation of human rights. For example, using *Moran v Pyle National*,²⁶⁹ a victim could argue that the violation of human rights can occur at the place of acting, and the corporate lawyer acted in British Columbia by facilitating the violation of human rights abroad. Establishing a standard of care to be imposed on Canadian legal entities that operate abroad (and the lawyers that help facilitate operations) creates a causative link. Subsequently, it would support the approach of *lex loci delicti*, as the wrong can be placed in British Columbia. Additionally, if the plaintiffs can establish a duty of due diligence that establishes a legal standard of care, they would have a stronger argument to apply Canadian law, as the tort occurred in a failure to exercise the due diligence required by Canadian law.²⁷⁰

Jurisdiction simpliciter considers whether the laws of a particular jurisdiction allow the jurisdiction to hear the case. As an example, in British Columbia, sections 3 and 10 of the *Court Jurisdiction Proceedings and Transfer Act (CJPTA)* address the territorial competence of a court to hear a case, relying on a real and substantial connection between the facts and British Columbia. The factor of *jurisdiction simpliciter* would be simple to fulfill, as the tort addresses actions of Canadian entities and the laws of Canada would allow the case to be heard as there is a real and substantial connection.

Forum non conveniens considers whether a more convenient forum exists elsewhere. This is a matter of discretion and requires courts to consider and conclude whether a more appropriate jurisdiction exists elsewhere. This may be a more difficult area for plaintiffs to overcome, as there may be another equally competent jurisdiction with an equally strong real and substantial connection. For example, in *Bil'in (Village Council) v Green Park*

²⁶⁷ The case of *Rutter v Allen*, 2012 BCSC 135, might be considered by way of analogy. In this case, a vehicular chain collision involving multiple defendants happened resulting in the injury of the plaintiff. Applying the law to the facts of a corporation who was negligent, it may be argued that the lack of due diligence (arguably a duty imposed by the CORE) caused the injuries abroad, thus, the Canadian legal entity should be included as a concurrent tortfeasor. A causal link must also be established.

²⁶⁸ A plaintiff may argue that the Canadian legal entity was either vicariously liable (if their employees caused the harm as the facts illustrate in *Garcia v Tahoe Resources Inc*, 2017 BCCA 39) or that the Canadian legal entity was acting in concert with another joint tortfeasor to harm the plaintiff.

²⁶⁹ *Moran v Pyle National (Canada) Ltd.*, [1975] 1 SCR 393.

²⁷⁰ Note that an issue the plaintiff may run into is *The Queen v Saskatchewan Wheat Pool*, [1983] 1 SCR 205, which rejected the tort of breach of statutory duty. Thus, this signals the imperative need for a new nominate tort to be created and outlined by the Courts.

International Ltd.,²⁷¹ the village of Bil'in filed a civil action in Canada against the Canadian companies and their director for building new neighbourhoods on Bil'in's land. However, the Quebec Superior Court dismissed the case on the grounds of *forum non conveniens*. Nevertheless, the case was significant in that, for the first time in Canada, a court found that a war crime can constitute a civil wrong in Canadian domestic law.²⁷² However, as the recent case Garcia suggests, *forum non conveniens* can be overcome by plaintiffs if they can demonstrate that there is a real risk that the alternate forum cannot provide justice.

Another consideration is whether the case would fall under provincial or federal jurisdiction. The case would likely fall under provincial jurisdiction per section 92(13) of the *Constitution*.²⁷³ While the creation of the CORE suggests that there is a federal system of regulation in relation to certain circumstances, the tort would likely fall under provincial powers because the nature of the claims would fall under property and civil rights. Nevertheless, the division of powers may be tricky to navigate especially with the overlap of issues. If Bill S-211²⁷⁴ were passed as legislation, although it falls under federal jurisdiction, it would still be relevant for the purposes of claims as it can be used to establish a legal duty of due diligence.

Finally, another consideration would be whether there is a real and substantial connection with the forum. In BC, one would have to turn to the *CJPTA*, which states that a real and substantial connection is presumed if it concerns a tort committed in BC or if it concerns a business carried on in BC or if the ordinary residence of the business is in BC.²⁷⁵ There would be a strong argument that because the business was carried on BC and because they were subject to CIL, there was a real and substantial connection. A lawyer who commits a tort extraterritorially may be held responsible if it can be established that based on CIL there was a legal duty of due diligence in ensuring there are no violations of human rights, establishing a standard of care and thus creating a causative link between the lawyer's action (or lack thereof) within the province of BC.

6.6 Lawyers' Civil Liability Under Securities Acts

Lawyers' liability under securities legislation is important in the corruption context because corporate lawyers often work with publicly traded corporations. In addition, the SEC is a major enforcer of the *FCPA*. Violations of anti-corruption and anti-bribery laws may result in additional violations of securities regulations, as the corporation may fail to disclose accurately their financial position and potential liabilities to the financial market. An investor who purchases a share shortly before a company is investigated, for or charged with corruption offences, could see the value of their investment fall drastically in a short period due to negative public perception of the company or because of the massive fines

²⁷¹ *Bil'in (Village Council) v Green Park International Ltd*, 2009 QCCS 4151.

²⁷² *Ibid* at paras 175-176.

²⁷³ *The Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s 92(13).

²⁷⁴ Bill S-211, *An Act to enact the Modern Slavery Act and to amend the Customs Tariff*, 1st sess, 43rd Parl, 2019-2020.

²⁷⁵ *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 (g)(h).

CHAPTER 9 COMPLIANCE PROGRAMS, RISK ASSESSMENTS, & DUE DILIGENCE

imposed on the company upon conviction or settlement. As disclosure and investigation of corruption and bribery may have a significant impact on the value of a company's shares, securities law is applicable in the anti-corruption context.²⁷⁶

²⁷⁶ For US law on this topic see: 17 CFR § 240.10b-5 (1951), 15 USC § 78t(e), *Sarbanes-Oxley Act of 2002*, 15 USC 7201, 116 Stat 745 § 307 (2002), 17 CFR § 205, and US Securities Exchange Commission, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans*, 2006, § 102(e). For more information on UK Securities Regulation, see Joan Loughery, *Corporate Lawyers and Corporate Governance* (New York: Cambridge University Press, 2011). For more information on Canadian securities regulation, see David Johnston, Kathleen Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (LexisNexis, 2014) and Gillen, *supra* note 259. Note that Canada's securities law varies provincially.

CHAPTER 10

PUBLIC OFFICIALS AND CONFLICTS OF INTEREST

IAN STEDMAN

CONTENTS

- 1. INTRODUCTION**
- 2. COMPARING APPROACHES**
- 3. CENTERING CONFLICTS OF INTEREST**
- 4. PUBLIC REPORTING**
- 5. CONCLUSION**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

How members of the public perceive the ethical conduct of elected officials, members of the executive, and members of the public service plays an important role in whether they trust their government. High levels of trust lead to greater civic engagement, which tends to give rise to better social and economic outcomes within a society.¹ This is, of course, all desirable. Corruption, on the other hand, has the opposite effect. When public sector actors engage in corrupt behaviour it gives rise to greater cynicism, which leads to less trust and less civic engagement.² It is for these simple reasons that we have seen countries all over the world adopt standards and rules to help guide the ethical conduct of their public officials. This chapter offers an overview of those standards and rules. In order to maintain a manageable scope, focus will be placed almost exclusively on elected officials and the regimes that have developed in relation thereto at the national levels in the United States, United Kingdom, and Canada.

The chapter is divided into four parts. The first part offers an introduction to the important role that public sector ethics fulfill in the broader global discourse around corruption. This includes a look at how public sector ethics has been addressed at the international level as part of ongoing efforts to curtail conduct that is damaging to economic development and prosperity. The second part begins by offering a comparative introduction to the different approaches to standard setting that these regimes have taken, focusing attention on the institutional frameworks in place at the national levels in the US, UK, and Canada. The third part offers a comprehensive introduction to the various principles and rules of ethical conduct, including their rationale and how they operate. The final part looks at accountability, oversight and enforcement of these rules, including an overview of the importance of transparency and public reporting, as well as the role that the criminal law plays in public sector anti-corruption frameworks. Although the US, UK, and Canada each also have sub-national public sector ethics laws and rules, those regimes are not discussed in this chapter.

1.1 Conceptualizing Political Corruption

Before addressing political corruption within our broader dialogue about global corruption, it is important to first acknowledge the diversity of governance approaches that exist across nations. From dictatorships to monarchies to representative democracies, these approaches vary in significant ways that make it impossible to treat political corruption as a conceptual monolith. To say something coherent about the topic then, a decision about how we think we can recognize if public sector officials are engaging in corrupt practices ought to be made at the outset.

¹ Daniel Kaufmann & Phyllis Dininio, "Corruption: A Key Challenge for Development" in Rick Stapenhurst, Niall Johnston & Riccardo Pelizzo, eds, *The Role of Parliament in Curbing Corruption* (Washington, DC: The World Bank Institute, 2006) 13 at 14.

² See e.g., Milan Skolník, "Corruption and Political Participation: A Review" (2020) 17:1 Social Studies 89, for a review of studies that have explored how corruption and the perception of corruption have impacted political participation.

Public sector officials spend a great deal of time and energy determining how to balance competing interests. Interests must of course be balanced when making policy decisions, but also when doing the everyday work of simply managing different relationships. It is in the tangled web of relationships and interests that the opportunity for corruption finds its home. It is also in this web that a public official can get caught up in helping others and lose sight of their professional duty to serve the broader public interest. Despite the complexity of public service, a useful conceptualization of political corruption must be able to establish a bright line between acting in the public interest and acting in a manner that improperly furthers private interests to the detriment of the public interest.

To help maintain clarity throughout this chapter, I will rely on a conceptual framework for public sector corruption that is inspired by Mark Philp's work and consists of meeting the following criteria:

- 1) A public official,
- 2) in violation of the trust placed in them by the public,
- 3) and in a manner that harms the public interest,
- 4) engages in conduct that exploits the office (including access and opportunities that they are afforded by virtue of holding that office) for clear personal or private gain in a way that runs contrary to the accepted rules and standards for the conduct of public officials within that political culture,
- 5) so as to benefit themselves or a third party by providing them with access to a good, service or opportunity (i.e., a benefit) they would not otherwise have access to.³

While the above framework is broad enough to capture any number of public sector actors, from elected officials to political appointees to public servants, this chapter is limited to elected officials. There are many similarities in the kinds of behaviours that are prohibited by the anti-corruption regimes in the US, UK, and Canada, but their different political cultures have also given rise to marked differences in their regulatory approaches. Understanding these differences will, in part, require a deeper analysis of what is meant by both "public interest" and the concepts of personal and/or private gain.

1.1.1 The Important Role of Political Culture

Anti-corruption regimes do not exist in a vacuum. The political culture within a given state will have a profound effect on when and why a regime emerges, how it develops, and whether it is adhered to. Research suggests that anti-corruption measures are more effective where political actors share a common political culture.⁴ To identify or describe a political

³ Mark Philp, "Conceptualizing Political Corruption" in Arnold J Heidenheimer & Michael Johnston, eds, *Political Corruption Concepts & Contexts*, 3rd ed (New Jersey: Transaction Publishers, 2002) 41 at 42.

⁴ Richard Mulgan & John Wanna, "Developing Cultures of Integrity in the Public and Private Sectors" in Adam Graycar & Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Cheltenham; Northampton: Edward Elgar, 2011) 416 at 416.

culture then, we look for shared political attitudes, values, standards and behaviours. We see these elements emerge from traditions, conventions, and customs that have developed over time and have been more or less adhered to, but also from decisions that are made about the design and structure of anti-corruption institutions. A political culture of ‘ethics as compliance’ might emerge, for example, if an anti-corruption regime requires ongoing and robust compliance aggressively enforced by independent oversight and auditing.

Another important factor in shaping political culture is the socio-economic reality of who holds elected office. As will be explored throughout this chapter, it can be difficult to design anti-corruption rules that are capable of effectively dissuading corruption from all public officials equally, including those who had previously accumulated immense personal wealth prior to serving in public office. Although it would be nice if every person who runs for elected office does so because they have a genuine desire to represent and serve others, it is impossible to separate holding elected office from holding a seat of political power. Sometimes wealth and power can intersect in a manner that challenges established political cultures and anti-corruption measures. As will become evident, the experience of the United States’ former President Donald Trump is instructive in this regard.

Finally, it is important to say something about the role that public perception and engagement play in shaping political culture. Recall that the concept of public interest is integral to the conceptual framework for identifying public sector corruption that was presented above. It is because of how public interest and expectations have evolved that the demand for broader and more varied anti-corruption regimes has emerged. This evolution in understanding and expectation has inspired an evolution in language as well. The public has come to expect that elected officials will do more than merely avoid corrupt practices, but that they will act ethically and honourably. It is for this reason that the more inclusive language of “government ethics,” “public sector ethics” and “conflicts of interest” have come to be used in place of the language of “anti-corruption” in the political realm. This is not to say that language of corruption is not used, but that it is more commonplace in the context of criminal anti-corruption laws than in the broader public sector regimes that deal with ethics and conflicts of interest. Each of the above expressions will be used throughout this chapter.

1.1.2 Role of Public Perception and Engagement

The avoidance of conflicts of interest has become the cornerstone of the modern anti-corruption regimes that will be considered in this chapter. When framed broadly, the concept of a conflict of interest can not only encompass the most egregious of self-dealing, but also the subtlest and even accidental mismanagement of public perception and expectation. Whereas the mere perception of a conflict of interest might once have been considered something worth considering for decision-makers, it is now treated almost by default as though it is a complete perversion of judgment for a public official to even allow themselves inadvertently to be in a position where they are perceived to have a conflict of interest. If the public merely perceives that an elected official is in a conflict of interest, whether or not they actually are, their ability to act in the public interest is called into question. The difference between perceived, apparent and real conflicts of interest will be explored in greater depth below.

1.2 International Standards

The international community has come to accept that ethical public sector governance is an important contributor to global economic development and prosperity. Various international bodies have taken steps to study, monitor, and provide guidance on the impact that public sector corruption can have, and to provide general advice on how to effectively manage conflicts of interest. The two most widely recognized international bodies to have taken up this work are the United Nations (UN) and the Organization for Economic Co-operation and Development (OECD). Both the UN and OECD have produced robust guidance documents that serve as resources for governments looking to implement or improve public sector anti-corruption measures. The World Bank Institute (WBI) and Transparency International (TI), the latter being a non-governmental organization that monitors and evaluates the effectiveness of anti-corruption regimes, have also recognized the important role public sector leadership plays in fostering the public trust needed for economic prosperity. The work of these four organizations will be discussed briefly.

1.2.1 UNCAC

The adoption of the United Nations Convention Against Corruption (UNCAC)⁵ in October 2003, and its subsequent emphasis on providing guidance and oversight placed the UN at the forefront of anti-corruption initiatives. As explained in-depth in Chapters 2 and 3, Article 15 outlines criminalization requirements and law enforcement requirements that apply to the bribery of foreign officials.

Articles 7 and 8 also relate to public officials, but do not require member states to pass criminal laws. Instead, they require that each State Party commit to taking various other actions “in accordance with the fundamental principles of its legal system.”⁶ Article 7 stipulates that states shall apply principles of equity and merit when hiring in the public sector. They will also support the adequate training of employees who are in positions that are vulnerable to corruption;⁷ promote adequate remuneration and pay scales;⁸ enhance transparency in the funding of candidates for public office;⁹ adopt systems that prevent conflicts of interests;¹⁰ promote education to enhance public sector awareness about the risks of corruption;¹¹ and so forth.

Article 8 stipulates that each signatory state shall promote ethical standards and endeavour to adopt codes of conduct that enhance “integrity, honesty and responsibility among its public officials,”¹² including by facilitating the reporting of corruption to an appropriate

⁵ United Nations Convention Against Corruption, 9 to 11 December 2003, A/58/422, art 42 (entered into force 14 December 2005) [UNCAC], online (pdf):

<https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

⁶ *Ibid*, art 7.

⁷ *Ibid*, art 7, s 1(b).

⁸ *Ibid*, art 7, s 1(c).

⁹ *Ibid*, art 7, s 3.

¹⁰ *Ibid*, art 7, s 4.

¹¹ *Ibid*, art 7, s 1(d).

¹² *Ibid*, art 8, s 1.

authority. State Parties should also, where appropriate, require public officials to declare their outside employment and other activities, investments they hold, and any assets or gifts they receive—particularly those from which a conflict of interest pertaining to their role as a public official may result—to an appropriate authority.¹³

UNCAC is complemented by a *Legislative Guide* (the *Guide*) to assist states that are seeking to pass laws to help implement the Convention.¹⁴ The *Guide* provides helpful tips, including that states are more likely to receive better buy-in from public officials if they develop rules “through a process of consultation rather than a top-to-bottom approach.”¹⁵ States might consider attaching these rules to employment contracts and they are also encouraged to engage in regular initiatives to raise awareness about what the rules are and how they apply.¹⁶

In addition to the above, the *Guide* directly addresses the various declarations to appropriate authorities that UNCAC recommends under Article 8, and makes the important point that they should be considered minimum disclosure requirements.¹⁷ The clear inference is that states are encouraged to go above and beyond the minimum recommendations that are put forth in UNCAC.

1.2.2 OECD

The United Nations General Assembly has granted what is called “observer status” to a number of international organizations, entities, and non-member states. Having this status allows those entities to participate in some limited way in the work of the General Assembly. The OECD is one such international organization that has been granted official observer status and accordingly, has been able to contribute to the work of the UN. The OECD is a policy-focused organization and works alongside other entities to help establish evidence-based standards and solutions to a variety of social, economic, and environmental issues. The OECD has been particularly active over the past two decades with its work on public sector trust and integrity.

The OECD’s major work in this area began to gain public attention in 1998 with the issuing of its *Recommendation on Improving Ethical Conduct in the Public Service* (1998 Recommendation).¹⁸ This 1998 Recommendation includes twelve principles related to managing ethics in the public service that could be used by all governments to support them in their review of their own ethics management systems. Included in those twelve principles

¹³ *Ibid*, art 8, s 5.

¹⁴ United Nations Office on Drugs and Crime (UNODC), *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed (United Nations, 2012) [Legislative Guide (2012)], at 65, online (pdf):

<https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

¹⁵ *Ibid* at 32, para 91.

¹⁶ *Ibid*.

¹⁷ *Ibid* at 33, para 96.

¹⁸ See János Bertók, *Trust in Government: Ethics Measures in OECD Countries*, (Paris: OECD Publications, 2000) at 74, online (pdf): <<https://www.oecd.org/gov/ethics/48994450.pdf>>, where the 1998 Recommendations are included as an Annex.

is that: ethical standards should be clear and reflected in a country's legal framework(s); guidance should be available to public servants and they should know their rights and obligations when exposing wrongdoing; the political class should demonstrate its commitment to ethical conduct in order to help reinforce the ethical conduct of public servants; and management must be committed to and supported by adequate accountability mechanisms. Each principle was developed and agreed upon by OECD Member countries, who were themselves encouraged to commit to a regular review of the policies, procedures, practices, and institutions they had in place to "encourage high standards of conduct and prevent misconduct as well as counter corruption."¹⁹

The 1998 Recommendation was followed by an implementation report in 2000, called *Trust in Government: Ethics Measures in OECD Countries*²⁰ (*Trust in Government*). *Trust in Government* is based on a survey of 29 OECD countries and described, in part, how they had implemented the 1998 Recommendation. Further goals of the *Trust in Government* report were to:

- Provide a comprehensive database from all Member countries for analysis;
- Identify promising practices – what works and how, in respective national environments; and
- Provide a framework for assessment.²¹

The robust report provides a broad comparative analysis that helped identify and uncover similarities and differences in principles and practices across jurisdictions. From this information, summaries of best practices were established, including: how to state and communicate core values; how to establish and implement measures focused on prevention; ways to punish or even criminalize misconduct; what sort of information ought to be publicly disclosed by whom and how often; how to establish reporting mechanisms; and how to ensure consistency in policy and application.²²

Another comprehensive report in 2003, called *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences*²³ (*Managing Conflict of Interest*), followed *Trust in Government*. Recall here that UNCAC was adopted in 2003. *Managing Conflict of Interest* offers a comparative survey of OECD member countries and again demonstrates a wide variety of approaches taken to prevent conflicts of interest, including proactive education; regulation and sanctions (criminal, administrative and/or monetary penalties); and emphasizing values and personal responsibility. Furthermore, there are a wide variety of systems of government. In turn, this means that different approaches were adopted, rather than a sole approach which might not map well across all settings.

¹⁹ *Ibid* at 26.

²⁰ *Ibid*.

²¹ *Ibid* at 21.

²² *Ibid*.

²³ János Bertók, *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences*, (Paris: OECD Publications, 2003), online (pdf): <<https://www.oecd.org/gov/ethics/48994419.pdf>>.

Managing Conflict of Interest highlighted that while some countries are tackling the problem of public sector corruption in the midst of economies that are also in transition, others may be more stable with decentralized governments, and some may even be able to advance coherent federal frameworks or leverage the use of regulations and sanctions that can be updated regularly in their anti-corruption efforts. By drawing out these different categorizations, the report provides more useful information for individual readers (i.e., countries) who find themselves in one of those categories. It is easier to see similarities and to recognize learning opportunities with this greater contextualization of the survey results that had been gathered.

In order to continue the move towards developing more practical reports and resources to assist countries with actually enhancing their public sector ethics infrastructure, the OECD published *Managing Conflicts of Interest in the Public Service: A Toolkit (Toolkit)*²⁴ in 2005. This toolkit provides “a set of practical solutions for developing and implementing ways to manage conflicts of interest in accordance with the OECD Guidelines for Managing Conflict of Interest in the Public Service.”²⁵ Among these practical solutions were definitions, diagrams, and checklists for identifying at-risk areas. The *Toolkit* also provides draft ethics codes that include, among other things, definitions of a conflict of interest, and sample rules and procedures related to the acceptance of gifts and gratuities, the registration of personal assets, and the implementation of public disclosure protocols. Finally, there is a section that emphasizes the importance of having policies and procedures in place to protect whistleblowers.

The publication of the *Toolkit* was later complemented by a collaborative effort between the OECD and the Asian Development Bank (ADB). The two organizations published a summary report of the proceedings of the 5th Regional Seminar on Making International Anti-Corruption Standards Operational, entitled *Managing Conflict of Interest: Frameworks, Tools, and Instruments for Preventing, Detecting, and Managing Conflict of Interest*.²⁶ One goal of the Seminar report is to emphasize that the OECD also supports the efforts of Asian and Pacific countries to fight corruption²⁷—an aspect that received little attention in the OECD’s earlier work. Building off of the earlier *Toolkit*’s theme, the Seminar report provides summaries and analysis of how conflicts of interest are managed in specific countries.²⁸

The survey work done by the OECD and the *Toolkit* and reports it produced are very likely the most important international documents in relation to establishing the role that public sector ethics and accountability play in creating strong and healthy economies. This work

²⁴ Howard Whitton & János Bertók, *Managing Conflict of Interest in the Public Service: A Toolkit*, (Paris: OECD Publications, 2005), online (pdf): <<https://www.oecd.org/gov/ethics/49107986.pdf>>.

²⁵ *Ibid* at 3.

²⁶ Kathryn Nelson et al, *Managing Conflict of Interest: Frameworks, Tools and Instruments for Preventing, Detecting, and Managing Conflict of Interest: Proceedings of the 5th Regional Seminar on Making International Anti-Corruption Standards Operational*, (Hosted by the Corruption Eradication Commission (KPK) Indonesia, Jakarta, 6-7 August 2007) (Paris; Manila: Asian Development Bank & OECD, 2008), online (pdf): <<https://www.oecd.org/site/adboecdanti-corruptioninitiative/40838870.pdf>>.

²⁷ *Ibid* at vii.

²⁸ *Ibid*.

drove international engagement on public sector ethics until the OECD adopted a new recommendation on public integrity in 2017.²⁹ The OECD *Recommendation of the Council on Public Integrity* (2017 Recommendation) is framed broadly as a “strategy against corruption”³⁰ and accordingly leverages robust data about corruption while using infographics to help explain why public integrity continues to be important in the context of corruption. The new 2017 Recommendation focuses increased attention on how vulnerable public procurement, public infrastructure projects, and policy-making can be to corruption and corrupt practices. It argues that actions to prevent public corruption must look beyond government and include measures aimed at educating individuals and dissuading corruption in the private sector as well.

One of the most important areas of emphasis in the 2017 Recommendation is the conceptualization of corruption as more than bribery. Corruption is known to include influence peddling, embezzlement of public property, use of confidential information, and abuse of power. Moving beyond a narrow understanding of corruption and trying to gain a broader sense of the full complexity of where and how corruption can emerge is imperative. To do this, transparency may not be enough; greater scrutiny and accountability mechanisms may also be needed. Public integrity requires a coherent and comprehensive integrity system, a culture of public integrity, and effective accountability mechanisms.³¹ To that end, the OECD offers thirteen individual principles or recommendations. Among other areas, the recommendations focus on investing in and encouraging political and managerial commitments to integrity; establishing high standards of conduct for public officials; establishing clear institutional responsibilities; promoting a “whole-of-society” culture of public integrity; promoting a merit-based, professional public sector; and ensuring that enforcement mechanisms are appropriate and effective.

With the new recommendations published, the OECD has become relentless in promoting and encouraging their uptake by states. Their 2020 *Public Integrity Handbook* (*Handbook*)³² acknowledges a need for greater clarity about how implementation of the thirteen principles might actually manifest. The *Handbook* explains the thirteen principles in greater depth and provides cross-sectoral “guidance to public officials and integrity practitioners, as well as to companies, civil society organizations and individuals.”³³ Renewed emphasis is placed on the importance of merit-based employment in the public service (as opposed to patronage hiring), the government’s role in providing guidance to the private sector in relation to corruption, the importance of civil society groups, and the role of citizens in helping to uphold public integrity values.³⁴ The *Handbook*’s guidance is highly practical, even discussing risk management processes and further emphasizing the value of enforcement

²⁹ OECD, *Recommendation of the Council on Public Integrity*, (OECD, 2017), online (pdf): <<https://www.oecd.org/gov/ethics/OECD-Recommendation-Public-Integrity.pdf>>.

³⁰ *Ibid* at 1.

³¹ *Ibid*.

³² Carissa Munro et al, *OECD Public Integrity Handbook*, (Paris: OECD Publishing, 2020), online: <<http://www.oecd.org/corruption-integrity/reports/oecd-public-integrity-handbook-ac8ed8e8-en.html>>.

³³ *Ibid* at 3.

³⁴ *Ibid*.

systems “to ensure real accountability for integrity violations.”³⁵ Given the questionable state of public sector ethics in one of the world’s most developed economies (i.e., the US) at the time this *Handbook* was published, the emphasis on enforcement could have been expected in light of the controversies concerning integrity of the Trump administration.

In an increasingly digital-first world and at a time where the COVID-19 pandemic limited the ability to gather physically, the OECD has recently focused its efforts on creating new, digital tools to complement the *Handbook* and encourage its uptake. The OECD’s Council on Public Integrity released a new recommendation, *Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, in recognition of the possibility that the pandemic might expose how vulnerable policy-making public procurement and public infrastructure spending are to corruption.³⁶ This new document, released in 2021, contains twelve principles for managing ethics in the public service, alongside the thirteen principles from 2017, as well as two new and separate OECD legal instruments. OECD legal instruments are different than recommendations because although they are not legally binding by default, they become legally binding on all Members other than those that abstain at the time of adoption. This move to create legal instruments signals that the OECD is confident in the quality of these principles and is willing to put added pressure on its Members to adopt them as binding commitments.

In order to support Members who are now expected to take more robust action to improve their public integrity and anti-corruption policies and infrastructure, the OECD has created an interactive multi-lingual website filled with background information and useful tools. This digital toolkit includes the OECD Public Integrity Maturity Model tool, for example, which allows governments or public sector organisations to “assess the elements of their integrity systems, and identify where they are situated in relation to good practice across four categories: nascent, emerging, established and leading.”³⁷ The OECD’s ongoing creation and modernization of resources supports better public sector ethics and accountability, and sets them apart as the international leader among NGOs in this space.

1.2.3 World Bank

The World Bank participates as an observer in more than 30 OECD bodies and provides support to OECD’s Global forums and regional events.³⁸ The World Bank signalled its interest in public sector ethics when it commissioned a 2004 report entitled *Legislative Ethics and Codes of Conduct*.³⁹ In July 2020, together with the United Nations and the OECD as part

³⁵ *Ibid.*

³⁶ OECD, *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, OECD/LEGAL/0298 (OECD, 2021), online (pdf): <<https://legalinstruments.oecd.org/public/doc/129/129.en.pdf>>.

³⁷ “OECD Public Integrity Maturity Models” (last visited 2 September 2021), online: OECD <<https://www.oecd.org/governance/ethics/public-integrity-maturity-models.htm>>.

³⁸ “Partnerships with International Organisations” (last visited 2 September 2021), online: OECD <<http://www.oecd.org/global-relations/oecdpartnershipswithinternationalorganisations/>>.

³⁹ Rick Stapenhurst & Riccardo Pelizzo, “Legislative Ethics and Codes of Conduct” (2004) World Bank and SMU Research Collection School of Social Sciences Working Paper No 37, online: <https://ink.library.smu.edu.sg/soss_research/37/>.

of the G20 Anti-corruption Working Group, the World Bank was instrumental in publishing the *Preventing and Managing Conflicts of Interest in the Public Sector: Good Practices Guide* (the *Good Practices Guide*).⁴⁰ Although duplicative in some ways to previous efforts by the OECD, the *Good Practices Guide* is more narrowly focused and goes into greater depth with respect to conflicts of interest. It serves as an important multi-stakeholder contribution to the modern literature on public sector conflicts of interest.

1.2.4 Transparency International

The OECD's 2020 *Public Integrity Handbook* emphasized the importance of civil society groups for good reason. Among the more high-profile and influential of these kinds of international non-governmental (NGO) and not-for-profit organizations is Transparency International (TI). TI works in over 100 countries conducting research about and advocating for improved anti-corruption practices and greater transparency to help uncover corruption that already exists in both the public and the private sectors. Every year TI holds conferences, publishes various reports and releases its famous Corruption Perceptions Index (CPI). The CPI is a list that "ranks 180 countries and territories by their perceived levels of public sector corruption, drawing on 13 expert assessments and surveys of business executives. It uses a scale of zero (highly corrupt) to 100 (very clean)."⁴¹

2. COMPARING APPROACHES

It is now well-established within the international community that public sector ethics regimes play an important role in helping governments to dissuade and combat corruption. The UN and OECD's work have drawn attention to the different ways these regimes have been established in countries that have varied systems of government. The political anti-corruption regimes of the US, UK, and Canada can be illustrative in this regard.

Within each of these countries there is a mix of hard and soft law that governs the behaviours of elected officials. Hard law, which can also simply be referred to as 'law,' refers to legal obligations that are binding and can be enforced by the courts. Examples of hard law are statutes/legislation, judge-made law (i.e., caselaw) and even contracts. Soft law, despite what its moniker may imply, serves an almost equally important role. Soft laws are those policies, procedures, and protocols that cannot be enforced by the court, but are nevertheless influential and, in some cases, enforceable through other mechanisms (we might call them *rules* for simplicity). An example of a soft law that is enforceable could be a code of ethical conduct that applies to members of the executive but over which the Prime Minister or President has sole enforcement authority. Even if the public disagrees with a decision to not enforce the code, no recourse to the courts would be available. Regardless, such a code of

⁴⁰ Alexandra Habershon et al, *Preventing and Managing Conflicts of Interest in the Public Sector: Good Practices Guide*, (World Bank/OECD/UNODC, 2020), online (pdf): <https://www.unodc.org/documents/corruption/Publications/2020/Preventing-and-Managing-Conflicts-of-Interest-in-the-Public-Sector-Good-Practices-Guide.pdf>.

⁴¹ "Corruption Perceptions Index" (last visited 2 September 2021), online: *Transparency International* (TI) <https://www.transparency.org/en/cpi/2020/index/nzl#>. This resource is explained more fully in Chapter 1.

conduct can still play an important role in influencing the ethical decision-making of the public officials to whom it applies.

The US, the UK and Canada all have laws that govern the ethical conduct of their elected officials. Those laws are passed by the relevant legislative bodies and can, for the most part, be enforced by the courts. What complicates matters however, is that because of the nature of their systems of government (i.e., parliamentary democracy in Canada and the UK and constitutional republic in the United States) even those laws are not always capable of being enforced by the courts. Canada's *Conflict of Interest Code for Members of the House of Commons*,⁴² for example, is administered by the Conflict of Interest and Ethics Commissioner (CIEC), who is an agent of Parliament.⁴³ As an agent of Parliament who has also been given a high level of discretion under the *Code*, the CIEC's findings about whether an elected official has violated the *Code* are not reviewable by the court for their reasonableness. This means that it is effectively impossible to have a court enforce the *Code* if there is reason to disagree with the reasonableness of the Commissioner's decision-making. These types of challenges with the enforceability of ethics laws will be addressed in greater detail below.

2.1 Principles-based

Whether we are talking about soft law or hard law, public sector ethics laws are sometimes assigned to advisers or commissioners for their administration because the standards public officials are expected to meet can evolve over time. There are some behaviours that it seems obvious we should want to prohibit (e.g., selling favours from public office or misappropriating public funds), but new ways of misbehaving sometimes come to light. Many laws or rules are drafted using principle-first language that allows for greater malleability in interpretation and application. A principles-based law can be applied to new scenarios even where those scenarios were not previously contemplated, and a precedent does not exist. In Ontario, Canada, for example, the *Members Integrity Act*⁴⁴ includes a concept called the "Ontario parliamentary convention"⁴⁵ (OPC) that is not defined in the *Act*. OPC has historically been used quite flexibly by Ontario's Integrity Commissioner as a standard against which the behaviours of elected officials can be judged. Principles-based laws encourage discretionary decision-making and, arguably, signal that the rule-makers are interested in promoting a culture of ethics (as opposed to a culture of compliance which more readily flows from a rules-based approach).

⁴² Canada, House of Commons, *Standing Orders of the House of Commons, Appendix 1: Conflict of Interest Code for Members of the House of Commons* (consolidated version as of 1 January 2021) [Canada Code], online: <<https://www.ourcommons.ca/about/standingorders/Index-e.htm>>.

⁴³ See Ian Stedman, *Resisting Obsolescence: A Comprehensive Study of Canada's Conflict of Interest and Ethics Commissioner and the Office's Efforts to Innovate while Strategically Asserting Greater Independence* (PhD Dissertation, Osgoode Hall Law School, 2019), online:

<<https://digitalcommons.osgoode.yorku.ca/phd/60/>>, for a discussion about the fact that it is in fact contested whether the CIEC is an agent of Parliament or simply an officer of the House of Commons.

⁴⁴ *Members' Integrity Act*, 1994, SO 1994, c 38 [MIA].

⁴⁵ *Ibid*, s 5.

2.2 Rules-based

By contrast, rules-based laws are more rigid and less flexible in their application. A rules-based approach relies on the prior identification of specific conduct that the rule-makers have determined to be undesirable and, ideally, establishes deterrents for those behaviours. A simple example might be a rule that states: ‘spending public funds for personal gain is not allowed. If a public official is found to have broken this law, then they will be removed from their public office.’ These laws might be otherwise characterized as if-then statements: ‘if action A is proven to have taken place, then result B must follow.’

2.2.1 Values

There is an important yet subtle distinction that must be made between values and principles. Many statutes (and even non-statutory rules regimes) begin with a preamble that serves as a statement of the overarching values toward which the rules are aimed. While these value statements are not enforceable, they set the tone for what the rule-makers expect from those who are subject to the formal rules. Why include these statements of value? Even when rules and principles are used together, it can be incredibly difficult to design a regime that will account for and protect against all instances of conduct that we might believe to be unethical. A statement of values can signal to those who are subject to a set of rules that even when they are uncertain about what those rules require, they should still be trying to hold themselves to the high standards that are set out in those underlying values. Behaviours that are rooted in these values may emerge and, if they are repeated over time, come to form what we call behavioural conventions. Generally speaking, these conventions are unwritten, politically enforceable norms of conduct.

2.2.2 Procedures

A final basic building block or element of every public sector ethics regime is procedure. If the goal of a regime is to do more than simply raise awareness, that is, if the goal is to detect, root out and possibly punish bad behaviour, then those who are subject to allegations of impropriety will expect some level of fairness in the processes that are engaged. The importance of procedure is typically addressed using one or both of the following approaches:

- 1) by requiring the individual or body that administers the regime to set out procedures they will follow, and ideally to make those procedures available to the public or, at least, available to anyone who may become subject to the regime; or
- 2) by establishing specific, detailed procedures as rules that must be followed as part of the regime’s administration.

Procedures help to establish stakeholder expectations and can, in some circumstances, also fill gaps in rules where a regime is not intended to (and generally, cannot possibly) be a comprehensive code covering all possible ethical scenarios. Procedural predictability is useful, for example, where principle-based rules apply, and a decision-maker has been permitted a measure of discretion.

2.3 Comparing the Structure of Different Regimes

When observing governments through a comparative lens, the US, the UK, and Canada can reasonably be viewed as being among the world's most advanced democracies. These nations each have deep commitments to the concept of the rule of law, observable through long-standing legal traditions, comparably high human rights standards, robust political institutions, and strong citizen engagement. Among those political institutions are government ethics regimes that are the focus of this chapter. Depending on the country in question, these regimes are overseen by advisers; administered by commissioners, agents of parliament or registrars; or maybe even overseen by the courts.

Given the political histories of these three nations, what exists today are complex and sometimes confusing tapestries of public sector ethics regimes that can, at times, appear more symbolic than functional. As one might imagine, there is an inherent conflict of interest that exists when legislators are ultimately the ones responsible for passing laws that set limits on their own conduct. What will become apparent as we explore how the regimes in these three countries operate is that there are significant limitations with respect to administrative independence and the effectiveness of oversight and enforcement mechanisms. When ethics violations are found, the outcomes (i.e., whether an individual is disciplined or not) often appear to be a simple reflection of who holds political power in that moment and what they deem to be politically expedient.

2.3.1 US

The US conflict of interest regime is divided into three components: the House of Representatives, the Executive, and the Senate. Elected members of the lower house or House of Representatives are subject to non-legislative Rules of the House of Representatives (the Rules).⁴⁶ The Rules are a lengthy document with standards of ethical conduct found primarily in Chapters XXIII (*Code of Official Conduct*) and XXVI (Financial Disclosure). The House Committee on Ethics is formally charged with overseeing the *Code of Official Conduct* (COC),⁴⁷ but the House recognized this was a large responsibility for the committee and adopted a resolution in 2008 to create the Office of Congressional Ethics (OCE).

The OCE is a non-partisan entity responsible for reviewing allegations of breaches of the COC and other alleged violations of any laws, rules, regulations or standards of conduct that would fall under the jurisdiction of the Committee on Ethics. The OCE Board conducts

⁴⁶ These rules are adopted anew by each successive Congress and can be found on the website of the House Committee on Rules: "Rules of the House of Representatives" (last visited 2 September 2021), online: *House Committee on Rules* <<https://rules.house.gov/rules-and-resources>>. The current Rules for the 117th Congress can be found at: US House of Representatives, Committee on Standards of Official Conduct, *Rules of the House of Representatives*, 117th Cong (Washington, DC: United States Government Printing Office, 2021) [House Rules], online (pdf): <<https://rules.house.gov/sites/democrats.rules.house.gov/files/117-House-Rules-Clerk.pdf>>.

⁴⁷ See "Committee Jurisdiction" (last visited 2 September 2021), online: *US House of Representatives, Committee on Ethics* <<https://ethics.house.gov/about/committee-jurisdiction>>, for more information about the Committee's jurisdiction.

investigations and then decides whether to refer that matter to the Committee on Ethics for further investigation and potential enforcement. To assist with this work and to help educate those who are subject to the Rules, the Committee on Standards of Official Conduct publishes a very lengthy (400+ pages) *House Ethics Manual* (the *Manual*).⁴⁸ The *Manual* provides greater detail about the Rules and outlines relevant precedents.

The OCE and the Committee on Ethics can compel witnesses and obtain evidence in order to conduct their investigations. The Committee recommends administrative actions in response to violations of the Rules,⁴⁹ which the House then votes on. The Committee must produce reports even when it dismisses an allegation. This requirement can help to educate stakeholders while also potentially deterring questionable ethical behaviour.

Members of Cabinet in the US are not also members of the House of Representatives and are accordingly not subject to concurrent conflict of interest rules. That said, these and other members of the executive branch are subject to the non-legislative Standards of Ethical Conduct for Employees of the Executive Branch (the *Standards*)⁵⁰ and the legislative rules found in the *Ethics in Government Act (EGA)*.⁵¹ They are also subject to criminal conflict of interest and public corruption laws,⁵² and various other statutory rules⁵³ and executive orders⁵⁴ that relate to ethical conduct and financial disclosure. Although the tapestry of rules that makes up the executive branch ethics program can be confusing, an Office of Government Ethics (OGE) has also been created to provide consistency and support to further its effective operation.

The OGE leads and oversees the executive branch ethics program⁵⁵ that applies to all government agencies and helps to prevent conflicts of interest, including improper personal financial gain. Oversight in this context does not, however, mean enforcement. Headed by

⁴⁸ US House of Representatives, Committee on Standards of Official Conduct, *House Ethics Manual* 110th Cong, 2nd Sess (Washington, DC: United States Government Printing Office, 2008), online (pdf):

<https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf>.

⁴⁹ *House Rules*, *supra* note 46 at Rule XI, clause 3.

⁵⁰ *Standards of Ethical Conduct for Employees of the Executive Branch* (codified in 5 CFR Part 2635, as amended at 81 FR 81641) (US Office of Government Ethics, effective 1 January 2017), online (pdf): <[https://www.oge.gov/web/oge.nsf/0/5438912F316A0D26852585B6005A1599/\\$FILE/SOC%20as%20of%2081%20FR%2081641%20FINAL.pdf](https://www.oge.gov/web/oge.nsf/0/5438912F316A0D26852585B6005A1599/$FILE/SOC%20as%20of%2081%20FR%2081641%20FINAL.pdf)>.

⁵¹ *The Ethics in Government Act*, Pub L No 95–521, 92 Stat 1824 (codified as amended in various sections of Titles 2, 5, 18, and 28 of the USC) [EGA].

⁵² See 187 USC § 201-209.

⁵³ See e.g., the *Stop Trading on Congressional Knowledge Act of 2012*, Pub L No 112–105, S 2038, 126 Stat 291, online (pdf): <<https://www.congress.gov/112/plaws/publ105/PLAW-112publ105.pdf>>, which prohibits members of Congress and other government employees from using non-public information for their own private profit.

⁵⁴ See e.g., “Ethics Pledges and Waivers” (last visited 15 September 2021), online: *The White House of President Barack Obama* <<https://obamawhitehouse.archives.gov/21stcenturygov/tools/ethics-waivers>>. These are generally found on the White House website, although there is no requirement that they be posted.

⁵⁵ *Office of Government Ethics and Executive Agency Ethics Program Responsibilities*, 5 CFR Part 2638, online: <<https://www.govinfo.gov/content/pkg/CFR-2012-title5-vol3/xml/CFR-2012-title5-vol3-part2638.xml>>.

a director, the OGE's role is purely preventative, educational, and supportive. It assists with interpreting rules and advises on how to best ensure compliance. The OGE works alongside the Designated Agency Ethics Official (DAEO) within each federal agency. The DAEOs are given various powers under the *EGA*, including the ability to provide advice to employees within their agencies or to provide disclosure waivers for employees who work part-time.⁵⁶ Inspector Generals (IG) for particular agencies investigate complaints with respect to compliance with the *EGA*.⁵⁷ IGs play a role in prevention and enforcement of ethics violations and work under the umbrella of an independent body called the Council of Inspectors General on Integrity and Efficiency.⁵⁸ Given the large number and the unique nature of many federal agencies, a decentralized approach to ethics oversight is likely the only practical approach.

The executive branch ethics program is complemented by several other statutes that are administered by the Office of the Special Counsel (OSC). Most important for our purposes is *The Hatch Act (HA)*,⁵⁹ which was passed in 1939 and places limits on the political activities that most federal employees can engage in, with the President and Vice President being the most notable exceptions. In order to help ensure that federal programs are administered in a nonpartisan manner, the *HA* "prohibits Federal employees from conducting political activities while on Government premises, using Government resources, or during duty hours. Furthermore, *The Hatch Act* bars Federal employees from running for partisan political office or from fundraising for a candidate or political party."⁶⁰ Interestingly, the OSC is responsible for enforcing the *HA*, but the Special Counsel who heads the OSC is in fact appointed by the President and confirmed by the Senate. In situations where the President and Senate are aligned politically, there is a risk that appointments like that of the Special Counsel could become politicized.

Finally, the Senate is subject to the *Senate Code of Official Conduct*, which is found within the Standing Rules of the Senate⁶¹ and administered by the Select Committee on Ethics. Just as there is for the House, the Select Committee on Ethics has also published a 500+ page *Ethics Manual*⁶² with information about the Rules and examples of precedents.

2.3.2 UK

Britain's approach to public sector ethics is coloured by its parliamentary system. Its approach is complicated by the multiplicity of players involved. For example, members of the House of Commons are subject to the non-legislative *Code of Conduct* for Members of

⁵⁶ *EGA*, *supra* note 51.

⁵⁷ *Inspector General Act of 1978*, Pub L No 95-452, 5 USC app 3.

⁵⁸ *Ibid.*

⁵⁹ *The Hatch Act*, Pub L 49-314, 24 Stat 440, c 314.

⁶⁰ *Ibid*, s 5.

⁶¹ US, Committee on Rules and Administration, S Res 285, *Standing Rules of the Senate*, 113 Cong, 2013, Rule XXXIV-XXXIX, online (pdf): <<https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf>>.

⁶² US, Select Committee on Ethics, *Senate Ethics Manual*, 108 Cong, (S Pub 108-1) (Washington, DC: US Government Printing Office, 2003), online (pdf): <https://www.ethics.senate.gov/public/_cache/files/f2eb14e3-1123-48eb-9334-8c4717102a6e/2003-senate-ethics-manual.pdf>.

Parliament,⁶³ which is not part of the Standing Orders. The Standing Orders merely specify that there shall be an Officer of the House called a Parliamentary Commissioner for Standards whose responsibility includes, “advis[ing] the Committee on Standards, its sub-committees and individual Members on the interpretation of any code of conduct to which the House has agreed.”⁶⁴

The Committee on Standards is also created under the Standing Orders and it is responsible for considering:

any matter relating to the conduct of Members, including specific complaints in relation to alleged breaches in any code of conduct to which the House has agreed and which have been drawn to the committee’s attention by the Commissioner; and to recommend any modifications to such code of conduct as may from time to time appear to be necessary.⁶⁵

The *Code of Conduct* is simply approved by a resolution of the House and published in conjunction with *The Guide to the Rules relating to the Conduct of Members*.⁶⁶

Despite the somewhat confusing language, the Committee on Standards cannot receive complaints directly about members. Any complaints alleging a violation of the *Code of Conduct* must be submitted to the Commissioner, whose reports will then be submitted to the Committee for its consideration and a determination regarding possible sanction(s). In some circumstances, where the Commissioner believes a breach to be minor, they can work with the member to rectify the issue. This might involve acknowledging a mistake, issuing an apology, or repaying some monies. The Commissioner is also responsible for maintaining a register of members’ financial interests and reports to the Committee, and so rectification could also mean simply adding a financial interest to a member’s report.⁶⁷ Reports about investigations are published on the Commissioner’s website.⁶⁸

Further to the Select Committee on Standards, there is also an independent Committee on Standards in Public Life (CSPL) that answers to the Prime Minister and cabinet. Members of the CSPL are public appointees and thus the CSPL is considered to be independent. The CSPL’s very broad mandate is to “advise the Prime Minister on arrangements for upholding

⁶³ UK, HC, *The Code of Conduct* (Prepared pursuant to the Resolution of the House 19 July 1995, adopted 19 July 2018) [HC Code], online (pdf):

<<https://publications.parliament.uk/pa/cm201719/cmcode/1882/1882.pdf>>.

⁶⁴ UK, HC, *Standing Orders of the House of Commons, Public Business 2018* (Standing Order, Session 2017-19) (Publication on the Internet: HC, 15 May 2019) [HC Standing Orders], s 150(2)(c), online: <<https://publications.parliament.uk/pa/cm201719/cmstords/1020/body.html>>.

⁶⁵ *Ibid*, s 149(1)(b).

⁶⁶ HC Code, *supra* note 63 at 9.

⁶⁷ HC Standing Orders, *supra* note 64, s 150(4).

⁶⁸ “Parliamentary Commissioner for Standards” (last visited 15 September 2021), online: UK Parliament <<https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/>>.

ethical standards of conduct across public life in England.”⁶⁹ Another way to frame this mandate is to say that the CSPL’s purpose is to advise the Prime Minister on how to strengthen and uphold the seven principles of public life (i.e., ethical standards) that those working in the public sector are expected to adhere to: selflessness, honesty, integrity, objectivity, openness, leadership, and accountability.⁷⁰ The UK’s *Civil Service Code*⁷¹ is also based on these seven principles and is incorporated into each individual employee’s employment contract. This *Code* is also not legislative and is overseen by the Civil Service Commission (CSC).

Yet another non-legislative code applies to the Prime Minister’s executive council. This *Ministerial Code*⁷² is simply a set of rules issued by the Prime Minister. Some sections of the *Code* also apply to special advisers and parliamentary private secretaries. The *Code* is not enforced by any external or independent body, but is instead left to the discretion of the Prime Minister. When an allegation is made, the Prime Minister may choose to appoint an advisor to conduct an investigation. Given that the *Code* is specific to each Prime Minister, it is generally updated when a new Prime Minister takes office.

Britain’s upper chamber is called the House of Lords. The House of Lords’ *Code of Conduct* is overseen by the Sub-Committee on Lords’ Conduct and administered by the House of Lords Commissioners for Standards. The Commissioners educate the Lords, administer the rules, investigate alleged breaches and maintain a register of Lords’ interests.⁷³

2.3.3 Canada

Canada’s federal conflict of interest regime can be divided into three components, all of which are supplemented by the criminal law. Elected members of the lower house are subject to a non-legislative *Conflict of Interest Code for Members of Parliament*,⁷⁴ which, unlike the UK, is found within the Standing Orders of the House of Commons. This *Code* can be

⁶⁹ “About Us” (last visited 15 September 2021), online: *UK Government: Committee on Standards in Public Life* <<https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about>>.

⁷⁰ “Guidance: The Seven Principles of Public Life” (published 31 May 1995), online: *UK Government - Committee on Standards in Public Life* <<https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2>>.

⁷¹ “Statutory Guidance: The Civil Service Code” (last updated 16 March 2015), online: *UK Government- Civil Service* <<https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>>.

⁷² UK, Cabinet Office, *Ministerial Code* (Issued by Prime Minister Boris Johnson, August 2019) [Ministerial Code], online (pdf):

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf>. For more information on the Ministerial Code, see UK, HC Library, *The Ministerial Code and the Independent Adviser on Ministers’ Interests* (Research Briefing No CBP 03750) by Chris Rhodes & Hazel Armstrong (London: HC Library, 2021), online: <<https://commonslibrary.parliament.uk/research-briefings/sn03750/>>.

⁷³ UK, HL, *Code of Conduct for Members of the House of Lords*, 10th ed (July 2020) [*Lords Conduct*], online (pdf): <<https://www.parliament.uk/globalassets/documents/lords-commissioner-for-standards/hl-code-of-conduct.pdf>>.

⁷⁴ *Canada Code*, *supra* note 42.

updated by a vote of the members themselves and does not need to pass through the formal legislative process. This is important because it means that, at least in theory, the *Code* should be much easier to update than legislation would be, particularly by a majority government. But the fact that the *Code* is not legislative also means that it is an internal policy of the House and its application is subject to parliamentary privilege. Being subject to parliamentary privilege prevents the courts from interfering in the administration of the *Code*.⁷⁵

In contrast to the US, members of the House who have been appointed to the executive council are also subject to the rules set out in the *Conflict of Interest Act*.⁷⁶ The *Act* applies to what it calls “reporting public office holders” including, but not limited to, ministers of the Crown, parliamentary secretaries, certain members of ministerial staff, and certain Governor in Council appointees. Both the *Code* and the *Act* are administered by the Conflict of Interest and Ethics Commissioner, who is appointed by the Governor in Council after consultation with the leaders of each recognized party in the House of Commons. Both the *Code* and *Act* are primarily rules-based but are written in language that allows for some degree of flexibility in interpretation. More detail about various rules will be provided below.

Finally, the upper chamber in Canada is called the Senate. The Senate consists of members who are appointed, not elected. Although the government that passed the *Act* did attempt to make senators subject to legislation that would be administered by the Conflict of Interest and Ethics Commissioner, senators voted against that idea.⁷⁷ Instead, senators insisted on establishing and appointing their own Senate Ethics Officer (SEO) who now administers, interprets and applies the *Ethics and Conflict of Interest Code for Senators*.⁷⁸ This is similar to the UK, where the House of Lords maintains a separate regime for the governance of its ethical conduct. Ultimately, the SEO makes recommendations back to the Senate and has no authority to discipline. Again, this *Code* is not legislative and can only be updated by the Senate and administered by the SEO. The courts have absolutely no role in overseeing these rules, even if a senator applies to the court to have a decision reviewed.⁷⁹ Instead, parliamentary privilege applies and protects the Senate’s right to discipline its own members.

2.3.4 Codes of Ethics for Political Parties

Canada’s 1991 Royal Commission on Electoral Reform and Party Financing⁸⁰ recommended that political parties develop their own internal codes of ethics. This recommendation had not been taken up by the major parties in 2014 when Elections Canada commissioned a report by Paul Thomas entitled *A Code of Ethics or Code of Conduct for Political Parties as a*

⁷⁵ *Parliament of Canada Act*, RSC 1985, c P-1 [POC Act], s 86.

⁷⁶ *Conflict of Interest Act*, SC 2006, c 9 [COI Act], s 2.

⁷⁷ Ian Stedman & Ian Greene, “Ethics Commissions” in Ian Greene & David Shugarman, eds, *Honest Politics Now: What Ethical Conduct Means in Canadian Public Life* (Toronto: James Lorimer & Company Ltd, 2017) 124 at 147.

⁷⁸ Canada, Office of the Senate Ethics Officer, *Ethics and Conflict of Interest Code for Senators* (in force 18 June 2021), online (pdf): <<https://seo-cse.sencanada.ca/media/au5e4jal/ethics-and-conflict-of-interest-code-for-senators-code-régissant-l'éthique-et-les-conflits-d-intérêts-des-sénateurs-june-2021.pdf>>.

⁷⁹ See e.g., *R v Duffy*, 2015 ONCJ 694.

⁸⁰ Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol 1 (Ottawa: Ministry of Supply and Services, 1991).

*Potential Tool to Strengthen Electoral Democracy in Canada.*⁸¹ One of Thomas' conclusions was that adoption of a code would cause political parties and their followers to be "more aware of, sensitive to and capable of reasoning about ethically challenging situations in ways that they otherwise might not have in the past."⁸² These codes could be particularly instrumental in creating standards of conduct surrounding campaign tactics and constituency work (including supporting charitable organizations), mobilizing voter turnout or even something as simple as fostering a culture of truth-telling. Most importantly, these codes could fill gaps that arise when the political will is simply not there for updating legislative or other codes.

In contrast, the Conservative Party,⁸³ the Scottish National Party,⁸⁴ and the Liberal Democrats⁸⁵ in the UK have implemented codes of conduct. Despite what seem to be strong arguments in favour of implementing party-specific codes, few political parties at the federal level in Canada have adopted a code of ethics. The federal Liberal Party has a *Campaign Code of Conduct*⁸⁶ and the Green Party of Canada has a *Members' Code of Conduct*.⁸⁷ Some sub-national political parties in Canada have released codes, including the Quebec Liberal Party,⁸⁸ the United Conservative Party of Alberta⁸⁹ and the Ontario Liberal Party.⁹⁰ Some of these codes include enforcement mechanisms. Both the mere allegation of a violation and its enforcement being accused of can have political consequences. However, the codes are non-legislative and unless they are integrated into employment contracts it is unlikely that the courts will play any role in enforcing them. Regardless, there is potential in this space for more regulation of the ethical conduct of public officials and those with whom they work in and outside of office.

⁸¹ Elections Canada, *A Code of Ethics or Code of Conduct for Political Parties as a Potential Tool to Strengthen Democracy in Canada*, by Paul G Thomas (EC, December 2014), online (pdf):

<https://www.elections.ca/res/rec/tech/cod/pdf/code_of_ethics_e.pdf>.

⁸² *Ibid* at 17.

⁸³ "Code of Conduct for Conservative Party Representatives" (last visited 15 September 2021), online: *The Conservative Party (UK)* <<https://www.conervatives.com/code-of-conduct>>.

⁸⁴ Scottish National Party, *Code of Conduct*, online (pdf):

<https://d3n8a8pro7vhmx.cloudfront.net/thesnp/pages/9765/attachments/original/1503997100/Code_of_Conduct.pdf?1503997100>.

⁸⁵ Liberal Democrats (UK), "Members' Code of Conduct" (last updated January 2017), online: *Liberal Democrats (UK)* <<https://www.libdems.org.uk/code-of-conduct>>. For more on UK Political Parties' Codes of Conduct, see Committee on Standards in Public Life Secretariat, *Review of Political Parties' Codes of Conduct*, (July 2019), online (pdf):

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841226/Review_of_political_parties_Codes_of_Conduct_July_2019.pdf>.

⁸⁶ Liberal Party of Canada, *Campaign Code of Conduct*, (2018), online (pdf): <<https://liberal.ca/legacy-uploads/wp-content/uploads/2018/11/8.5x11-Code-of-Conduct-ENG1.pdf>>.

⁸⁷ Green Party of Canada, *Members' Code of Conduct*, v 1.3 (20 January 2019), online: <<https://www.greenparty.ca/en/members/resources/party/procedures/safe-space-policy>>.

⁸⁸ Quebec Liberal Party (QLP), *Code of Ethics and Conduct*, (Montreal: QLP, 2016), online (pdf): <https://plq.org/app/uploads/2016/08/03_code_of_ethics.pdf>.

⁸⁹ United Conservative Party of Alberta, *Code of Conduct*, (updated 17 October 2020), online (pdf): <<https://static.unitedconservative.ca/Code-of-Conduct-Updated-October-17-2020.pdf>>.

⁹⁰ Ontario Liberal Party, *Code of Conduct*, (adopted February 2018), online (pdf): <<https://ontarioliberal.ca/wp-content/uploads/2019/02/2018-OLP-Code-of-Conduct.pdf>>.

2.3.5 Importance of Independent Oversight

As should be apparent from the above overview of how the political ethics regimes in these three countries are structured, it is easy to take for granted that self-regulation in this space is acceptable. The complex accountability tapestries in each of these countries place varying levels of emphasis on undertaking active public engagement and consultation. There is perhaps good reason for this when we consider that one of the fundamental tenets of representative democracies is that those who govern should be elected and not appointed to their positions. It accordingly makes sense that elected officials would not want to subject themselves to accountability regimes where they, as a unified body, give up control over disciplinary outcomes. As we will see, it is very rare for an appointed or delegated ethics official to be granted authority to make a finding with disciplinary implications that do not also have to be approved by the legislative body to which they are accountable.

There is an important difference, however, between involving the public in the creation of the rules and in granting true independence to the individual or body responsible for their administration. On the understanding that ethics rules ought to be revisited periodically, Canada included mandatory periodic review clauses in both its *Act* and *Code*. Included in the *Code* is a requirement that the Standing Committee on Procedure and House Affairs undertake a comprehensive review of the rules every five years and report back to the House.⁹¹ The *Act* requires only one such review, which must begin within five years of the *Act* coming into force and be conducted by whichever committee or committees the House and Senate assign the task.⁹²

The UK Parliament's Committee on Standards launched a review of the *Code of Conduct* for Members of Parliament in late 2020, with assistance from the Parliamentary Commissioner for Standards. The review invited input from anyone wanting to contribute, including members of the general public.⁹³ These mandatory periodic reviews of parliamentary ethics laws are incredibly important so that Parliament has an opportunity to keep its standards current with public expectations, and to have effective systems of administration in place that can help to foster public trust in government and in politicians.⁹⁴

Even if the rules are co-designed with public input, legislative bodies most commonly retain control over any disciplinary decisions that must ultimately be made. However, a level of independence from the government in decision-making about disciplinary measures is generally desirable. Not having independence can prove problematic when seeking to maximize public trust and minimize public cynicism, particularly if a disciplinary action is

⁹¹ *Canada Code*, *supra* note 42, s 33.

⁹² *COI Act*, *supra* note 76, s 67(1).

⁹³ "Standards Committee Launches Inquiry Into Code of Conduct for MPs" (22 September 2020), online: *UK Parliament - Committees* <<https://committees.parliament.uk/work/596/code-of-conduct/news/119395/standards-committee-launches-inquiry-into-code-of-conduct-for-mps/>>.

⁹⁴ Jean T Fournier, "Strengthening Parliamentary Ethics: A Canadian Perspective", Remarks, (Paper delivered at the Australian Public Sector Anti-Corruption Conference, Brisbane, 29 July 2009) at 11, online (pdf): <<https://seo-cse.sencanada.ca/media/fyaogolw/strengthening-parliamentary-ethics-july-29-2009.pdf>>.

recommended by the ethics body and then the relevant legislative body or actor (particularly when the President or Prime Minister is involved) subsequently chooses not to take action.

There are three notable exceptions to the general approach that legislative bodies or actors will retain control over disciplinary decisions. These are: 1) situations where the ethics body is permitted to mete out small monetary penalties for an official failing to meet what are usually administrative obligations 2) situations where the ethics body is permitted to determine whether a matter is minor and can be easily remedied by working with the official, and 3) situations involving criminal law. Further, the age of the internet has created an environment where ethics bodies are often required or permitted to publish their work online. This transparency seems to mitigate some concerns about independence. Even if a legislative body or actor refuses to adopt a disciplinary recommendation, the fact that the recommendation was made public allows the electorate to have information that can influence how people vote in the next election.

3. CENTERING CONFLICTS OF INTEREST

Central to every public sector ethics regime is the concept of conflict of interest. It is generally accepted that there are three types of conflicts that should be addressed through these regimes: real conflicts of interest, apparent conflicts, and potential conflicts. Unsurprisingly, the types of conflict guarded against in individual regimes vary greatly. This variance is typically a function of the political will of those who create the regime, but can also be a function of whether a regime has been modernized and whether public input has been incorporated. Further, there is tremendous variation in the language used to describe each conflict. For example, to whom each type of conflict applies and what counts as a 'improper' or a 'private interest' may be expressed differently among regimes. Modernized regimes are more likely to include broader conceptions of what counts as a private interest, as well as prohibitions against apparent conflicts of interest and improperly benefitting individuals beyond oneself. Accounting for these distinctions may help illuminate how particular rules operate, including what gets captured by the rules and what is overlooked.

A real or actual conflict of interest arises when a public official's private interests stand in conflict with their public duties. In other words, when a public official cannot fulfil their public duties without also benefitting themselves personally. An example might be a Minister of Finance who must make decisions about the banking industry that could impact profit levels, but who also holds large amounts of stock in individual banks. Another example might be a Minister of Mining and Forestry who owns stock in a mining company in a remote area, but must also make a decision about whether to use public funds to build a road that would help create jobs by providing that mining company and its employees with better access to the mine site.

A potential conflict of interest can arise before an actual or real one develops. Public officials must always be cognizant of ways in which their own private interests could come into conflict with their public duties. Accordingly, a potential conflict exists whenever there is a mere possibility that a private interest could clash with a future public duty. Returning to the Minister of Finance example, that individual should know upon being assigned the

ministerial portfolio that the fact they own stock in those companies has the potential to put them in a conflict of interest if and when they ever need to make an official decision that could affect the profitability of those companies. A potential conflict is not a real conflict. In fact, a best practice in this space is to identify potential conflicts in advance so that steps can be taken to mitigate or outright protect against those potential conflicts becoming actual or real conflicts.

An apparent conflict of interest is much more complicated and less commonly addressed in public sector ethics regimes than the aforementioned conflicts, but is arguably equally as important. An apparent conflict of interest arises when it merely appears as though a public official is in a position where their ability to fulfil their public duties stands in conflict with their private interests.⁹⁵ These types of conflicts are much more common in the digital age of micro-blogging and social media, where citizens are much more actively engaged in understanding (or at the very least, exposed to) public policy decisions and can easily share information with one another without much worry about intermediaries or gatekeeping. Imagine our Minister of Finance has recognized upon accepting their appointment as minister that they are in a potential conflict of interest. The new minister immediately sells all bank stocks before being sworn in. The public believes that the minister continues to own that bank stock because a public registry of private interests was posted when the minister took office as a member. This registry is now out-dated, but the applicable rules specify that it does not need to be updated until six months after the minister is sworn in to the new position. In the interim, there appears to the public to be a potential conflict of interest. Imagine now that the minister makes a very public decision that has a positive impact on the profitability of the banking sector. To those who are unaware that the minister sold all their stock, this decision appears to place the minister in a conflict of interest.

Apparent conflicts of interests arise all the time. Sometimes they are a precursor to a real conflict of interest, but other times the appearance is simply the result of observers having imperfect or incomplete information about a situation. Appearances can of course be deceiving, but unless those appearances are acknowledged and tended to, they can also lead to distrust and public cynicism. Even though it may seem undesirable and maybe even impossible to prohibit apparent conflicts of interest, it is becoming increasingly more important to try to actively minimize or avoid apparent conflicts of interest and to address them if and when they do arise.

3.1 Defining Private Interests

To further complicate the concept of conflict of interest, the definition of a “private interest” is sometimes extended to include family members and/or dependents and can also be extended beyond mere financial interests. The inclusion of family members means that public officials must be aware of those family members’ relevant interests. This requires those who design the rules to consider whether the family members captured must also be obligated to make either private or public disclosures about their interests. Extending

⁹⁵ See Valerie Jepson, “Apparent Conflicts of Interest, Elected Officials and Codes of Conduct” (2018) 61:2 Can Pub Admin 36 at 40, for a discussion of the reasonable apprehension of bias in the context of conflicts of interest.

conflicts of interest and reporting requirements to include family members in this way has been criticized as an invasion of privacy and public officials sometimes simply refuse to comply with any such filing requirements.

3.1.1 Improperly Benefitting Self and Others

A conflict of interest can arise when a public official not only uses their public office and powers in order to benefit themselves personally, but also when those actions “improperly benefit others.”⁹⁶ Of course, official decisions always benefit someone (why make them otherwise?), but public sector ethics rules generally contemplate that it can be improper for a public official to benefit others with their decisions, even if those others are not their family members or dependents. This is often interpreted in a way that captures friends or close business acquaintances. This flexible language empowers ethics bodies to investigate official decisions that appear to favour someone who is known to the decision-maker or, more generally, decisions that appear not to be impartial.

The interpretation of the word “improper” is also central to conflict rules and their operationalization. What it means for something to be improper is very much open to interpretation. For example, the CIEC in Canada has recently interpreted this word in a way that seems to broaden the scope of the rule. In the 2019 *Trudeau II Report*⁹⁷ under the *Conflict of Interest Act* and in the 2021 *Ratansi Report*⁹⁸ under the *Conflict of Interest Code for Members for the House of Commons*, the CIEC provides that it may be improper (for the purpose of the ethics rules) to break some other rule external to the ethics rules in order to benefit another person.

3.1.2 Outside Activities

Conflict of interest laws also tend to restrict or prohibit elected officials from participating in certain outside activities. Not only is being a member of the executive now considered to be a full-time job, but having outside interests also opens more opportunities for public officials to encounter conflicts of interest. Ethics rules often prohibit members of the executive from having other business interests⁹⁹ and from accepting government contracts.¹⁰⁰ Elected officials who do not serve in the executive are not generally prohibited from owning a company or having other business interests, but might be prohibited from accepting government contracts.¹⁰¹ Exceptions to these rules may exist where the ethics body has provided approval.

⁹⁶ MIA, *supra* note 44, s 2.

⁹⁷ Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report*, (Ottawa: Parliament of Canada, 2019) (Commissioner: Mario Dion) [*Trudeau II Report*], online (pdf): <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf>>.

⁹⁸ Office of the Conflict of Interest and Ethics Commissioner, *Ratansi Report* (Ottawa: Parliament of Canada, 2021) (Commissioner: Mario Dion), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Ratansi%20Report.pdf>>.

⁹⁹ See e.g., MIA, *supra* note 44, s 12; *Ministerial Code*, *supra* note 72, s 7.7; *COI Act*, *supra* note 76, s 17.

¹⁰⁰ See e.g., *COI Act*, *supra* note 76, s 13(1); *Ministerial Code*, *supra* note 72, s 7.7.

¹⁰¹ See e.g., MIA, *supra* note 44, s 7.

Many public officials also have prior affiliations with organizations outside of government. For example, they may have sat on the board of directors for a company or volunteered with a charitable organization. Members of the executive are often required to recuse themselves from these positions,¹⁰² whereas other elected officials may simply need to seek approval from the applicable ethics body. The goal, again, is to minimize the possibility of a conflict of interest arising.

3.1.3 Matters of General Application

Importantly, decisions that are about matters of general application are not usually considered to be conflicts of interest. If a legislator is voting on something that impacts a whole industry, for example, this rule allows them to not have to recuse themselves from that vote simply because their spouse or child is employed in that same industry. The general consensus is that even though it is important to avoid conflicts of interest, the rules must still be reasonable about allowing legislators to represent their constituents. Consider, for example, that an elected member of parliament lives in a rural area and their spouse works on a local farm. One of the reasons that person may have been voted into office is because they promised the local farming community that they would advocate for the rights and interests of local farmers. This would be a reasonable, and arguably desirable, political platform. It would be completely unfair and undemocratic to prohibit that individual from voting on matters that are of general application to the farming industry simply because their spouse happens to work on one of the local farms.

3.1.4 Member of a Broad Class

Similar to the general application exception above, ethics rules also sometimes carve out exceptions in order to allow legislators to vote on matters that affect their own or another person's private interests as long as it only affects them "as one of a broad class of persons."¹⁰³ This exception might allow our Minister of Finance, above, to make decisions about the banking industry without having to first sell their stocks. Whether a matter is broad enough to be considered "a broad class" is typically left to the ethics body or ethics advisor to interpret. These ethics bodies often publish annual reports, sample inquiries or guides that assist public officials by offering examples of precedent advice and/or decisions. These important resources are explored in greater depth below.

3.2 Improper Influence

In addition to restricting the right of elected officials to make decisions, public sector ethics laws generally prohibit officials from using their position to influence a decision made by another person in order to further their own private interest(s) or another person's or entity's private interest(s).¹⁰⁴ Prohibitions like this contemplate situations where an elected official feels tempted to assist their constituent(s) through seeking the circumvention of established policies and procedures that apply generally to everyone. A more egregious example exists

¹⁰² See e.g., *Ministerial Code*, *supra* note 72, s 7.8; *COI Act*, *supra* note 76 s 21.

¹⁰³ See e.g., *COI Act*, *supra* note 76, s 2(1); *Canada Code*, *supra* note 42, s 3(3)(b); *MIA*, *supra* note 44, s 1.

¹⁰⁴ See e.g., *Canada Code*, *supra* note 42, s 9; *MIA*, *supra* note 44, s 4; *COI Act*, *supra* note 76, s 9.

when an elected official believes a colleague should award a contract to a certain individual (perhaps someone they know or otherwise have some personal connection to). In order to compel their colleague to award that contract to the favored party, the elected official may promise to vote a certain way on a matter of importance to that colleague that comes up in the legislative house or in the cabinet office. These kinds of behaviours are generally understood to be improper because they manipulate the playing field in a way that unfairly benefits some people or groups over others.

3.2.1 Campaign Contributions

Although they tend to vary a great deal between countries, rules about campaign contribution limits can function in essence to constrain one of the ways that outsiders are able to have influence over politicians. If you limit the amount of money that any one person, entity or group can donate to an individual or political party's campaign fund, then it is less likely that politician (or aspiring politician) will feel obligated to return the favour to that donor. The unfortunate reality is that political campaigns can be incredibly expensive, so candidates must work very hard to raise enough money to be able to participate at a competitive level. Placing limits on either contributions or spending, or both, can help to curb the influential role that money plays in politics. Enforcing these limits can also help reduce the pressure to improperly prioritize the needs of their donors that politicians might feel after they take office.

Political spending in the US has been treated much differently than in Canada and the UK, due in part to the US Supreme Court's 2010 decision in *Citizens United*.¹⁰⁵ The Court struck down a federal law that prohibited corporations and unions from spending money in connection with federal elections. This did not mean that corporations and unions could make unlimited campaign contributions to a candidate or party, but that free speech gave them the right to spend their own money independently of candidates on matters that were political in nature. This has led to the creation of political action committees (also known as Super PACs) that allow wealthy donors to contribute money to non-profit organizations whose purpose is to independently spend money on political issues. Of course, the issues chosen often align with a party's or candidate's political interests, even though the candidate cannot endorse that PAC. Due to the US laws applicable to non-profits, the names of donors to these PACs are not required to be disclosed—although they sometimes are. This has been referred to as "dark money."¹⁰⁶ These PACs can have significant social and political influence that politicians must vigilantly guard against, especially given the already high cost of running for public office.

3.3 Insider Information

Public officials are generally prohibited from using knowledge that they acquire by virtue of their position and that is not available to the public to further (or seek to further) their private interests. Again, this prohibition sometimes extends to the interest(s) of their friends

¹⁰⁵ *Citizens United v Federal Election Commission*, 558 US 310 (2010).

¹⁰⁶ Heather K Gerken, "The Real Problem with *Citizens United*: Campaign Finance, Dark Money, and Shadow Parties" (2013) 97:4 Marq L Rev 903.

and families.¹⁰⁷ They are likewise generally prohibited from improperly attempting to further any other person's private interests.¹⁰⁸ A rule like this may seem somewhat intuitive given the centering of conflicts of interest; however, comprehensive public sector ethics regimes are nevertheless explicit about prohibitions on benefitting from knowledge derived from public positions in the same manner that they prohibit benefitting from decisions made in an official capacity.

Determining what counts as a decision or as an action in the context of conflict of interest laws can be difficult. Similar difficulties arise in evaluating what counts as a private interest. These are not monolithic concepts; they have been interpreted differently by different ethics bodies in different jurisdictions. While a private interest may be equated with a pecuniary interest (that is, benefitting oneself financially), it may also extend to include future favours or support with respect to future political ambitions, depending on the jurisdiction. Because these rules are often drafted using rather flexible language, restrictions on benefitting from the use of insider information are carved out and separated from rules about conflicts of interest in decision-making.

3.4 Contrasting Legislative and Executive Roles

The duty to avoid conflicts of interest can look very different for legislators who also serve as members of the executive. Assuming an elected official has private interests that they must be attentive to (e.g., a stock portfolio, investment properties, ownership interest in a company, etc.), being a member of the executive might require them to make more daily decisions that could potentially lead to conflicts than faced by a general legislator. Consequently, members of the executive need to be especially diligent in avoiding conflicts of interest. If mere apparent conflicts of interest continue to capture the public's attention and to provoke greater public cynicism and distrust in government, increased interest in the idea of having specialized ethics advisors who are employed by and become an integral part of the executive may be generated.

Finally, it is important to acknowledge that the inclusion of people with diverse perspectives and background experiences in public office is desirable. An inevitable corollary to the inclusion of diverse and highly qualified persons serving in public office is the reality that conflicts of interest will arise. The goal of these regimes must be to help recognize and minimize those conflicts so that they do not cause damage. Being in a potential or even real conflict is not the same as improperly benefitting from that conflict. The goal must be to recognize risk and then to take steps to minimize or eliminate harm. Different ways to work towards this goal are discussed below.

3.5 Recusal and Restraint on Participation

One of the most widely accepted ways to avoid being in a real conflict of interest once a potential conflict has been identified is to recuse oneself from that situation. Legislators are

¹⁰⁷ See e.g., *Canada Code*, *supra* note 42, s 10; *MIA*, *supra* note 44, s 3.

¹⁰⁸ *COI Act*, *supra* note 76, s 8.

generally expected to recognize when participating in a vote or debate might put them in a conflict of interest and to recuse themselves in advance. Some jurisdictions require legislators to register their recusals with an ethics body and that registry may even be made public.¹⁰⁹ Members of the executive may also avail themselves of the recusal mechanism in order to avoid conflicts of interest in their bureaucratic roles. This could happen on a case-by-case basis or, if the potential for a conflict has been identified in advance, a blanket prohibition or screen could be established. Some ethics bodies have authority to establish conflict of interest screens that are shared within a department in order to ensure that protocols are in place to determine who should handle files about particular matters that could, if handled by the executive member, give rise to a real or apparent conflict of interest.¹¹⁰

These conflict of interest screens are rather unique, and at times, controversial.¹¹¹ After all, elected officials should not be subject to the whims of unelected bureaucrats when it comes to deciding how to represent their constituents. To minimize controversy, ethics bodies might be given express authority from legislators to outright prohibit or restrain an elected official's participation in certain types of matters.¹¹² This is effectively a forced recusal, as opposed to a voluntary one effected through a screen. Unlike a recusal, a restraint operates automatically, ensuring that an official is not put in a position where it is possible to forget to recuse themselves. These mechanisms may be used not only where a financial interest is implicated, but also when benefits have the potential to accrue to some other personal or family interest.

3.6 Disclosure of Interests

The proposition that elected officials should be required to prepare and file disclosure statements with an ethics body when they take office is widely accepted. In many regimes, these filings must be updated on a yearly basis or whenever there is a "material change" in that official's interests.¹¹³ One of the reasons for this disclosure requirement is so ethics bodies have an opportunity to review an official's ongoing interests and then provide them with personalized advice that takes their specific regime's requirements into account. This advice should hopefully help the official recognize and avoid any ethics transgressions.

A statement of private interests will always need to be filed for the elected official but may also be required for their family members and other dependents.¹¹⁴ While the specific information required to be disclosed will vary by regime, the following details are generally included:

¹⁰⁹ See e.g., *COI Act*, *supra* note 76, s 25(1); *Lords Conduct*, *supra* note 73, s 16.

¹¹⁰ See e.g., *COI Act*, *supra* note 76, s 29.

¹¹¹ See e.g., *Democracy Watch v Canada (Attorney General)*, 2018 FCA 194, wherein Democracy Watch argued that allowing conflict of interest screens effectively circumvents the *Act*, which requires public office holders to report any conflicts of interest.

¹¹² See e.g., *MIA*, *supra* note 44, s 10; *Canada Code*, *supra* note 42, s 8.

¹¹³ See e.g., *Canada Code*, *supra* note 42, s 21(3); *Lords Conduct*, *supra* note 73, s 14; *MIA*, *supra* note 44, s 20(4).

¹¹⁴ See e.g., *MIA*, *supra* note 44, s 20(2)(a); *Lords Conduct*, *supra* note 73, s 45.

- Sources and amounts of any income (e.g., employment or investment);
- Sources and amounts of any liabilities. The definition of a liability will vary, but typically includes loans and other debts. This has also been interpreted as including “contingent liabilities” under some regimes;¹¹⁵
- A list of assets, including stocks, investment properties, high value personal property, and so forth;
- Professional memberships and associations; and,
- Volunteer engagements and commitments.

Some ethics bodies will audit these filings, which means the official could be required to include official statements to confirm their assets, liabilities, and other interests. Failure to disclose fully, accurately, and on time can sometimes result in fines or what have been called “administrative monetary penalties”¹¹⁶ (AMPs).

3.6.1 Private Disclosure

The disclosure process happens in two stages: first, private disclosure, and then review and publication. The first is the private disclosure statement. Elected officials file their statement in confidence to the ethics body. This distinction between private and public is important because some of that disclosed information will then be made public. Private disclosure statements are typically filed yearly, but some jurisdictions merely require a yearly acknowledgement or confirmation rather than a *de novo* filing. This can ease some of the administrative burden and time required to comply, while providing the ethics body with the required information. Officials are also generally expected to file any updates on an ongoing basis. These are sometimes called a “statement of material change”¹¹⁷ and time limits for compliance are typically imposed, after which a file or AMP may be issued.

3.6.2 Public Disclosure / Registry

After private disclosure statements are received, ethics bodies are then tasked with reviewing, possibly auditing, and summarizing their contents. Regimes that require disclosure of this nature will also include specific instructions about what information must then be made public.¹¹⁸ The purpose of a public disclosure statement or registry is to be transparent about what private interests elected officials might have. In theory, this allows the public to keep a watchful eye on their elected leaders in order to ensure that they are not placing themselves in conflicts of interest or behaving in a manner that might improperly benefit someone. These public disclosures are made available online, and because this public disclosure is generally acknowledged to be an invasion of privacy,¹¹⁹ only limited information is included.

¹¹⁵ See e.g., *COI Act*, *supra* note 76, s 22(2)(b).

¹¹⁶ *COI Act*, *supra* note 76, s 52.

¹¹⁷ *MIA*, *supra* note 44, s 20(4).

¹¹⁸ See e.g., *MIA*, *supra* note 44, s 21(2); *Canada Code*, *supra* note 42, s 24(3).

¹¹⁹ Ontario, Commission on Conflict of Interest, *Annual Report 1990-91* (Toronto: Publications Ontario, 1991) (Commissioner: Gregory T Evans) at 1, online (pdf):

Public statements generally contain:

- A list of the names of companies in which shares are held;
- The names and private companies in which an ownership interest is held and the nature of that company's operations;
- Information about investment properties (e.g. the number of properties and/or their general location);
- Information about companies and investments from which income is generated/received;
- The nature of any liabilities (this usually excludes mortgages on primary residences);
- A list and a description of the nature of any volunteer engagement; and
- A list and description of any professional memberships and affiliations.¹²⁰

Despite the above lists, ethics bodies are also often given broad discretion to include or exclude any item from the public disclosure based upon what they reasonably believe is in the public's best interest.¹²¹ This discretion is typically granted using principle-first language, providing for greater flexibility, and the ability to avoid establishing rigid precedents.

With respect to the statements of material change, some jurisdictions conduct reviews on an ongoing basis in order to add new information to their public registry. Others only update their public registry once per year, which permits new information to stay hidden from the public for a period of time. In most circumstances, real-time updates are certainly consistent with a regime that values transparency. However, again the reality is that ethics rules are generally agreed upon by the people who are subject to them. Public officials make deliberate decisions about ongoing disclosure obligations; accordingly, delayed disclosure is typically by design, unless the ethics body is empowered to exercise its discretion in this regard.

3.6.3 Blind Trusts and Divestiture

Occasionally an official will disclose assets or interests strictly prohibited by the rules. In Canada, for example, Ministers of the Crown are not allowed to "be a party to a contract with a public sector entity under which he or she receives a benefit."¹²² Rules of this nature (that is, pre-determined conflicts) are effectively a consensus about what the rule-makers all agree is never going to be acceptable. Like other conflicts of interest, these rules might be implemented in several different ways. First, some public sector ethics regimes allow the person who holds the prohibited asset or interest to simply disclose it and then to proceed as they normally would. They may have to recuse themselves from certain discussions or certain votes, or they may set up a conflict of interest screen at their own discretion. Second,

¹²⁰ See e.g., *Canada Code*, *supra* note 42, s 24; *COI Act*, *supra* note 76, s 25(4); *MIA*, *supra* note 44, s 21.

¹²¹ See e.g., *MIA*, *supra* note 44, s 21(4)(11); *Canada Code*, *supra* note 42, s 24(3)(l).

¹²² *COI Act*, *supra* note 76, s 13(1).

some regimes require that prohibited assets be divested or sold, eliminating any potential for conflict. Finally, a blind trust may be executed. This mechanism is the most complicated response to the disclosure of prohibited assets or interests.

A blind trust requires that a public official's assets (usually shares in a private or publicly-traded company) be placed in a trust prior to their appointment to the cabinet position. A trust is a fiduciary relationship where one party (the trustor) gives the other party (the trustee) legal title to some asset that they then hold for the benefit of some third party (the beneficiary). In the blind trusts contemplated by public sector ethics laws, the trustor and the beneficiary are the same person (i.e., the public official). The trustee must be a third party who is arm's length to the trustor/beneficiary. The trust is "blind" because the beneficiary has no right to receive ongoing information about the trust or to direct the trustee's management decisions. Specific requirements for instruments of this nature are typically set out in the applicable ethics rules or left to the discretion of the relevant decision-maker in the ethics body.¹²³

3.6.3.1 Executive Branch Nominees

The executive branch in the US functions differently than it does in Canada and the UK, as elected officials in the US are not appointed to executive positions in the same manner. Instead, anybody can be nominated to the executive branch by the President. The nominees must be vetted by a Senate committee which is required to approve or confirm their appointment. When nominations are made, the Office of Government Ethics (OGE) is tasked with reviewing that person's private disclosure statement(s) and ensuring that they are free from conflicts of interest.¹²⁴ These individuals are expected to sign an ethics pledge and their public financial disclosure reports can then be requested from the OGE.¹²⁵

3.6.4 Ethics Waivers (US)

Another unique feature of the US system of government is that the President can grant ethics waivers to members of the executive. The President establishes this power to grant ethics waivers simply by signing an executive order that brings the power into existence.¹²⁶ Different Presidents may require that the waivers be made public, but that level of disclosure is not in fact required.¹²⁷ The President can then create waivers that allow individual members of the executive to avoid having to comply with specific ethics rules. These waivers

¹²³ See e.g., *MIA*, *supra* note 44, s 11(3); *Canada Code*, *supra* note 42, s 19.

¹²⁴ *EGA*, *supra* note 51, § 101.

¹²⁵ The White House, President Joe Biden, "Executive Order on Ethics Commitments by Executive Branch Personnel" (20 January 2021), online: <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ethics-commitments-by-executive-branch-personnel/>>.

¹²⁶ *Ibid*, s 3.

¹²⁷ See e.g., Memorandum from Emory A Rounds, III, Director of the United States Office of Government Ethics to Agency Heads and Designated Agency Ethics Officials (18 February 2021), "Legal Advisory: Waiver Authority and Making Waivers Public under Section 3 of Executive Order 13989", LA-21-0, online (pdf): <[https://www.oge.gov/Web/oge.nsf/Legal%20Docs/CF1E6B2DAF6E62A085258680006E1ECE/\\$FILE/LA-21-04.pdf?open](https://www.oge.gov/Web/oge.nsf/Legal%20Docs/CF1E6B2DAF6E62A085258680006E1ECE/$FILE/LA-21-04.pdf?open)>.

are typically used when a person comes into the executive from an industry with which they will be required to continue to interact. Ethics rules generally prohibit executive officials from working closely with former colleagues who might now benefit from their connection to the executive branch of government. This prohibition serves to minimize the risk of unintentional or inadvertent preferential treatment being given. Although there is no formal requirement to do so, ethics waivers are typically made available to the public on the OGE website. Because the OGE has no investigative authority however, the Office is limited in what it can do if the President does not share those waivers or release them publicly. This can be problematic in the context of wanting transparency about an official's ethical obligations.

3.6.5 Gifts, Benefits, and Travel

Public sector ethics regimes generally include rules about what types of gifts, benefits, and travel a public official may permissibly accept.¹²⁸ Public officials commonly receive gifts of gratitude in exchange for speaking at or attending an event. Gratitude can also take the form of a benefit, including a free dinner or an upgraded seat. Sometimes public officials must even travel to remote locations in order to meet with constituents or tour a remote facility (e.g., mining operations). A public official may not be able to make such visits unless they accept travel and accommodations. These are the kinds of exchanges that are addressed.

Rules about gifts are often divided into four considerations:

(1) What types of gifts are acceptable?

Gifts are generally acceptable when they are received as part of a custom, protocol or social obligation that normally accompanies the responsibilities of holding public office.¹²⁹ Given that the custom of gift-giving in exchange for a dignitary's presence at an event is rather well-established, ethics bodies and advisors are generally quite flexible with allowing public officials to accept such gifts before seeking advice about its appropriateness. Given the social consequences of turning down a gift (i.e., being seen as rude), in some circumstances, ethics regimes provide for the possibility that it may be better to err on the side of politeness.

(2) What value of a gift is acceptable?

If a gift is acceptable under the rules about custom, protocol and social obligation, then the next question is often about its value and whether that value and or another aspect of the gift's nature warrants disclosure.

(3) When does a gift need to be publicly reported?

Each public sector ethics regime that includes rules about gifts and benefits will also determine when an item must be reported to the ethics body and/or made public. In Canada, for example, elected officials must report gifts that they or their family members receive from any one source that total

¹²⁸ These rules do not speak to what it is acceptable to give, as that could be covered by the regular conflict of interest rules relating to acceptable conduct.

¹²⁹ See e.g., *MIA*, *supra* note 44, s 6; *Canada Code*, *supra* note 42, s 14(2).

CDN\$200 or more within a 12-month period. That report must be filed within 30 days of receipt or within 30 days from the date on which the value of the accumulated gifts from that single source totalled CDN\$200.¹³⁰ The individual gifts must all be reported publicly as well.

- (4) When, if ever, can a gift be retained by the recipient or must it be relinquished to the government (or some related entity)?

Finally, it is sometimes the case that a gift is worth much more than those within a particular jurisdiction believe it is acceptable for an elected official to receive and keep. When a public office holder in Canada (or a member of their family) accepts a gift or other advantage that has a value of CDN\$1,000 or more, it must be forfeited to the Crown, unless the Conflict of Interest and Ethics Commissioner determines otherwise.¹³¹

The above rules apply to both gifts and benefits, but there may also be rules that apply specifically to travel. Some governments have rules requiring that the fair market value of any necessary travel must be reimbursed, while others allow elected officials to accept travel as a gift or benefit under limited circumstances. Designated public office holders in Canada (which include members of cabinet and other senior officials) are encouraged to pay for their travel from the consolidated revenue fund, or by using parliamentary or political party funds. If they cannot do so and the travel costs exceed CDN\$200, they must file a statement with the Conflict of Interest and Ethics Commissioner disclosing the name of the person or organization that paid, the names of anyone who accompanied the official on the trip, and the nature and value of the trip and any other gifts or benefits received, including accommodations. Interestingly, the *Conflict of Interest Act* does not require that the information is made public. Instead, the Commissioner is merely expected to prepare a list once a year of such disclosures and to file that list with the Speaker of the House of Commons.¹³²

3.7 Seeking Advice

Most public sector ethics bodies are given mandates that include the provision of education and awareness. This work can take many forms, but four are worth special attention: advice giving, regular meetings, specialized training sessions, and the use of digital media. Typically, stakeholders that are subject to the rules administered by an ethics body are entitled to contact that body to ask specific questions about how to meet their obligations. These questions could be about administrative obligations, as well as how to comply with the ethics rules (such as those related to conflicts of interest and insider information). An official can also sometimes request a formal opinion from the ethics body. How ethics rules operate should not be a guessing game for those who are subject to them. It is accordingly

¹³⁰ *Canada Code*, *supra* note 42, s 14; *COI Act*, *supra* note 76, s 23.

¹³¹ *COI Act*, *supra* note 76, s 11(3); See also *Ministerial Code*, *supra* note 72, s 7.22 (note that in the UK, gifts exceeding £140 that are “given to Ministers in their Ministerial capacity become the property of the Government and do not need to be declared”).

¹³² *Canada Code*, *supra* note 42, s 15.

important to encourage stakeholders to reach out and proactively seek clarity whenever they have questions or concerns.

3.7.1 Advice as Absolution

One way to incentivize seeking advice is to structure the ethics regime so that the formal advice the ethics body provides can, if followed, be used as a defence to allegations of misconduct. For this to work effectively, however, the advice-seeker must fully disclose all relevant facts and the advice must be received before the unethical action occurs. If a complaint is subsequently made against that official, and if that official has done exactly what the ethics body has advised, then any subsequent investigation would be required to acknowledge that the official followed the advice.¹³³ Officials who follow the advice of ethics bodies, even if that advice is poor, can accordingly be confident that they will not be punished in any way for their compliance.

Practically speaking, regimes that allow prior advice to be used as a defence to an allegation of misconduct need to take the advice-giving function seriously. In Canada, for example, the CIEC provides advice. Giving bad advice, or even advice based on incomplete information, would reflect poorly on the Commissioner. It should be very rare for an official who received advice to have to rely on it for absolution after it was followed. These absolution provisions are rarely invoked by advice-seekers but do an important job of incentivizing public officials to seek advice from their ethics bodies before they act.

3.7.2 Regular Meetings with Advisor

Many of these regimes also require (or allow) newly elected officials to meet with their ethics advisor or ethics registrar. These meetings might be further required on a yearly basis, or whenever an official is appointed to a new position (e.g., a cabinet or executive position). As explained, elected officials may be required to file disclosure documents with ethics bodies that outline their private interests, including assets and liabilities. One of the ways that ethics bodies add value for officials is to provide them with disclosure-specific advice that will help them to better recognize and avoid apparent, potential, and actual conflicts of interest. By requiring these meetings on an annual basis, some regimes effectively force personalized education sessions on officials. While this can be an effective approach given the busy schedules of officials, it can also be seen as unnecessary and paternalistic. This latter perception has resulted in most regimes opting to forgo such requirements.

3.7.3 Regular Training

Further to the annual meetings, many ethics bodies offer regular or tailored training for their stakeholders. This can be especially useful for educating those who are subject to the rules as well as for their inner circle of advisors, and particularly those who may be responsible for guarding against problematic or unethical situations. Regular and focused training is integral to raising awareness and to building and sustaining a culture of excellence in ethical decision-making.

¹³³ MIA, *supra* note 44, s 31(7).

3.7.4 Digital Media

Ethics bodies are beginning to leverage digital media to engage with stakeholders and the general public. Websites now do more than tell visitors how to phone or fax the office; they host information that can be searched, downloaded, and distributed. Social media channels are also being leveraged to engage and educate stakeholders.¹³⁴ The move into the digital age has created an opportunity for ethics bodies to expand their reach in a way that maybe was not contemplated when they were created. The new digital environment offers new and significant tools for ethics bodies. For example, some ethics bodies may have been given no explicit public education mandate, but may be permitted or required to make reports public. It costs less to use digital media than to have a physical mailing list, and a broader range of people can potentially access and take an interest in this work if it is posted online. In the wake of Donald Trump's presidency, where questions about the ethical conduct of the President and his advisors were in the headlines on an almost-daily basis, placing greater emphasis on outreach and education about how these regimes operate is crucial, and digital tools provide an efficient and effective means of doing so.

3.8 Post-Employment / Cooling Off

The Hatch Act restricts the political activity of federal employees in the US. Rules that restrict people working in the public service (not in ministers' offices) from also being politically engaged are very common. A public servant is generally expected to be politically neutral and loyal to the acting government. Neutrality and loyalty are valued so that public servants do not need to be replaced whenever the political party in power changes. This provides for the continuity and consistency necessary for bureaucracies to proceed on a (relatively) seamless basis. These kinds of political activity restrictions do not, however, apply to everyone.

Elected officials and their inner circles of advisors and staffers will always be politically-minded. Although it is not generally accepted that they should be allowed to campaign using public sector resources or while at their public sector jobs, their political nature is accepted. As such, these individuals are often subject to post-employment restrictions when they leave their roles in the public sector. Post-employment rules are important because political life can be cyclical in nature. If a person is committed to one political party over another, then they typically stick with that party and volunteer their time to assist with fundraising, strategizing, campaigning, and polling. This is very common for political operatives who work alongside ministers and party leaders. Because these people are known to go back and forth between government and industry, ethics rules are typically put in place specifically to prevent them from using their knowledge and/or connections in a way that would improperly benefit them in their private sector roles.

¹³⁴ See e.g., Office of the Conflict of Interest and Ethics Commissioner, *Annual Report: Conflict of Interest Act 2020-21*, (Ottawa: Parliament of Canada, 2021) (Commissioner: Mario Dion), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/AnnualReports/Annual%20Report%20Act%202020-21.pdf>>.

Common post-employment rules provide that former public office holders:

- Must not seek preferential treatment from those they have worked with in the public sector;
- Must not disclose or benefit from the use of confidential information that they acquired while working in the public sector;
- Must not lobby their former employer or anyone they had close contact with in their former public sector role;
- Cannot take a position at a company or organization that has ongoing business with the government that they were privy to and that they have confidential information about; and,
- Cannot switch sides on an ongoing transaction.

Rules of this nature apply mostly to senior unelected officials and rarely to elected officials, unless they are also members of the executive.

4. PUBLIC REPORTING

Not only do public sector ethics bodies generally have an obligation to educate their stakeholders, they must also publicly report their own activities. Specific rules are often provided about what must be reported on, to whom, and when.¹³⁵ Public reporting typically takes the form of annual and complaint-specific reports. Annual reports can contain a range of information, including:

- The ethics body's composition and budget;
- A summary of the number of requests for advice received and what topics those requests covered;
- A summary of the number of requests for investigation received and who those requests related to;
- Summaries of outreach and education activities undertaken, including appearance before official committees; and,
- Samples of actual advice given (usually anonymized).

Ethics bodies that oversee the conduct of legislators typically report directly to that legislative body or to a selected committee. Annual and other reports are generally made public and the ethics body can be called upon to answer questions at the discretion of the legislative body or committee. Making these reports and proceedings public also means that they can indirectly contribute to the public awareness and education work that the ethics body undertakes.

¹³⁵ See e.g., POC Act, *supra* note 75, s 90.

4.1 Complaints, Investigations, and Enforcement

There is little point in having so many ethics rules if they cannot be enforced. Unfortunately, public sector ethics regimes can be more effective at setting standards for elected officials than enforcing those standards. The regimes that apply to unelected public servants tend to be more easily enforced because they are either legislative in nature or can be incorporated into employment contracts. This means they can either be enforced by the courts or a negative finding can lead to disciplinary action in the employment context.

There are several key elements that these complaint regimes tend to have in common. The first is the mechanism by which a complaint can be made and by whom it can be filed. Some ethics bodies are permitted to accept complaints from elected officials, from the legislative body as a whole (through a motion that is passed in the House, for example), and/or from members of the public. While it may seem counterintuitive to limit who can make a complaint, ethics regimes that provide for absolutely anyone to file a complaint are exceedingly rare. Some regimes have gotten around the need to be granular about who should have standing to file a complaint by allowing the ethics body or its head to exercise their own initiative in determining what to investigate. Providing these initiative rights is arguably ideal because it places an expectation on ethics bodies to stay proactive while also allowing them to accept complaints from the public without being obligated to investigate.

The next significant component of these regimes is the requirements regarding the quality of evidence needed from a complainant in order to support a request for investigation. Complaints processes can sometimes be used improperly and as political battlegrounds, with an elected official from one party filing a complaint against an official from a different party in order to engage the poor optics that would inevitably result from being subject to an ethics investigation. Complaints are also sometimes made that appear to be nothing more than fishing expeditions. This happens when the complainant submits low quality evidence, like newspaper articles or speculative postings they have copied from social media, and makes no specific arguments as to which rule(s) has been broken. It may be an inefficient use of resources to require or to even allow an ethics body to investigate when the complaint itself does not meet some basic evidentiary standards.

This leads to the next element: should it be mandatory for an ethics body to conduct an investigation into any complaint it receives or should the body be empowered to exercise its discretion? Regardless of which option is chosen, should the ethics body also have a duty to acknowledge every complaint? Should it be required to file a public report about every complaint, even if a complaint was deemed to be unfounded or vexatious? Each regime is different, but these are important questions that are generally addressed in their design.

Finally, some regimes are very detailed when it comes to establishing procedures. Procedural clarity is a mark of fairness in the legal system and allows stakeholders to know what they can expect. That said, most ethics bodies are not subject to the requirements of administrative law and procedural clarity is rarely mandated. It is accordingly nothing more than good practice standards that dictate whether complaint and investigation processes will be published in order for stakeholders to know what to expect and to provide for investigatory efficiency.

4.1.1 Discipline and Sanctions

Assuming an investigation into an alleged violation of an ethics rule results in a negative finding, what are the possible outcomes and next steps? How, if at all, can an ethics body correct and/or shape the behaviour of public officials through its work? As noted, public sector ethics regimes that apply to elected officials are generally not autonomous and fully independent. These regimes are tasked with conducting investigations and reporting their results back to the relevant legislative bodies. Those legislative bodies must then consider whether they agree with the findings and what, if anything, they would like to do about them. Disciplinary measures of any real consequence against a person who was democratically elected to office are then agreed to and meted out by their peers who were also democratically elected to office. Despite this apparent conflict, investigation reports nevertheless do have influence and can have a significant impact on ongoing behaviour and ethical compliance more generally. Ethics bodies have a variety of disciplinary tools at their disposal, including:

(1) Name and Shame

In a line of work where a person's reputation is perhaps as central to their role as their official duties, being featured in a report where the investigator concludes that there has been an ethics violation can be particularly damaging. The public wants desperately to trust that their politicians are serving in public office for the right reasons and that they are not taking improper advantage of their power or influence over the public purse. An investigation report may conclude that a public official has violated the ethics rules, but that the violation was inadvertent or did not rise to a level of such significance that disciplinary measures ought to be taken. A report could also recommend that a public official apologize publicly for a minor lapse of judgement, which is typically what happens when the official has been cooperative and has acknowledged or corrected their mistake. Regardless of whether a report recommends a significant penalty, the mere act of publishing a report explaining that an elected official has done wrong can have a profound and lasting impact on that person's reputation and career. This has been coined "naming and shaming."

(2) Salary Reduction or Suspension

An investigation report might recommend that a public official's salary be withheld for a period of time (e.g., until a debt has been repaid) or that they be suspended from the position either temporarily or permanently, with or without pay. These are significant penalties, however, and ethics bodies are unlikely to be given the authority needed to impose them. Suggesting such a penalty in response to a violation adds to the public shaming of that official and adds higher stakes to the subsequent discussion by the legislative body who is ultimately responsible for providing reprimand. They may choose to proceed with the recommended action, or they may choose something different, but the mere recommendation can do damage regardless.

(3) Monetary Penalties or Fines

An increasingly popular disciplinary tool is the administrative monetary penalty (AMP). The right to issue AMPs must be explicitly provided to the ethics body and the limits of that

power must be made very clear. In Canada, for example, the CIEC has the power to issue AMPs to certain designated public office holders (including members of cabinet) if they fail to fulfil certain administrative responsibilities under the *Act*. This includes, for example, filing annual private disclosure statements and statements of material change. Whether an AMP would be enforceable by a court of law if an elected official refused to pay is unclear, but it is perhaps reasonable to expect that the legislative body would exercise its right to discipline its own members and issue that same penalty if an elected member did refuse to pay.

(4) Impeachment

The US Constitution contains “emoluments clauses.” The foreign emoluments clause prohibits the US President from “profiting, gaining from or receiving any other advantage from a foreign or domestic government.”¹³⁶ This clause was added to the Constitution because many believed the Articles of Confederation were written in such a way that they might help give rise to a very weak central government. The Framers of the Constitution were accordingly concerned that an influential foreign state might be able to “sway the President’s decision-making to its own benefit.”¹³⁷ There is also a domestic emoluments clause which prohibits the President receiving any sort of advantage from any state government.¹³⁸ The remedy for violating one of these clauses has always been impeachment.¹³⁹

Impeachment is both a political and legal process. Articles of impeachment are drafted and laid before the House of Representatives and then, if passed, before the Senate. The articles set out the allegations against the President and legislators vote on whether they agree to impeach based on that information. A vote to impeach is only one part of the process, which typically involves a number of hearings as well. Assuming a President is impeached by both Houses, they must then decide upon a remedy. Beyond the shame invoked by the impeachment itself, the Houses must also decide if the violation is worth removal from office and/or disqualification from holding public office in the future. Impeachment has also been used in the UK, but the procedure has been considered obsolete since 1806.¹⁴⁰

(5) Removal

In the most egregious cases of misconduct, an elected official can be removed from office by their peers. This happens very rarely, but there are certainly examples from the UK,¹⁴¹ the

¹³⁶ US Const art I, § 9, cl 8.

¹³⁷ Gabe Lezra, “Profiting off the Presidency: Trump’s Violations of the Emoluments Causes” (1 October 2019), online (blog): *American Constitution Society: Expert Forum* <<https://www.acslaw.org/expertforum/profiting-off-the-presidency-trumps-violations-of-the-emoluments-clauses/>>.

¹³⁸ US Const art II, §1, cl 7.

¹³⁹ Alexander Hamilton, James Madison & John Jay, “Federalist No 65” in Clinton Rossiter, ed, *The Federalist Papers*, (New York, NY: Dutton/Signet, 2012) 394.

¹⁴⁰ UK, HC Library, *Impeachment* (Research Briefing No CBP 7612) by Jack Simson Caird (London: HC Library, 2016), online (pdf): <<https://researchbriefings.files.parliament.uk/documents/CBP-7612/CBP-7612.pdf>>.

¹⁴¹ *Ibid.*

US,¹⁴² and Canada.¹⁴³ This may occur when an ethics investigation leads to a criminal investigation where it is subsequently determined that an elected official has committed a crime. Removal could also result from serious breaches of the public trust that do not quite rise to the level of criminality or where criminality cannot be proven to the requisite standard for criminal guilt.

4.1.2 Contesting Outcomes

One of the reasons that establishing and communicating clear processes and procedures is crucial is because people who are the subject of negative findings will often want a way to appeal those findings and reports. Appeal mechanisms provide a means to ensure that ethics bodies are held accountable for their work. Of course, the ability to appeal is a function of how the ethics regime is structured. If the ethics body is only allowed to report back to the legislative body, and not to make final decisions about discipline, then it is less likely that an appeal mechanism will be available with respect to the ethics body's findings. Parliaments also have an inherent right (i.e., parliamentary privilege) to discipline their own members, so it is also highly unlikely that an official will be able to appeal a disciplinary action taken by a parliamentary body. Judicial review may be possible in the context of regimes that apply to public officials who are not elected, but these are the types of concerns generally addressed within the instruments that establish each individual regime.

4.2 Criminal Law

Criminal laws exist in every country to prohibit public officials from breaching the public trust or otherwise taking improper advantage of the benefits afforded by holding public office. The specific language of the criminal prohibitions will vary slightly by jurisdiction, but they are most often similar in substance. The Canadian *Criminal Code*, for example, includes laws against bribing judicial officers or other government actors,¹⁴⁴ committing frauds on government,¹⁴⁵ influencing or negotiating appointments or dealings in offices,¹⁴⁶ and committing breaches of trust.¹⁴⁷ Ethics bodies are typically required to suspend any inquiries or investigations into a matter if a related criminal charge is filed. Civil actions can also be brought against government officials for behaviours that amount to misfeasance in

¹⁴² "List of Individuals Impeached by the House of Representatives" (last visited 2 September 2021), online: *United States House of Representatives: History, Art & Archives* <<https://history.house.gov/Institution/Impeachment/Impeachment-List/>>.

¹⁴³ See "3. Privileges and Immunities" in HC, *House of Commons Procedure and Practice* by Robert Marleau & Camille Montpetit, eds, Catalogue No X9-2/5-1999E (Ottawa: House of Commons, 2000), online:

<<https://www.ourcommons.ca/marleumontpetit/DocumentViewer.aspx?DocId=1001&Language=E&Sec=Ch03&Seq=7>>, wherein it is noted that the House has expelled members on four occasions.

¹⁴⁴ *Criminal Code*, RSC 1985, c C-46, ss 119-20.

¹⁴⁵ *Ibid*, s 121.

¹⁴⁶ *Ibid*, s 125.

¹⁴⁷ *Ibid*, s 122.

public office¹⁴⁸ or breach of their fiduciary duties.¹⁴⁹ For an explanation of criminal law regarding bribery, for example, see Chapters 2 and 3.

5. CONCLUSION

The concept of conflict of interest underpins public sector ethics laws, but by no means defines them. A wide variety of principles, rules, accountability mechanisms, and educational activities are required to establish and maintain high standards of ethical conduct. Public sector actors must balance competing interests on a day-to-day basis, particularly when it comes to policy- and other decision-making. It is in the consistently tangled web of relationships, interests, and responsibilities that the risk of corruption surfaces and the need to stay vigilant arises. A principle challenge of public sector ethics regimes is their legislative nature: the rules are established by those same individuals who are subject to them. Indeed, this inherent tension sometimes means that they are slow to be updated and improved. Regimes that become outdated can unfortunately also be quick to lose their influence over public officials.

While this chapter has offered an overview of the rules and responsibilities in place within the US, the UK and Canadian regimes, it is important to remember the difference between ethics and compliance. International organizations like the UN, the OECD and Transparency International continue to press for higher anti-corruption standards around the world in order to help foster a culture of public sector ethics. Proactive engagement with and education about the value of public sector ethics can help inspire countries to establish a conceptual space within their political cultures, where standards and rules for the conduct of public officials can emerge, and greater buy-in with underlying principles can be achieved.

¹⁴⁸ See e.g., *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263.

¹⁴⁹ See e.g., *The Toronto Party v Toronto (City)*, 2013 ONCA 327.

CHAPTER 11

REGULATION OF LOBBYING

GERRY FERGUSON AND IAN STEDMAN*

* This chapter was originally written and updated by Jeremy Sapers as a directed research and writing paper, with significant additions and deletions made by Gerry Ferguson. Descriptions of UK law and policy in the original chapter were added by Madeline Reid and Gerry Ferguson.

CONTENTS

- 1. INTRODUCTION**
- 2. TERMINOLOGY**
- 3. LOBBYING AND DEMOCRACY**
- 4. REGULATORY SCHEMES**
- 5. COMPARATIVE SUMMARY**
- 6. REGULATORY FRAMEWORK AND CONTEXT**
- 7. ELEMENTS OF LOBBYING REGULATION**
- 8. COMPARING REGULATIONS IN THE EUROPEAN UNION**
- 9. CONCLUSION**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

Lobbying is an aspect of the public policy-making process in all democratic countries and is not an inherently corrupt practice.¹ Broadly defined, lobbying occurs when special interest groups engage public officials in an effort to influence decision-making. Lobbyists may promote corporate interests or advocate for issues of broader public concern. Access to public officials has become a commodity in most developed nations and influence in the industry commands significant resources. When undertaken ethically and under the administration of a robust, transparent regulatory regime, lobbying can promote political rights and improve government decision-making. Legitimate lobbying practices facilitate democratic engagement and provide government officials with specialized knowledge.

Involving private interests in the legislative process risks fostering relationships that perpetuate undue influence, as well as creating routes of preferential access to public officials. The OECD warns that undue influence in policy-making constitutes a “persistent risk” in member countries due to the “unbalanced representation of interests in government advisory groups” and the “revolving door”² between government and the lobbying industry. Where access to decision-makers no longer fulfills the public interest, the legitimacy of lobbying erodes and corruption can follow. A recent Gallup World Poll, reported on by the OECD, found that only 41.8% of citizens in OECD countries trusted their government.³ In an era when trust levels in national governments are declining, lobbying must be perceived by the public as legitimate to be effective. The legitimacy challenge is exacerbated by the fact that lobbying is generally understood as a practice that advances special interests.⁴ Transparency in legislative decision-making is closely related to levels of public trust in politicians⁵ and addressing concerns about lobbying is therefore a key lever for restoring confidence in government.⁶ As a result, governments must develop lobbying policy that promotes transparency, integrity, and impartiality in the legislative process.

¹ OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying*, (Paris: OECD, 2014) [OECD 2014], online: <<http://www.oecd.org/gov/lobbyists-governments-and-public-trust-volume-3-9789264214224-en.htm>>.

² OECD, *Government at a Glance 2015*, (Paris: OECD, 2015) at 158, online: <https://read.oecd-ilibrary.org/governance/government-at-a-glance-2015_gov_glance-2015-en#page1>.

³ OECD, *Government at a Glance 2021*, (Paris: OECD, 2021) at 206, online: <<https://www.oecd-ilibrary.org/docserver/1c258f55-en.pdf?expires=1626707794&id=id&accname=guest&checksum=21E9FDA66352FF19E9FBBEC5E253952E>>.

⁴ Joel S Hellman, Geraint Jones & Daniel Kaufmann, “Seize the State, Seize the Day: State Capture, Corruption and Influence in Transition” (2000) The World Bank Policy Research Working Paper No 2444, online: <<http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-2444>>.

⁵ Klaus Schwab, *The Global Competitiveness Report 2013–2014*, (Geneva: World Economic Forum, 2013), online (pdf): <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf>.

⁶ OECD 2014, *supra* note 1.

Policy should reflect modern growth in the lobbying industry globally;⁷ the number of lobbyists and lobbying activities have both increased significantly in recent years.⁸ This growth has catalyzed social engagement and public concern for greater transparency and oversight. An opaque lobbying process can enable disproportionate access to decision-makers and provide unfair advantages for well-funded interests. This inequality suppresses minority interests and stifles public consultation in policy development.⁹ The existence of powerful interests—be they corporate, private or government—and the participatory character of democracy ensure that lobbying will remain an entrenched practice. As efforts to engage public officials and influence decision-making continue, concomitant regulation must be maintained.

This chapter surveys lobbying in the context of corruption and anti-corruption policy development. The majority of the discussion focuses on relationships between individuals and government, and opportunities for corruption that are created when private interests engage government. While public officials are often bound by legislation and ethical codes of conduct, this chapter addresses primarily the regulation of lobbyists. Section 2 provides a brief introduction to terminology used throughout this chapter and a summary discussion of the challenges related to adopting objective definitions for global phenomena such as corruption and lobbying. Section 3 addresses the relationship between lobbying and democratic governance, and suggests that while lobbying is an integral component of democracy, democracy alone does not prevent corruption. Section 4 situates lobbying policy within broader regulatory frameworks, and recommends five basic principles to guide public officials in the development of lobbying policy. Sections 5, 6, and 7 contain a substantive review of lobbying regulatory regimes in the US, the UK, and Canada. Finally, Section 8 introduces the regulatory environment in the European Union, contrasting approaches and identifying areas for improvement.

2. TERMINOLOGY

2.1 Defining Lobbying

Although definitions of lobbying abound in academic literature, nongovernmental publications, and government directives, there is no global consensus on what constitutes “lobbying” or a “lobbying activity.” However, defining these terms is a prerequisite to developing meaningful policy and identifying the scope of acceptable lobbying conduct. The

⁷ OECD, *Lobbying in the 21st Century: Transparency, Integrity and Access*, (Paris: OECD, 2021) [OECD 2021] at 14, online: <<https://www.oecd.org/corruption-integrity/reports/lobbying-in-the-21st-century-c6d8eff8-en.html>>.

⁸ *Ibid* at 128.

⁹ OECD, *Lobbyists, Governments and Public Trust, Volume 1: Increasing Transparency Through Legislation*, (Paris: OECD, 2009) [OECD Lobbyists 2009], online: <<http://www.oecd.org/publications/lobbyists-governments-and-public-trust-volume-1-9789264073371-en.htm>>.

OECD advises that statutory definitions of lobbying must be “robust, comprehensive, and sufficiently explicit to prevent loopholes and misinterpretation.”¹⁰

It has been suggested that “the word ‘lobbying’ has seldom been used the same way twice by those studying the topic.”¹¹ A report published by the OECD in 2021 demonstrates that the definition of lobbying varies across member countries.¹² The Public Relations Institute of Ireland (PRII) suggests a typical and generally useful definition of lobbying:

the specific efforts to influence public decision making either by pressing for change in policy or seeking to prevent such change. It consists of representations to any public officeholder on any aspect of policy or any measure implementing that policy, or any matter being considered, or which is likely to be considered by a public body.¹³

The European Commission provides another general definition, describing lobbying as “any solicited communication, oral or written, with a public official [intended] to influence legislation, policy or administrative decisions.”¹⁴ According to Transparency International, lobbying is “any direct or indirect communication with public officials, political decision-makers or representatives for the purposes of influencing public decision-making carried out by or on behalf of any organized group,”¹⁵ and includes all activities intended to influence policy and decision-making of governmental, bureaucratic or similar institutions. As with corruption, statutory definitions of lobbying must reflect domestic environments.

The broad spectrum of language used to describe lobbying reflects the complexities of the influence industry. Dialogue between citizens and government can manifest directly between interest groups and legislators or through indirect, grassroots modes of influence intended to affect legislative processes by shifting public opinion.¹⁶ Lobbyists may work on behalf of corporate interests, citizens groups or other organizations advocating for the public interest. A formal distinction can be made between promoters of the general, public interest

¹⁰ OECD 2014, *supra* note 1 at 38.

¹¹ Frank Baumgartner & Beth Leech, *Basic Interests: The Importance of Groups in Politics and Political Science* (Princeton, NJ: Princeton University Press, 1998) at 33.

¹² OECD 2021, *supra* note 7 at 138.

¹³ OECD, *Lobbyists, Governments and Public Trust, Volume 2: Promoting integrity by self-regulation*, (Paris: OECD, 2012) [OECD 2012] at 23, online: <<http://www.oecd.org/publications/lobbyists-governments-and-public-trust-volume-2-9789264084940-en.htm>>.

¹⁴ European Commission, *Green Paper: European Transparency Initiative*, COM 2006 194 final (2006) [European Commission Green Paper], online: <<https://op.europa.eu/en/publication-detail/-/publication/1e468b07-27ba-46bc-a613-0ab96fc10aa9>>.

¹⁵ Suzanne Mulcahy, *Lobbying in Europe: Hidden Influence, Privileged Access*, (Berlin: Transparency International [TI], 2015) at 6, online (pdf): <https://images.transparencycdn.org/images/2015_LobbyingInEurope_EN.pdf>; Dieter Zinnbauer, “Corrupting the Rules of the Game: From Legitimate Lobbying to Capturing Regulations and Policies” in Dieter Zinnbauer, Rebecca Dobson & Krina Despota, eds, *Global Corruption Report 2009: Corruption and the Private Sector* (Cambridge: Cambridge University Press, 2009) 32 at 32, online: <<https://www.transparency.org/en/publications/global-corruption-report-2009>>.

¹⁶ Secondary tactics may include reorienting political debate and stimulating industry and grassroots opposition to proposed legislation.

and lobbying for the corporate, private interest.¹⁷ Individual citizen and collective group access to legislators is a fundamental democratic political right; this right extends to any kind of special interest group, including corporate lobbies. Pharmaceutical, electronics manufacturing and equipment, real estate, and energy sectors are among the most commonly represented commercial interests.¹⁸ Public interest groups advocate for trade unions, environmental concerns, industry transparency and regulation, among other civil society interests. Inclusive definitions of “lobbyist” recognize the following as members of the influence industry: lobbying consultancy firms, in-house lobbyists employed by corporations, lawyers working in public affairs departments for law firms and corporations, think-tanks, and expert groups created by government for the purpose of policy development.

Identifying lobbyists and what constitutes lobbying is essential for effective regulation; distinguishing between research, advisory, and lobbying efforts ensures that policy is neither under-inclusive nor overbroad.¹⁹ Generally, broad definitions are preferable because under-inclusive legislation can encourage private interests to exploit unregulated alternatives to engage public officials.²⁰

2.2 Terminology in a Comparative Context

Transnational economic, social, and political interdependencies have increased dramatically in recent years. Lobbying strategies and practices are evolving lockstep with the global socio-political landscape.²¹ General constructions of corruption and lobbying are helpful to identify the boundaries of academic and legal inquiry, but do not easily accommodate comparative analysis. This is due in part to discourse variability across social, political, and economic lines. Unique legal approaches to corruption and lobbying regulation reflect broader social and institutional differences across jurisdictions. Divergent domestic lobbying practices have resulted in different rules for the same actors in different jurisdictions and inconsistent compliance at the international level.²² It is therefore important that policy-makers develop specific anti-corruption policies. Further, the literature must acknowledge that legal (and extra-judicial) practices are the result of, and operate within, broader social structures.

¹⁷ Claude Turmes & Fred Thoma, “An Act for Parliament” in Helen Burley et al, eds, *Bursting the Brussels Bubble: The Battle to Expose Corporate Lobbying at the Heart of the EU* (Brussels: ALTER-EU, 2010) 162, online (pdf): <<https://www.alter-eu.org/sites/default/files/documents/bursting-the-brussels-bubble.pdf>>.

¹⁸ OECD 2021, *supra* note 7 at 22.

¹⁹ Categorizing lobbyists and demarcating regulatory boundaries is a challenging task for policy-makers. For example, the meta-category of think-tanks includes state-funded policy research organizations, politically affiliated bodies and largely independent academic associations and institutions.

²⁰ For example, think-tanks and law firms have rejected calls to join the lobbyist registries in the EU. These organizations provide alternatives for individuals who want to engage politicians outside of the regulatory regime.

²¹ OECD 2014, *supra* note 1.

²² *Ibid.*

While regional variation persists, globalization has somewhat standardized expectations of conduct and corruption discourse, largely through the proliferation of global corporations. In addition, as discussed in Chapter 1, the wide application of international instruments, such as UNCAC, suggests that there is an agreed “core of corruption” generally understood as undesirable and inconsistent with principles of good governance and global economic relations. Still, there is no universal definition of corruption, and the terminology common to global economic discourse and comparative study may advance ideological and regional preferences. For example, conceptions of corruption in the context of development rhetoric have been criticized as a “disguise [for] political agendas, or … the interests of the powerful.”²³ To this extent, corruption is a normative concept, influenced by regional moral, ethical, and institutional traditions and practices. Lawmakers must recognize corruption discourse as being used and developed “by particular actors [representing] particular sets of practices,”²⁴ and that anti-corruption policies should be harmonious with both domestic needs and global expectations.

Historically, corruption and lobbying research has focused on single-country case studies. As discussed in Chapter 1, comparative literature on corruption is scarce due to the secrecy of corruption, the lack of a universal definition, and cultural differences across countries. While cultural differences may challenge comparative study and the development of objective definitions, domestic policy must reflect the unique “diversity, capacities and resources of lobbying entities.”²⁵

3. LOBBYING AND DEMOCRACY

Lobbying is a centuries-old component of governmental decision-making.²⁶ As will be argued in Section 3.1, lobbying is generally considered an acceptable and necessary practice in modern democracy, and lobbying regulation is widely recognized as a legitimate act of political participation.²⁷ When undertaken appropriately, lobbying can “strengthen accountability in government and the participation of citizens in policymaking”²⁸ by providing a valuable source of dialogue between citizens and public officials.²⁹ Lobbyists operate as guides, intermediaries, and interlocutors, providing services to interest groups by navigating the complexities of modern democratic decision-making. Not only do lobbyists provide an important conduit for citizens to communicate with government, they

²³ Elizabeth Harrison, “Corruption” (2007) 17:4/5 Dev Pract 672.

²⁴ *Ibid.*

²⁵ OECD 2014, *supra* note 1 at 38.

²⁶ OECD, Public Governance and Territorial Development Directorate, Public Governance Committee, *Lobbying: Key Policy Issues*, GOV/PGC/ETH(2006)6 (Paris: OECD, 2006) [OECD 2006], online: (pdf) <[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH\(2006\)6&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH(2006)6&docLanguage=En)>.

²⁷ OECD 2021, *supra* note 7 at 16.

²⁸ OECD 2012, *supra* note 13 at 14.

²⁹ Will Dinan & Erik Wesselius, “Brussels: A Lobbying Paradise” in Helen Burley et al, *supra* note 17, 23.

also promulgate valuable and often specialized information that advances informed decision-making and sound policy development.

Legitimate lobbying activities therefore improve the quality of public decision-making and promote the democratic right to petition government.³⁰ Unfettered access to public officials, however, presents opportunities for private interests to exercise undue influence. Influence peddling perpetuates corruption and is a major threat to democratic governance founded on equality and popular representation.³¹ When the procurement of government favour becomes the province of vested and well-funded interests, lobbying can significantly damage public trust in the integrity of democratic institutions. Without effective regulation, the influence industry can become an “exclusive and elite pursuit.”³² Without adequate oversight and enforcement, regulation is ineffective.

3.1 Democracy as an Indicator of Transparency

Corruption, in the sense of the misuse of public office for private gain, is inherently inconsistent with basic principles of democracy: openness and equality.³³ Democratic processes empower citizens to detect and punish corruption.³⁴ For lobbying to maintain legitimacy and align with democratic principles, it must operate subject to disclosure and transparency requirements. Legitimate lobbying practices democratize the flow of information between voters and public officials, and mobilize citizen engagement in the legislative process. Dialogue is an essential component of effective democratic governance, and lobbying is an “important element of the democratic discussion and decision-making process.”³⁵

While theoretically consistent, the relationship between ethical lobbying practices and democracy is imperfect. As expected, according to Transparency International’s Corruption Perceptions Index (CPI), the least corrupt nations are, almost without exception, democratic.³⁶ However, corruption persists despite democratization, economic liberalization, and the adoption of transnational laws and domestic enforcement designed to eliminate it.³⁷ Corruption levels in democratic states are moderated by the state’s degree

³⁰ OECD 2014, *supra* note 1 at 40.

³¹ OECD 2012, *supra* note 13 at 11.

³² Craig Holman, “Obama & K Street – Lobbying Reform in the US” in Helen Burley et al, *supra* note 17, 125.

³³ Porta Della & A Pizzorno, “The Business Politicians: Reflections from a Study of Political Corruption” in M Levi & D Nelken, eds, *The Corruption of Politics and the Politics of Corruption* (Oxford: Blackwell, 1996).

³⁴ Zinnbauer, *supra* note 15 at 32.

³⁵ *Ibid.*

³⁶ “Corruption Perceptions Index: 2020” (last visited 26 September 2021) [2020 CPI], online: TI <<https://www.transparency.org/en/cpi/2020/index/nzl>>. See Chapter 1, Section 4.1 for further discussion on TI’s CPI.

³⁷ Wayne Sandholtz & William Koetzle, “Accounting for Corruption: Economic Structure, Democracy and Trade” (2000) 44:1 Intl Studies Q 31 at 32.

of poverty, national culture, and perceptions towards corruption,³⁸ and strength of key social institutions.³⁹

Various studies indicate an association between economic underdevelopment and corruption regardless of whether a state is democratic or non-democratic; however, the types of corruption may vary depending on governance types. Countries with more economic opportunities than political ones, such as China, experience different types of corruption than countries with more political opportunities than economic ones, like India. These disparities engender different relationships between citizens and government. Economic problems encourage patronage. Patronage in turn encourages personal relationships with individual decision-makers, rather than broad affiliations with political parties.⁴⁰ Where there is restricted individual economic freedom, economic success depends less on market forces and more on the ability to influence decision-makers.⁴¹ In contrast, systems that feature limited political access tend to centralize transactions among small groups of local government actors. These officials are typically appointed bureaucrats who do not rely on personal followings.

Strong social ties between corporations and government increase the likelihood of corruption.⁴² Robust disclosure and transparency rules are often resisted by political leaders out of self-interest.⁴³ Further, enforcement faces significant challenges because these political-private relations often operate behind closed doors. Increased transparency through disclosure would subject these interactions to scrutiny and reduce opportunities for corruption.

Transparency International has documented a number of immediate measures that can be adopted to reduce the risk of interest groups exerting undue influence on public policy development:

- regulations on lobbying;
- regulations on the movement of individuals between the administration and the private sector (revolving door);
- regulations on conflict of interest;
- regulations on political finance;
- regulation on private sector competition;
- rules on transparent decision-making and access to information; and

³⁸ Raymond Fisman, "Estimating the Value of Political Connections" (2000) 91:4 Am Econ Rev 1095.

³⁹ Alvaro Curervo-Cazurra, "The Effectiveness of Laws against Bribery Abroad" (2008) 39:4 J Intl Bus Stud 634.

⁴⁰ Yan Sun & Michael Johnston, "Does Democracy Check Corruption? Insights from China and India" (2009) 42:1 Comp Politics 1.

⁴¹ Sandholtz & Koetze, *supra* note 37.

⁴² Jamie D Collins, Klaus Uhlenbruck & Peter Rodriguez, "Why Firms Engage in Corruption: A Top Management Perspective" (2009) 87:1 J Bus Ethics 89.

⁴³ Holman, *supra* note 32.

- civil society and media oversight.⁴⁴

4. REGULATORY SCHEMES

4.1 Lobbying and the Broader Regulatory Framework

Most regulatory regimes distinguish unscrupulous lobbying activity from criminal conduct. Distinct statutory instruments address lobbying as opposed to criminal conduct, such as bribery, government fraud, and extortion. In addition to criminal law, other areas of law and practice work alongside lobbying rules to create a broad regulatory regime aimed at promoting government integrity. These include election campaign and party funding rules (see Chapter 14), government procurement rules (see Chapter 12), conflict of interest rules (see Chapter 10), whistleblower protection (see Chapter 13), and access to government information infrastructure.

4.2 Principles

Public authorities have the primary responsibility to establish standards of conduct for public officials who may be targeted by lobbying and to enact legislation that regulates the lobbying industry.⁴⁵ Authorities must not only ensure that they act in accordance with these obligations, but also that the lobbyists they engage with operate ethically and legally and adhere to relevant principles, rules, and procedures. This dual responsibility reflects the role of public officials in promoting impartiality, integrity, and transparency in government.

Robust regulation and ethical standards are necessary to maintain integrity in the decision-making process and, consequently, public confidence in government institutions. If lobbyist registration and disclosure are not mandatory, transparency is compromised and lobbying activities risk undermining public trust in government. As discussed, undisclosed relationships with and disproportionate access to public officials can lead to corruption.⁴⁶ Lobbying commands the mobilization of significant private resources; the application of these resources may enable unfettered access to public officials that can lead to powerful private interests gaining influence at the expense of the public interest.⁴⁷

Corporate lobbies have significantly greater resources at their disposal compared to public interest groups. Without effective regulation, financial disparity provides well-funded lobby groups privileged access to decision-makers. Deep pockets and preferential access allow corporate lobbies to engage in comprehensive and prolonged lobbying efforts that are

⁴⁴ Francesco Bosso, Maíra Martini & Iñaki Albisu Ardigó, *Political Corruption Topic Guide*, (Berlin: TI, 2014) at 26–27, online: <<https://knowledgehub.transparency.org/guide/topic-guide-on-undue-influence/5282>>.

⁴⁵ OECD Lobbyists 2009, *supra* note 9.

⁴⁶ Hellman, Jones & Kaufmann, *supra* note 4.

⁴⁷ “OECD Forum on Transparency and Integrity in Lobbying”, (27–28 June 2013) [OECD 2013], online: *OECD* <<http://www.oecd.org/gov/ethics/lobbying-forum.htm>>.

difficult for public interest groups to match.⁴⁸ These inequalities undermine democratic decision-making because those with greater resources become more capable of influencing policy.⁴⁹ In the interest of generating confidence in government, lobbying rules, policies and practices should level the playing field by promoting integrity, fairness in public policy-making, openness and inclusiveness, reliability, and responsiveness.⁵⁰ Effective regulation will leverage citizen engagement,⁵¹ access to information and principles of open government.⁵²

States face a number of choices when developing standards and procedures for lobbying, such as:

- Definition of lobbyist;
- Definition of lobbying;
- Regulatory scheme (voluntary/mandatory/self-regulated); and
- Enforcement mechanisms.

There is no single appropriate approach to regulation. A review of experiences in North America and Europe suggests that effective regulation results from an incremental process of political learning and reflects domestic cultural, political, and constitutional norms.⁵³ Policies from one jurisdiction cannot be uncritically transplanted to another. Nevertheless, while approaches to regulation may vary, effective policies contain many common elements.

In 2010, the OECD released the *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*.⁵⁴ These principles are intended to guide executive and legislative decision-makers in the development of regulatory and policy options that meet public expectations for transparency and integrity in lobbying. However, in 2021, the OECD found these principles to be relevant, yet inadequate, due to their focus on lobbying registries,

⁴⁸ Anne Therese Gullberg, "Strategy Counts, Resources Decide: Lobbying European Union Climate Policy" in Helen Burley et al, *supra* note 17, 29.

⁴⁹ Dinan & Wesselius, *supra* note 29.

⁵⁰ OECD 2014, *supra* note 1.

⁵¹ Lobbying is one of many tools that can promote inclusive decision-making. For an example of an innovative project, see: Government of Canada "Open Government Initiative" (last modified 19 February 2021), online: *Open Government Initiative* <<https://open.canada.ca/en>>; "Consulting with Canadians" (last modified 14 June 2021), online: *Government of Canada* <<https://www.canada.ca/en/government/system/consultations/consultingcanadians.html>>; Treasury Board of Canada, "Government-Wide Forward Regulatory Plans" (last modified 17 August 2021), online: *Government of Canada* <<http://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/gwfrp-ppreg-eng.asp>>.

⁵² OECD, "Open government" in OECD, *Modernising Government: The Way Forward*, (Paris: OECD, 2009) at 29 [OECD Modernising Government 2009], online: <https://read.oecd-ilibrary.org/governance/modernising-government_9789264010505-en#page1>.

⁵³ *Ibid.*

⁵⁴ OECD Council, *Draft Recommendations of the Council on Principles for Transparency and Integrity in Lobbying*, (OECD, 2010) C(2010)16, online (pdf): <[https://one.oecd.org/document/C\(2010\)16/en/pdf](https://one.oecd.org/document/C(2010)16/en/pdf)>; OECD Council, 1213th Sess, C/M(2010)3/PROV (2010) at s 37(i), online (pdf): <[https://one.oecd.org/document/C/M\(2010\)3/PROV/en/pdf](https://one.oecd.org/document/C/M(2010)3/PROV/en/pdf)>.

rather than the diverse practices and mitigation strategies available.⁵⁵ The OECD has ordered a review of these principles and recommendations, which will be completed in 2023.⁵⁶

The OECD also provides five elements that lobbying legislation or regulation should address to enhance good governance, transparency, and accountability:

1. Standards and rules that adequately address public concerns and conform to the socio-political, legal and administrative context;
2. Scope of legislation or regulation that suitably defines the actors and activities covered;
3. Standards and procedures for disclosing information on key aspects of lobbying such as its intent, beneficiaries and targets;
4. Enforceable standards of conduct for fostering a culture of integrity in lobbying; and
5. Enhancing effective regulation by putting in place a coherent spectrum of strategies and practices for securing compliance.⁵⁷

These elements do not suggest a “one size fits all” approach to regulation. Instead, they provide the fundamental building blocks from which legislators can develop meaningful policy tailored to political, legal, and cultural circumstances. The following section elaborates on these elements.

4.2.1 Standards Consistent with Socio-Political, Legal, and Administrative Context

Legislation and policy must consider constitutional traditions and rights, including the expectations of civil society regarding access to government and participation in the decision-making process. Across many countries, social expectations and codified rights vary widely, affecting how citizens petition government, seek interest representation, and develop social relationships with government.⁵⁸ Effective standards reflect a country’s democratic and constitutional traditions and interact with wider legal and administrative frameworks (including codes of conduct for public officials, rules on election campaign financing, provisions providing protection for whistleblowers, access to information laws, and conflict of interest rules).⁵⁹ The regulatory framework and its constituent parts should foster integrity, transparency, accountability, and accessibility in government.⁶⁰

⁵⁵ OECD, *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*, OECD/LEGAL/0379, (OECD, 2021) at 4, online (pdf): <<https://legalinstruments.oecd.org/public/doc/256/256.en.pdf>>.

⁵⁶ *Ibid.*

⁵⁷ OECD Lobbyists 2009, *supra* note 9 at 3–4.

⁵⁸ OECD Modernising Government 2009, *supra* note 52.

⁵⁹ *Ibid.* For more information on lobbying and conflict of interest, see: Margaret Malone, *Regulation of Lobbyists in Developed Countries: Current Rules and Practices* (Dublin: Institute of Public Administration, 2004) at 3, online (pdf): <<https://www.lobbyists.ru/eu1/1.pdf>>.

⁶⁰ OECD Lobbyists 2009, *supra* note 9.

Public concern surrounding integrity in the lobbying industry may arise for various reasons. Understanding public concern allows legislators to appropriately define the parameters of policy development and respond meaningfully to the impetus for regulation. The OECD has identified three primary social concerns: (1) accessibility to decision-makers (2) integrity of government decision-making, and (3) conduct in lobbying.⁶¹ Each of these concerns demands unique policy solutions. Considering the root causes of public concern will help identify the most appropriate regulatory response and measures for achieving compliance.

4.2.2 Scope of Policy on Lobbying

The efficacy of lobbying regulation depends largely on how lobbying is defined and who is considered a lobbyist. Policy should consider the different types of entities and individuals that may engage public officials and the theatres where lobbying activities may occur. Regulation should reflect the complexities of modern legislative decision-making and the need to promote equity among all stakeholders. Regulations should primarily target individuals or organizations who receive remuneration for lobbying activities.⁶² However, varying levels of public concern may demand a more encapsulating definition. According to the OECD, “where transparency and integrity are the principle goals of legislation, effectiveness is best achieved if definitions are broad and inclusive”⁶³ and capture formal and informal lobbying in traditional and modern theatres of lobby activity. Inclusive policies promote equal access to decision-makers and address public concern over integrity in the lobbying industry.

Policy should balance the public’s interest in transparency and integrity with the government’s interest in soliciting outside expertise. Broad definitions and rigorous disclosure requirements risk deterring informed members of the public from approaching government.⁶⁴ Regulations overburdened by excessive disclosure and reporting requirements will encourage non-compliance and consequently fail to meet their objectives.⁶⁵ Lobbyists may be hesitant to meet registration requirements out of a concern that disclosure will provide competitors with proprietary intelligence and indications of their work.⁶⁶ As a result, lobbyists may be encouraged to obscure disclosures or avoid compliance altogether. Lawmakers must balance the risks of mandating specific information disclosures with the challenges of accepting only summary descriptions of lobbyists’ objectives.

Legislation that provides broad definitions of lobbyists and lobbying may include exclusionary provisions that exempt specific actors or activities from disclosure

⁶¹ *Ibid* at 20.

⁶² OECD 2014, *supra* note 1.

⁶³ OECD Lobbyists 2009, *supra* note 9.

⁶⁴ Justin Greenwood, “Regulation of Interest Representation in the European Union (EU)” in Clive S Thomas, *Research Guide to US and International Interest Groups* (Westport, CT: Praeger Publishers, 2004) at 379.

⁶⁵ John Warhurst, “Locating the Target: Regulating Lobbying in Australia” (1998) 51:4 Parliamentary Aff 538 at 538.

⁶⁶ Greenwood, *supra* note 64 at 379.

requirements.⁶⁷ For example, legislation may exempt representatives of other governments acting in their official capacity or communications that are undertaken within the public realm. Compliance nonetheless relies on definitions and exclusions that are unambiguous and clearly understood by lobbyists and public officials.

4.2.3 Standards and Procedures for Information Collection and Disclosure

Standards for transparency, accountability, and integrity in lobbying are the foundation for the appropriate conduct of public officials and lobbyists. Transparency “enable[s] the public to know who is lobbying for what, in order to allow it to take suitable precautions to protect its interest.”⁶⁸ Enhancing transparency is the primary objective of lobbying regulation and effective disclosure is the surest method to promote accountability. Regulations and practices that mandate disclosure of information related to communications between public officials and lobbyists empower citizens to exercise their right of public scrutiny.⁶⁹ Because transparency enhances the perceived and actual integrity of government, policy must not only target lobbyists, but also public officials who make decisions and may be susceptible to bribery and other forms of corruption.⁷⁰

Disclosure rules determine the type of information that must be shared, the nature of registration and reporting, and the manner in which information is communicated to the public. Sparse information will render regulations meaningless, while excessive data may bury meaningful information and encourage non-compliance.⁷¹ At a minimum, lobbyists should identify their clients, beneficiaries, and objectives. Requirements must be harmonized with existing norms and laws related to confidential and privileged information; legitimate expectations of openness must be balanced against privacy rights and economic interests in protecting proprietary information. Regulations that avoid excessive demands and address privacy interests will facilitate disclosure of pertinent but parsimonious information.⁷² Disclosure requirements should solicit lobbyists to identify the intent of their lobbying activity, their employer and beneficiaries, and the individuals, offices, and institutions targeted by their lobbying.⁷³ It is important that disclosure is timely and that updates are made periodically. Information should be readily available and technology should be utilized to encourage compliance and facilitate public access.

⁶⁷ A P Pross, “The Rise of the Lobbying Issue in Canada” in Grant Jordon, ed, *Commercial Lobbyists: Politics for Profit in Britain* (Aberdeen: University of Aberdeen Press, 1991).

⁶⁸ Frederick M Hermann, “Lobbying in New Jersey, 2006” (Paper delivered at the Nineteenth Annual Meeting of the Northeastern Regional Conference on Lobbying in Philadelphia, Pennsylvania, August 2006) (Trenton, NJ: New Jersey Election Law Enforcement Commission, 2006), online (pdf): <<https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/24801/I7962006.pdf?sequence=1&isAllowed=y>>.

⁶⁹ OECD Lobbyists 2009, *supra* note 9.

⁷⁰ Grant Jordan, “Towards Regulation in the UK: From ‘General Good Sense’ to ‘Formalised Rules’” (1998) 51:4 Parliamentary Aff 524.

⁷¹ OECD Lobbyists 2009, *supra* note 9.

⁷² A possible solution to managing information overload is for regulations to define information requirements according to the type of lobbyist. This option may increase legislative complexity but ultimately improve the quality and accessibility of data.

⁷³ OECD Lobbyists 2009, *supra* note 9.

Electronic filing should improve the convenience, flexibility, accessibility, and comparability of lobbyist data.

4.2.4 Standards of Conduct Fostering a Culture of Integrity

Lobbying requires the participation of both government and interest groups. As “it takes two to lobby” lobbyists and public officials share the responsibility of maintaining the integrity of regulatory schemes. Self-regulation through professional codes may be sufficient to inculcate a culture of professional ethics in the lobbying industry; however, the OECD notes that while voluntary codes may be capable of providing clear guidance, their application is “not stringent enough to change the behaviour of those who abuse legitimate means of influence.”⁷⁴ Codes of conduct are intended to promote principles of behaviour harmonious with those of good governance—honesty, transparency, and professionalism. Without sufficient measures and resources to enforce rules and apply sanctions, self-regulation may fall short of meeting its objectives. Social concern surrounding the conduct of lobbyists may require government intervention through the codification and enforcement of professional standards.

There are three types of codes of conduct that may affect lobbyist operations: professional codes or self-regulation; employment and post-employment codes for current and former public office holders; and statutory or institutional codes. Together, these instruments help provide the social license and public support necessary for lobbyists to operate.

Professional codes are usually created by lobbyists themselves. They promote ethical standards from within, and are often developed and implemented on an ad hoc basis. Because enforcement is limited, the OECD concluded in 2012 that professional codes are largely ineffective.⁷⁵ Employment and post-employment codes prescribe the conduct of public officials in their interactions with lobbyists. They often apply during and following an official’s term in public office.

These rules and procedures reflect broader democratic principles and promote public confidence in government decision-making. Public officials should ensure their engagement with lobbyists avoids preferential treatment, conforms to legal requirements of information disclosure, enhances transparency, and avoids conflicts of interest. Meeting these obligations may require “revolving door” provisions for public officials leaving office. Former public officials equipped with knowledge and access to current decision-makers are a valuable commodity for lobbyists. They may maintain favour with former staff and therefore retain the capacity to informally influence decision-making. Revolving door provisions mandate “cooling-off” periods during which former public officials must not lobby their former organizations. “Reverse revolving door” provisions prevent former lobbyists from influencing policy reform from the inside. Together, these restrictions minimize the transfer of confidential information, ensure lobbyists and government operate at arm’s length and maintain public trust in government.

⁷⁴ OECD 2021, *supra* note 7 at 86.

⁷⁵ OECD 2012, *supra* note 13 at 80. In Europe, however, some public affairs organisations have introduced reprimands and expulsions into the voluntary codes.

4.2.5 Mechanisms Encouraging Compliance

It is widely recognized that compliance is greatest where regulators utilize a gamut of enforcement strategies.⁷⁶ Soft measures and incentive-based tools, including communication outreach, education programs, and access to government buildings, should be used with more coercive sanctions to promote compliance. Communication strategies can be used to raise awareness of expected standards and mobilize conformity among key actors. Education programs, primarily targeting lobbyists and public officials, increase comprehension of rules and policies. Periodic courses complement existing professional curriculums, such as ethics training. These undertakings support formal reporting requirements and encourage compliance. Incentives can be used strategically to encourage compliance. For example, registered lobbyists may be granted access to automatic alert systems for consultation and release of government documents. Traditional sanctions include administrative fines and the removal of lobbyists from registries. Regulators may also develop innovative strategies based on individual experiences and compliance histories, such as public reporting of improprieties by lobbyists.

To maximize their effect, sanctions must be proportionate and timely. Regulatory authorities must operate with sufficient independence and resources to ensure meaningful, objective enforcement. This requires that regulators be insulated from political pressure and delegated sufficient discretion to initiate investigations and to allocate the nature and extent of the resources dedicated to each investigation.

5. COMPARATIVE SUMMARY

For more than a century, the US was the only jurisdiction to formally regulate lobbyists.⁷⁷ Before the early 2000s, only three other countries had implemented lobbying regulation: Australia, Canada, and Germany.⁷⁸ Globalization has since led to the adoption of lobbying policy across cultures and continents. For example, regulatory regimes now exist in the following OECD countries: Poland, Hungary, Israel, France, Mexico, Slovenia, Austria, Italy, the Netherlands, Chile, the UK, and the EU.⁷⁹ Addressing the relationship between civil society and government is “increasingly regarded as a desirable and necessary development in the interests of good government.”⁸⁰

Global economic and political relationships have transferred methods of lobbying between countries and regions; indeed, many lobbying firms and public interest groups are themselves multinational organizations.⁸¹ However, lobbying standards and rules cannot be

⁷⁶ OECD 2012, *supra* note 13.

⁷⁷ OECD Lobbyists 2009, *supra* note 9. However, provisions against bribery, fraud, and other forms of corruption and influence peddling were more common.

⁷⁸ Stephen F Clarke, “Summary” in *Regulation of Lobbying in Foreign Countries* (Washington, DC: The Law Library of Congress, 1991) 1.

⁷⁹ OECD 2014, *supra* note 1 at 17–18.

⁸⁰ Malone, *supra* note 59 at 3.

⁸¹ Interest groups and stakeholders affected by legislative and policy change transcend international borders. This global element has taken on particular significance with the rise of multinational

borrowed from one jurisdiction and adopted in another without careful consideration. Effective policy must reflect the domestic socio-political, legal, and administrative environment. States possess varying degrees of regulatory competency and experience, making “political-learning”⁸² an essential requirement for the development of effective regulation.⁸³ While globalization has normalized lobbying techniques, culturally specific lobbying strategies continue to reflect longstanding, localized social relationships between citizens and government.

Domestic approaches to lobbying regulation reflect regional value systems, political structures, and legislative objectives. For example, constitutional documents prescribe some limits to lobby regulation in Canada and the US. In order to maintain confidence in government, lawmakers must preserve traditional modes of representation and access to public officials.⁸⁴ This is increasingly difficult when international trade and governance structures demand globally normalized standards. Nonetheless, effective regulation will be tailored to accommodate the political culture, governmental system, social partnerships, and norms of the society in which it operates.⁸⁵

Unlike the experience of the European Union, corporate lobbies in the US, the UK, and Canada rarely participate directly in policy-making and remain on the periphery of the legislative process. In the EU, lobbyists commonly hold positions on internal working groups and legislative consultative bodies.⁸⁶ It is not uncommon for industry to participate in expert groups directly involved in policy development.⁸⁷

The political and economic systems in the US, and to a lesser extent, Canada and the UK, facilitate easy entry into the lobbying industry; motivated and well-resourced individuals should find few barriers. Since it is reasonable for individuals to pay third parties to promote their interests, lobbying undertakings often involve an element of compensation. The

corporations, some of which generate annual revenues that dwarf the GDP of entire countries. Trade policy is developed with the economic best interests of the home country in mind. In the EU, corporate lobbies were integral in the development and implementation of the Global Europe trade strategy. This trade agenda intends to create open markets in developing countries and has the potential to significantly alter the economies of non-EU nations. Subsequent trade deals with South Africa have resulted in a nearly 50 percent increase in European imports, undercutting local producers, triggering unemployment and exacerbating South Africa’s trade deficit. When the balance of power hangs heavily in favour of corporate lobbies, policy development may succumb to business interests at the expense of domestic and global public interests. For more information, see: European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — Global Europe: Competing in the World — A Contribution to the EU’s Growth and Jobs Strategy*, COM(2006) 567 (2006).

⁸² In this context, political learning refers to the process whereby lawmakers draft legislation in response to acute incidents, such as corruption scandals. For more information, see Section 4, where it is suggested that lobbying policy should be forward-thinking rather than reactionary.

⁸³ OECD Lobbyists 2009, *supra* note 9.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Clive S Thomas, ed, *Research Guide to US and International Interest Groups* (Westport, CT: Praeger Publishers, 2004) at 379.

⁸⁷ OECD Lobbyists 2009, *supra* note 9.

flexible and capitalist-driven North American systems necessitate regulation and transparency. The American legislative process endows individual lawmakers with significant influence over legislation. This creates an environment in which lobbyists often target individual public officials, rather than political parties or levels of government. This is particularly the case where the executive branch is the primary source of legislative change, as it is in Canada, the UK and the EU.⁸⁸ On the other hand, in many European countries, corporatist systems have historically played a significant role in policy development. Lobbying evolved alongside pre-existing relationships between industry and government, and corporate interests therefore continue to enjoy a high level of integration within European policy-making processes.⁸⁹ As such, the impetus for lobbyist registration is less clear for corporate groups, because corporate participation is historically a common and accepted practice.⁹⁰

6. REGULATORY FRAMEWORK AND CONTEXT

In Canada and the US, lobbying regulation also exists in varying degrees at the provincial or state and municipal levels.⁹¹ In the UK, rules and requirements for lobbyists and public officials vary between the House of Commons, House of Lords and devolved Assemblies and Parliaments in Wales, Northern Ireland, and Scotland. It should be noted that while lobbying schemes below the federal government level are an important source of regulation for the industry, they are outside the scope of this chapter.

6.1 US

6.1.1 Governance Structure

The US has a republican system of government. At the national level, individual state governments send representatives to the legislative branch (Congress) composed of the House of Representatives and Senate. The President leads the executive branch of the federal government. Power is broadly diffused in the US, and there are many decision-making intervals that present the opportunity for lobbyists to engage public officials.

6.1.2 Regulatory Framework

Lobbying in the US is protected by the first amendment to the Constitution, which states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

⁸⁸ OECD Lobbyists 2009, *supra* note 9.

⁸⁹ Karsten Ronit & Volker Schneider, “The Strange Case of Regulating Lobbying in Germany” (1998) 51:4 Parliamentary Aff 559.

⁹⁰ Clarke, *supra* note 78.

⁹¹ At the provincial level, Alberta, British Columbia, Saskatchewan, New Brunswick, Newfoundland and Labrador, Nova Scotia, Manitoba, Ontario, and Quebec have lobbying registration regimes. At the municipal level, Ottawa and Toronto have implemented lobbying registries.

peaceably to assemble, and to petition the Government for a redress of grievances.”⁹² The *Lobbying Disclosure Act* (*LDA*) took effect in 1996 and constitutes the legal framework governing federal lobbying registration and reporting. In 2007, the *Honest Leadership and Open Government Act* (*HLOGA*)⁹³ was enacted and amended the *LDA*. The *HLOGA* modified the thresholds and definitions of lobbying activities, changed the frequency of reporting for registered lobbyists and lobbying firms, and added additional disclosure requirements.⁹⁴ In 2009, a Presidential Executive Order further enhanced lobbying regulation.⁹⁵ Filings are made jointly to the Secretary of the Senate and Clerk of the House of Representatives. These officials have the authority to provide guidance and assistance on the registration and reporting requirements of the *LDA*, and, where necessary, verify and inquire to ensure the accuracy, completeness, and timeliness of registrations and reports.⁹⁶

6.1.3 Summary

In 2019, a record \$3.51 billion was spent on federal lobbying in the US. In 2020, that record was surpassed by an annual turnover of over \$3.53 billion.⁹⁷ At that time, there were over 11,500 registered lobbyists in Washington, DC, representing the highest density of lobbyists in the world.⁹⁸ The US scored 67 on the 2020 Transparency International CPI and was ranked 25th out of 180 countries surveyed in regard to perceived corruption.⁹⁹ It seems likely that the perceptions of higher levels of lobbying will result in higher perceptions of corruption.

6.2 UK

6.2.1 Governance Structure

The political system in the UK is known as the “Westminster model.” The UK Parliament is comprised of a lower chamber, the House of Commons, and an upper chamber, the House of Lords. The House of Commons is made up of 650 elected Members of Parliament (MPs). The party with the most MPs forms the Government and its leader becomes the Prime Minister. The House of Lords is made up of unelected representatives, who can be

⁹² US Const amend 1, § 1.

⁹³ *Honest Leadership and Open Government Act of 2007*, Pub L No 110-81, 121 Stat 735 (2007) [*Honest Leadership and Open Government Act*], online (pdf):

<<https://transition.fec.gov/law/feca/s1legislation.pdf>>.

⁹⁴ The Congressional Research Service found the impact of the *HLOGA* on the registration, termination, and disclosure of lobbyists and lobbying firms is mixed. For more information, see: US, Congress Research Service, *Lobbying Registration and Disclosure: The Impact of the Honest Leadership and Open Government Act of 2007* (CRS Report R40245) (Washington, DC: Congressional Research Service, 2011), online (pdf): <<https://www.fas.org/sgp/crs/misc/R40245.pdf>>.

⁹⁵ US, Federal Register, *Ethics Commitments by Executive Branch Personnel* (FR Doc E9-1719) (Washington, DC: Federal Register, 2009), online (pdf): <<https://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1719.pdf>>.

⁹⁶ *Lobbying Disclosure Act*, Pub L No 104-65, 109 Stat 691 (1995), online: <<http://lobbyingdisclosure.house.gov/lda.html>>.

⁹⁷ “Lobbying Data Summary” (last visited 4 October 2021), online: *Open Secrets* <<https://www.opensecrets.org/federal-lobbying/summary>>.

⁹⁸ Mulcahy, *supra* note 15.

⁹⁹ 2020 CPI, *supra* note 36.

hereditary peers, bishops, experts or those appointed by the Queen. Cabinet Ministers are appointed from the members of both chambers to head various departments. Bills can be introduced in either chamber by Ministers or MPs and must be approved by both chambers, except financial bills, which need only the approval of the House of Commons. In addition to the House of Lords and House of Commons, in 1997–98, the UK devolved powers to three nations, creating Legislative Assemblies in Wales and Northern Ireland, and a Parliament in Scotland.

6.2.2 Regulatory Framework

The regulatory framework in the UK has undergone many changes. Prior to 2014, the UK depended solely on self-regulation by lobbying professionals. After 2014, three professional associations emerged: the Chartered Institute of Public Relations (CIPR), the Public Relations Consultants Association (PRCA), and the Association of Professional Political Consultants (APPC). However, in 2018, the APPC merged with PRCA. Members of the CIPR are individuals, while members of PRCA are organizations. Both associations require members to adhere to a code of conduct and run registers for UK lobbyists.¹⁰⁰

In a 2009 inquiry, the Public Administration Select Committee deemed the self-regulatory regime inadequate.¹⁰¹ In 2010, the government began proactively publishing information on Ministers' meetings with lobbyists, but these disclosures do not include whom lobbyists represent. In order to fill this gap and supplement the self-regulatory regime, the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (TLA) was enacted in January 2014.¹⁰² The TLA requires consultant lobbyists to disclose the names of clients through the Register of Consultant Lobbyists, which was launched in March 2015.¹⁰³ There were 143 lobbyist registrations under the TLA in March 2020, compared to 140 the previous year.¹⁰⁴ The Registrar is independent of government and the lobbying industry. The goal of the TLA is to balance openness with the freedom of lobbyists to represent others and the encouragement of public engagement with policy-making.¹⁰⁵

In 2016, the *Lobbying (Transparency) Bill*, a private members' bill, was introduced in the House of Lords.¹⁰⁶ Although it was never passed into law, the proposed legislation would have repealed and replaced the current lobbyist regime under the TLA.¹⁰⁷ The bill proposed to broaden the scope of the register to include more in-house lobbyists and expand

¹⁰⁰ Elizabeth David-Barrett, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (London: Transparency International UK [TI UK], 2015) at 28, online: <<http://www.transparency.org.uk/publications/liftthelid/>>.

¹⁰¹ OECD 2014, *supra* note 1 at 217.

¹⁰² *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c 4 [TLA], s 2(3), online: <<https://www.legislation.gov.uk/ukpga/2014/4/contents/enacted>>.

¹⁰³ "Registration" (last visited 29 September 2021), online: *Office of the Registrar of Consultant Lobbyists* <https://registerofconsultantlobbyists.force.com/CLR_Search>.

¹⁰⁴ Office of the Registrar of Consultant Lobbyists, "Statement of Accounts 2019-20" at 6, online (pdf): *Office of the Registrar of Consultant Lobbyists* <<https://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2020/07/20200720-ORCL-2019-20-Annual-Report-Accounts-laid.pdf>>.

¹⁰⁵ OECD 2014, *supra* note 1 at 217.

¹⁰⁶ *Lobbying (Transparency) Bill* [HL] (UK), 2016–2017 sess, Bill 75.

¹⁰⁷ *Ibid*, s 24.

disclosure requirements for lobbyists.¹⁰⁸ The bill also proposed that the Registrar issue a mandatory code of conduct to replace the voluntary codes of conduct that exist in the UK.¹⁰⁹

The UK also regulates the lobbying activities of Members of Parliament. Although a tradition of representation of special interests by MPs exists in the UK and many MPs hold paid consultancies related to their roles as parliamentarians, scandals involving lobbying led to debates over consultancies and eventually to regulation.¹¹⁰ The Resolution of July 15, 1947, as amended in 1995 and 2002, provides that:

No Member of the House shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received, is receiving, or expects to receive—

- (i) advocate or initiate any cause or matter on behalf or any outside body or individual, or
- (ii) urge any other Member of either House of Parliament, including Ministers, to do so,

by means of any speech, Question, Motion, introduction of a Bill or amendment to a Motion or Bill, or any approach, whether oral or in writing, to Ministers or servants of the Crown.

The code of conduct for MPs also prohibits paid advocacy in any House proceedings and lays out principles to follow including integrity, honesty, and openness.¹¹¹ The House of Lords has a register for “peers consultancies and similar financial interests in lobbying for clients”¹¹² and peers are not allowed to vote or speak on behalf of consultancy clients if clients have a direct interest in lobbying. Staff of MPs and journalists are also subject to controls due to their access to Westminster and resultant ability to exert influence.¹¹³

¹⁰⁸ UK, HL Deb (9 September 2016), vol 774, cols 1257–1258 (Lord Brooke of Alverthorpe). In the debate, Lord Brooke pointed out problems with the current register: “The current register has been in operation for 18 months, and it has failed abysmally. Three-quarters of the industry working in-house are exempt; of the consultant lobbyists covered, just 136 firms are signed up, a long way from the 700-plus registrants that the Government anticipated when pushing the Bill through. In the last quarter, one-third of the UK’s registrants are effectively blank submissions, with no clients having met the very high bar that triggers registration. There is no requirement in current law to provide details of whom they have met in government, nor whom they are seeking to influence. It is little wonder that in the past six months the register has been viewed by the public a total of 363 times, which is an average of just two people visiting the website a day.”

¹⁰⁹ *Lobbying (Transparency) Bill*, *supra* note 106.

¹¹⁰ OECD Lobbyists 2009, *supra* note 9 at 74.

¹¹¹ *Code of Conduct for Members of Parliament*, prepared pursuant to the Resolution of the House of 19 July 1995, online: <<http://www.publications.parliament.uk/pa/cm201516/cmcodes/1076/107602.htm>>.

¹¹² Colin Nicholls QC et al, *Corruption and Misuse of Public Office*, 3rd ed (Oxford: Oxford University Press, 2017) at 418–419.

¹¹³ OECD Lobbyists 2009, *supra* note 9 at 74.

6.2.3 Summary

The lobbying industry in the UK employs approximately 4,000 lobbyists and is worth £2 billion, making it the third largest lobbying industry in the world.¹¹⁴ However, caution should be used when quantifying the lobbying industry in the UK. As Transparency International UK notes, “[d]ue to lack of reporting and data, there is no comprehensive information on the scale or nature of lobbying activity in the UK.”¹¹⁵

Lobbying can occur anytime throughout the legislative process, as well as during drafting of a bill and after enactment when secondary regulation is created. Aside from Ministers, both MPs and peers are targeted by lobbyists, since both can influence policy by asking Ministers questions and tabling, scrutinizing and voting on bills. Parliamentary staff, who mainly draft positions on policies and bills, may also be targeted, along with the personal staff of Cabinet Ministers. Members of the civil service may also be subject to lobbying due to their role in drafting bills and secondary regulation.¹¹⁶

The UK scored 77 on the 2020 Transparency International CPI and was ranked tied for 11th out of 180 countries surveyed in regard to perceived corruption.¹¹⁷

6.3 Canada

6.3.1 Governance Structure

Canada is a federal country with ten provinces and three territories. The Parliament of Canada has two lawmaking bodies: elected members of Parliament in the lower chamber or the House of Commons, and appointed Senators in the upper chamber or the Senate. The leader of the party with the majority of seats in the House of Commons appoints a core executive of (usually elected) public officials called the Cabinet. The Cabinet has the greatest lawmaking power subject to the ultimate approval of Parliament. The legislative process is highly centralized and lobbying activities therefore focus on a relatively small number of key actors.

6.3.2 Regulatory Framework

The Canadian Constitution embraces the rule of law, democracy, and respect for democratic institutions.¹¹⁸ Lobbying regulation must promote these principles, and lobbying

¹¹⁴ David-Barrett, *supra* note 100 at 11.

¹¹⁵ *Ibid.* Although numbers of ministerial meetings can provide some measurement, TI UK points out that lobbying can also be informal and take place outside of formal government meetings, such as during political party conferences. Lobbying may also target civil servants who are not required to disclose lobbying activity and meetings.

¹¹⁶ *Ibid.*

¹¹⁷ 2020 CPI, *supra* note 36.

¹¹⁸ Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, C 11.

undertakings must not compromise the democratic process.¹¹⁹ In 2006, the *Federal Accountability Act (FAA)* received Royal Assent and amended the *Lobbyists Registration Act (LRA)*. Following the enactment of the *FAA*, the *Lobbying Act (LA)* was enacted in 2008 to provide comprehensive lobbying regulation at the federal level in Canada.¹²⁰ The *LA* mandates basic registration requirements for individuals paid to communicate with federal public office holders and is supplemented by the *Lobbyists' Code of Conduct (LCC)*. Following extensive consultation, the current version of the *LCC* came into force on December 1, 2015.¹²¹ The purpose of the *LCC* is to promote transparency and integrity in government decision-making by adopting mandatory ethical standards for lobbyists.¹²² The Commissioner of Lobbying is an independent Officer of Parliament under the *LA* and has a mandate to develop and ensure compliance with the *LCC* and maintain the Registry of Lobbyists.¹²³

6.3.3 Summary

In 2020–2021, the Lobbyist Registrar reported a record high number of lobbyists registered at 8,005, with a monthly average of over 6,200.¹²⁴ Most registrants are consultant lobbyists, followed by in-house lobbyists for organizations and in-house lobbyists for corporations.¹²⁵ Consultant lobbyists must file one return per client and it is therefore not uncommon for consultants to have multiple active registrations. The House of Commons is the most common target of lobbying undertakings, followed by Innovation, Science and Economic Development Canada, the Prime Minister's Office, Finance Canada and the Senate. The Prime Minister's Office was the third most contacted government institution in 2013–2014. The first budget for the Office of the Commissioner of Lobbying was CDN\$467,000 in

¹¹⁹ The Canadian Bar Association, National Administrative Law Section, *Lobbyists' Code of Conduct Consultation* (Ottawa: Canadian Bar Association, 2014), online (pdf):

<https://lobbycanada.gc.ca/media/1729/cba_-_submission_-_2014-01-30.pdf>.

¹²⁰ On 12 December 2006, Bill C-2, the *Federal Accountability Act (FAA)*, received Royal Assent. Under s 3.1(1) of the *FAA*, the *Lobbyists Registration Act* was renamed the *Lobbying Act*.

¹²¹ Canada, Officer of the Commissioner of Lobbying of Canada, *The Lobbyists' Code of Conduct*, Ottawa: Office of the Commissioner of Lobbying, 2015 [Office of the Commissioner of Lobbying, *[The Lobbyist's Code of Conduct]*, online: <[https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct](https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct)> (a subsequent consultation ended in 2020, with a new *LCC* expected in 2021, or shortly thereafter)].

¹²² Canada, Office of the Commissioner of Lobbying, *Annual Report 2013–14* (Ottawa: Office of the Commissioner of Lobbying, 2014) [Office of the Commissioner of Lobbying, *Annual Report 2013–14*] at 31, online (pdf): <https://www.orl-bdl.gc.ca/media/1505/ar_2013-14en.pdf>.

¹²³ Under s 68 of the *Federal Accountability Act*, the Government must consult with Parliament before appointing the Commissioner of Lobbying. This process promotes autonomy of the Office and minimizes partisanship.

¹²⁴ Office of the Commissioner of Lobbying of Canada, *Annual Report 2020–21*, (Ottawa: Office of the Commissioner of Lobbying, 2021) [Office of the Commissioner of Lobbying, *Annual Report 2020–21*] at 5, online (pdf): <https://lobbycanada.gc.ca/media/1972/oclc-pub-002-annualreport2021-en_final-web.pdf>.

¹²⁵ *Ibid* at 7.

1989.¹²⁶ As of 2019–2020, commensurate with an expanded mandate, the cost of operation has grown to CDN\$5.2 million.¹²⁷

Canada scored 77 on the 2020 Transparency International CPI and was ranked tied for 11th out of 180 countries surveyed in regard to perceived corruption.¹²⁸

7. ELEMENTS OF LOBBYING REGULATION

Each country's laws and policies must define the activities that constitute lobbying and the actors involved in lobbying undertakings. Theatres of lobbying may be limited to formal engagements, such as consultative committees, or extend to include informal discussions and meetings. Generally, two classes of actors are targeted by regulation: public officials and lobbyists. Government officials captured by legislation are usually identified expressly in the statute that governs their conduct. Lobbyists are usually defined according to their conduct or engagement with government officials.

7.1 Definition of Government Officials

7.1.1 US

The *LDA* defines Public Officials (POs), Executive Branch Officials (EBOs) and Legislative Branch Officials (LBOs). POs are any elected or appointed officials, or employees of a federal, state, or local unit of government.¹²⁹ EBOs include: the President; the Vice-President; officers and employees of the Executive Office of the President; any official serving in an Executive Level I-V position; any members of the uniformed services serving at grade 0–7 or above; and Schedule C employees.¹³⁰ LBOs include: members of Congress; elected officers of either the House or the Senate; employees or any other individual functioning in the capacity of an employee who works for a Member, committee, leadership staff of either the Senate or House; a joint committee of Congress; a working group or caucus organized to provide services to Members; and any other Legislative Branch employee serving in a position described under section 10(1) of the *Ethics in Government Act (EGA)*, 1978.¹³¹

¹²⁶ Then called the Office of the Registrar of Lobbyists.

¹²⁷ Office of the Commissioner of Lobbying, “Financial Statement for the Year Ended March 31, 2020” (last modified 1 December 2020), online: *Office of the Commissioner of Lobbying of Canada* <<https://lobbycanada.gc.ca/en/reports-and-publications/financial-statements-for-the-year-ended-march-31-2020/>>.

¹²⁸ 2020 CPI, *supra* note 36.

¹²⁹ *Lobbying Disclosure Act*, *supra* note 96, § 3(15).

¹³⁰ *Ibid*, § 3(3).

¹³¹ *Ibid*, § 3(4).

7.1.2 UK

The *TLA* disclosure requirements only apply when lobbyists communicate on behalf of a client with “a Minister of the Crown or permanent secretaries,”¹³² or an equivalent listed in the *TLA*. The communication must be made while the official holds the post in order to trigger the legislation. A Minister of the Crown is defined in section 2(6) as a “holder of an office in the government, and includes the Treasury.” Equivalents to permanent secretaries include, for example, the Director of Public Prosecutions and the Chief Executive of Her Majesty’s Revenue and Customs. Transparency International UK criticizes this narrow definition, which excludes communications with parliamentarians, Assembly members, and less senior civil servants.¹³³

7.1.3 Canada

The *LA* has broad application and distinguishes between public office holders (POHs) and designated public office holders (DPOHs). POHs refer to virtually all persons occupying an elected or appointed position in the federal government, including members of the House of Commons, the Senate, and their staff.¹³⁴ DPOHs include key decision-makers within government, senior public officials, senators, and certain staff of the Leader of the Official Opposition.¹³⁵ DPOHs are subject to post-employment, or revolving door, limitations and lobbyists have particular disclosure requirements for undertakings with DPOHs.

7.2 Definition of Lobbyist

Lobbying is no longer restricted to firm or consultancy lobbyists. Lobbyist ranks now include employees of corporations engaged in government relations, employees of public interest organizations, lawyers, think-tanks, and governments from other jurisdictions.

7.2.1 US

The *LDA* defines a “lobbyist” as:

any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client or a six month period.¹³⁶

¹³² *TLA*, *supra* note 102, s 2(3).

¹³³ TI UK, *How Open is the UK Government? UK Open Governance Scorecard Results* (London: TI UK, 2015) [TI UK, *How Open is the UK Government?*] at 17, online:

<<https://www.transparency.org.uk/publications/how-open-uk-government-uk-open-governance-scorecard-results>>.

¹³⁴ *Lobbying Act*, RSC 1985, c 44, s 2(1).

¹³⁵ *Ibid*; *Designated Public Office Holder Regulations*, SOR/2008-117, Schedule 1.

¹³⁶ *Lobbying Disclosure Act*, *supra* note 96, § 3(10).

7.2.2 UK

The *TLA* only applies to “consultant lobbyists,” which are defined as individuals who make communications with senior decision-makers about the workings of government in exchange for payment.¹³⁷ Only lobbyists registered under the *Value Added Tax Act 1994* are within the scope of the definition, which excludes smaller businesses. Further exclusions are discussed below.

7.2.3 Canada

The *LA* identifies three types of lobbyists:

- Consultant lobbyists are individuals who lobby on behalf of clients and must register.
- In-house lobbyists (corporate) are senior office holders of corporations who carry on commercial activities for financial gain and must register when one or more employees lobby and lobby undertakings constitute 20% or more of their duties.
- In-house lobbyists (organizations) are senior officers of organizations that pursue non-profit objectives and must register when one or more employees lobby and lobby undertakings constitute 20% or more of their duties.¹³⁸

7.3 Definition of Lobbying Activity

7.3.1 US

Under the *LDA*, “lobbying activities” include:

lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts and co-ordination with the lobbying activities of others.¹³⁹

¹³⁷ Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration* (November 2015) at 9, online (pdf): <<http://registrarofconsultantlobbyists.org.uk/wp-content/uploads/2015/12/20151111Guidance-on-the-requirement-for-registration1.pdf>>.

¹³⁸ Canada, Library of Parliament, *The Federal Lobbying System: The Lobbying Act and the Lobbyists' Code of Conduct*, (background paper), Pub No 2011-73-E (Ottawa: Library of Parliament, 2011), online: <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201173E>. The unique requirements for in-house lobbyists ensure that responsibility for the actions of lobbyists rest at the highest levels of corporate management.

¹³⁹ *Lobbying Disclosure Act*, *supra* note 96, § 3(7).

“Lobbying contacts” are “oral or written communications” with executive or legislative branch officials.¹⁴⁰ Unlike in Canada,¹⁴¹ grass-roots activities that do not directly target public officials do not require registration.¹⁴²

7.3.2 UK

“Consultant lobbying” in the *TLA* is defined as follows in the Registrar’s guidance:

Organisations and individuals are considered to be carrying out the business of consultant lobbying if they fulfil the following criteria:

They have made direct oral, written or electronic communications personally to:

a Minister of the Crown, Permanent Secretary (or equivalents) currently in post, referred to as “Government Representatives”

relating to:

- The development, adoption or modification of any proposal of the Government to make or amend primary or subordinate legislation
- The development, adoption or modification of any other policy of the government
- The taking of any steps by the Government in relation to any contract, grant, financial assistance, licence or authorisation; or
- The exercise of any other function of government.

This communication is made in the course of a business and in return for payment on behalf of a client, or payment is received with the expectation that the communication will be made at a later date.¹⁴³

They are registered under the *Value Added Tax Act* (1994).¹⁴⁴

Transparency International UK has criticized the ambiguity surrounding “direct contact” with a Minister or Permanent Secretary.¹⁴⁵ The Registrar’s guidance states that “[m]aking communications personally means communicating directly with a Government Representative by name or by title, using oral, written or electronic communication. An

¹⁴⁰ *Ibid*, § 3(8).

¹⁴¹ *Lobbying Act*, *supra* note 134, s 5(2)(j).

¹⁴² There is one exception. The *LDA*, § 15, permits organizations that are required to file under § 6033(b)(8) of the *Internal Revenue Code* to use tax law definitions of lobbying in lieu of *LDA* definitions. Tax law definitions include grass-roots lobbying.

¹⁴³ Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration*, *supra* 137 at 9.

¹⁴⁴ *Ibid*.

¹⁴⁵ David-Barrett, *supra* note 100 at 31.

example would be writing an email to a Minister of the Crown in which the email is addressed to the Minister specifically.¹⁴⁶ Communications with a government department, special adviser, administrator, or a private secretary are not covered by the *Act*. It is irrelevant whether the government official or lobbyist initiates communication.¹⁴⁷

The CIPR's voluntary and universal UK Lobbying Register defines "lobbying services" as:

activities which are carried out in the course of a business for the purpose of:

- a) influencing government, or
- b) advising others how to influence government.¹⁴⁸

7.3.3 Canada

The *LA* designates certain activities as lobbying only when carried out for compensation.¹⁴⁹ Activities that must be reported include communicating with a POH in respect of:

- the development of any legislative proposal by the Government of Canada or by a member of the Senate or House of Commons;
- the introduction of any Bill or resolution in either House of Parliament of the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament;
- the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*;
- the development or amendment of any policy or program of the Government of Canada;
- the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada; and
- the awarding of any contract by or on behalf of Her Majesty in right of Canada.¹⁵⁰

Individuals must also file a return if they undertake to arrange a meeting between a POH and any other person.¹⁵¹

The Canadian experience demonstrates the importance of precise vocabulary in achieving regulatory compliance. Legislation preceding the *LA* defined lobbyist activity as communication with public office holders "in an attempt to influence." Enforcement was

¹⁴⁶ *Ibid* at 9.

¹⁴⁷ *Ibid*.

¹⁴⁸ Chartered Institute of Public Relations, *A Guide to Professional Conduct* at 1, online: <https://www.cipr.co.uk/CIPR/About_Us/Professional_standards/CIPR/About_Us/Professional_Standards.aspx>.

¹⁴⁹ *Lobbying Act*, *supra* note 134, s 5(1).

¹⁵⁰ *Ibid*, s 5(a)(i)–(vi).

¹⁵¹ *Ibid*, s 5(b).

stymied by the evidentiary burdens of establishing that an “attempt to influence” had occurred. As a result, the *LA* instead describes lobbying activities as communications “in respect of” legislation and policies.¹⁵²

7.4 Exclusions from the Definitions

Exclusions provide greater certainty in the application of laws and must therefore be clearly defined and unambiguous. Exclusionary provisions identify either classes of actors or specific activities that are exempt from registration and disclosure requirements. Activities commonly excluded comprise those that involve a pre-existing element of public disclosure, such as appearances before legislative committees or commissions, and other activities of an inherently public nature.

7.4.1 US

The *LDA*’s definition of “lobbying contact” excludes communications that are:

- made by a public official acting in his or her capacity as a public official;
- made by a media representative, if the purpose of the communication is to gather and disseminate news and information to the public;
- made in materials that are available to the public through a medium of mass communication;
- made on behalf of a foreign government, country or political party and disclosed under the *Foreign Agents Registration Act*;
- administrative requests for meetings, etc., that do not attempt to influence a covered official;
- made during participation in an advisory committee subject to the *Federal Advisory Committee Act*;
- testimony given before a committee, subcommittee, or task force of Congress;
- information provided in writing in response to a request for specific information from a covered official;
- communications that are compelled by statute, such as those required by subpoena;
- impossible to report without disclosing information that is not permitted to be disclosed by law;
- made to an official in an agency regarding a) criminal or civil inquiries, investigations or proceedings or b) filings that the government is required to keep confidential, if the agency is responsible for the proceedings or filings;
- made on the record in a public proceeding;

¹⁵² *Lobbying Act*, *supra* note 134, s 5(1)(a).

- petitions to agencies that are intended to be on the public record;
- made on behalf of an individual that only relates to that individual's personal matters, unless the communication is made to a covered executive branch official, or a legislative branch official in the case of communications regarding legislation for the relief of the individual;
- disclosures protected under the *Whistle Blower Protection Act*, the *Inspector General Act* or other statutes;
- made by churches and religious orders that are exempt from filing federal income tax returns;
- made by officials of self-regulatory organizations registered with the Securities Exchange Commission or the Commodities Future Trading Commission; or
- made by the SEC or Commodities Future Trading Commission in relation to their regulatory responsibilities under statute.¹⁵³

If an individual's communications fall into the above exceptions, they will not be considered a lobbyist under the *LDA* and will not be required to register. The definition of "lobbyist" also excludes individuals whose lobbying activities constitute less than 20% of the time spent working for a particular client over a six-month period, although that individual may still fit the description of a lobbyist in relation to other clients. Finally, even if an individual meets the definition of "lobbyist," they are not required to register if the total income from their lobbying activities on behalf of a particular client does not exceed \$5,000, or if their total expenses for lobbying activities do not exceed \$20,000 within six months.

7.4.2 UK

The *TLA* lists a number of exclusions from its definition of consultant lobbyists. The Registrar's guidance summarizes these exclusions as follows:

- Individuals and organisations not registered under the *Value Added Tax Act 1994*;
- Individuals making communications in the course of their employer's business (only the employer is required to be registered);
- Officials or employees of governments of countries other than the United Kingdom;
- International organisations as defined by section 1 of the *International Organisations Act 1968* such as the United Nations;
- 'In-house' lobbyists defined as those who are lobbying on behalf of their own organisation;
- Organisations that carry on a business which is mainly non-lobbying and communicate with Ministers in a way that is incidental to the main course of their business; and

¹⁵³ *Lobbying Disclosure Act*, *supra* note 96, § 3(8)(B).

- Organisations that represent a particular class or body of people and whose income is derived wholly from those people, and where the lobbying is incidental to their general activity.¹⁵⁴

The last exemption listed would apply, for example, to a workers' group lobbying on behalf of its own members. Charities are also excluded unless they receive payment from another person for lobbying on that person's behalf.¹⁵⁵ The definition of "consultancy lobbying" has been heavily criticized for its narrow scope by groups such as Transparency International UK. Particularly contentious are the exclusions of in-house lobbyists and those whose business is not primarily comprised of lobbying. Transparency International UK argues that the *TLA*'s inadequate scope "will prevent it from regulating the majority of lobbying that occurs."¹⁵⁶ The APPC, one of the UK's former self-regulating professional associations, estimated that the *TLA* would capture only 1% of all lobbying activity in the UK.¹⁵⁷ The Registrar of Consultant Lobbyists commented that the law was "very narrowly drafted."¹⁵⁸ Agreeing that the definitions were too narrow, the CIPR launched a universal voluntary register called the UK Lobbying Register in July 2015, open to all lobbyists and binding them to a code of conduct.¹⁵⁹ In contrast to these perspectives, some commentators have characterized the *TLA*'s minimal scope as "proportionate" to the problem and important for promoting healthy lobbying.¹⁶⁰

7.4.3 Canada

Canada's exclusions reflect its constitutional and social environment. Exclusions for representatives of provincial governments¹⁶¹ reflect Canadian federalism, and exclusions for Aboriginal councils and governments¹⁶² reflect Canada's colonial history and constitutional protection of Aboriginal rights. The following communications are also exempt from the *LA*'s application:

- submissions to Parliamentary committees that are a matter of public record;
- communications on behalf of an individual or group to a POH about the enforcement, interpretation or application of a statute by that POH in relation to that individual or group; and
- requests for information submitted to a POH.¹⁶³

¹⁵⁴ Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration*, *supra* 137 at 13, online.

¹⁵⁵ *Ibid.*

¹⁵⁶ TI UK, *How Open is the UK Government*, *supra* note 133 at 17.

¹⁵⁷ *Ibid.*

¹⁵⁸ Tom Moseley, "Lobbying Register Will Have Few Applicants, Registrar Predicts", *BBC News* (24 February 2015), online: <<http://www.bbc.com/news/uk-politics-31151820>>.

¹⁵⁹ See the CIPR website for more information at:

<https://cipr.co.uk/CIPR/Our_work/Policy/Lobbying.aspx>.

¹⁶⁰ OECD 2014, *supra* note 1 at 217.

¹⁶¹ *Lobbying Act*, *supra* note 134, s 4(1).

¹⁶² *Ibid.*

¹⁶³ *Ibid*, s 4(2).

7.5 Disclosure Requirements

Disclosure must satisfy the transparency objectives of regulation. Policy should require lobbyists to provide information that facilitates public scrutiny of their activity and provides public officials with sufficient knowledge to balance the competing interests of lobbyists and the public at large. As discussed, meaningful disclosure must be concise. Satisfying the public interest in transparency may necessitate disclosure of the beneficiaries of lobbyists' efforts. The OECD has provided guidance for minimum requirements of disclosure rules: information must be relevant to legislative goals of transparency, integrity and efficacy; demands must result in information that is pertinent, yet parsimonious; and technology must be utilized to create accessible information infrastructure.¹⁶⁴ Identifying the direct beneficiaries of lobbying is much simpler for corporate interest lobbyists compared to public interest lobbyists. Nonetheless, policy should favour transparency from all lobbyists¹⁶⁵ and require disclosure of clients, lobbying objectives, and how the undertaking is funded.¹⁶⁶ Ultimately, the usefulness of disclosure requirements depends on the manner in which information is to be used and collected.¹⁶⁷ Under the relevant statutory instruments in Canada, the US, and the UK, disclosure is mandatory.¹⁶⁸

7.5.1 Content of Disclosure

Lobbyists must be required to disclose all relevant information in a manner conducive to public reporting. Legislation that intends to uncover who is behind lobbying often provides financial thresholds for reporting.¹⁶⁹ Expenditures may provide a useful metric by which the public can comprehend the stakes involved and public officials can identify disparities in access between public interests and well-funded lobby groups.¹⁷⁰ The *LDA* applies earnings thresholds that trigger registration requirements and estimates of income and expenditures. The prevailing view in Canada is that the complexities of analyzing and monitoring financial disclosure outweigh the public benefit achieved through transparency.¹⁷¹ There have been calls in Europe to strengthen disclosure requirements surrounding financial information.¹⁷² Financial disclosure is viewed as necessary for overall lobbying transparency, the identification of lobbyists and beneficiaries, and the prevention of misleading and unethical

¹⁶⁴ OECD 2021, *supra* note 7 at 72.

¹⁶⁵ OECD Lobbyists 2009, *supra* note 9.

¹⁶⁶ European Commission Green Paper, *supra* note 14 at 194.

¹⁶⁷ For example, information that may be used in criminal prosecutions may be subject to more rigorous disclosure and data retention rules.

¹⁶⁸ In the EU, registration is voluntary but attaches mandatory disclosure obligations.

¹⁶⁹ OECD Lobbyists 2009, *supra* note 9.

¹⁷⁰ John Chenier, *The Lobby Monitor*, 15 (29 October 2003) 1 at 13.

¹⁷¹ House of Commons, Standing Committee on Elections, Privileges and Procedure, "First Report to the House", Minutes of Proceedings and Evidence, (Ottawa: 1985–1986) at 4.

¹⁷² Rachel Tansey & Vicky Cann, *New and Improved? Why the EU Lobby Register Still Fails to Deliver*, (Brussels: ALTER-EU, 2015), online (pdf): <<https://www.alter-eu.org/sites/default/files/documents/Why%20EU%20Lobby%20Register%20still%20fails%20to%20deliver%20-%20print%20version.pdf>>.

lobbying.¹⁷³ However, financial regulations are difficult to assess¹⁷⁴ and exhaustive regulations may frustrate compliance and overburden regulators.¹⁷⁵

Requiring registrants to disclose the targets of lobbying efforts advances the public interest in transparency. In order to define “lobbying activities” with sufficient precision and delineate the theatres of lobbying captured under regulation, policy should identify the decision-making points where lobbyists commonly attempt to exert influence.

7.5.1.1 US

In the US, lobbyists must report any oral or written communication to a “covered executive branch official or a covered legislative branch official”¹⁷⁶ made on behalf of a client. Lobbyists must also identify the Houses of Congress and federal agencies contacted on behalf of clients.¹⁷⁷

Lobbying firms must file separate registrations for each client if total income from that client for lobbying activities is equal to or greater than \$2,500 during a quarterly period.¹⁷⁸ Organizations employing in-house lobbyists must file a single registration if total expenses for lobbying activities are equal to or greater than \$10,000 during a quarterly period.¹⁷⁹ Registrants must disclose:

- the name, address, business telephone number, and principal place of business of the registrant and a general description of its business or activities;
- the name, address and principal place of business of the registrant’s client and a general description of its business or activities;
- the name, address and principal place of business of any organization, other than the client, that contributes more than \$10,000 toward the lobbying activities of the registrant in a semi-annual period and in whole or in major part plans, supervises, or controls such lobbying activities;
- a statement on the general issue areas the registrant expects to engage in lobbying activities on behalf of the client;
- the names of the registrant’s employees who have acted or who will act as a lobbyist on behalf of the client and whether those employees have been a covered executive or legislative branch official in the past twenty years;
- whether the client is a State or local government or a department, agency, special purpose district, or other instrumentality controlled by one or more State or local governments; and

¹⁷³ *Ibid.*

¹⁷⁴ OECD Lobbyists 2009, *supra* note 9.

¹⁷⁵ OECD 2006, *supra* note 26.

¹⁷⁶ *Lobbying Disclosure Act*, *supra* note 96, § 14.

¹⁷⁷ *Ibid.*, §§ 3(8)(a), 5(b)(2)(b).

¹⁷⁸ *Honest Leadership and Open Government Act*, *supra* note 93, § 201(b)(5)(A).

¹⁷⁹ *Ibid.*, § 201(b)(5)(B). Notably, registration is not required for pro bono clients since the monetary thresholds would not be met.

- details of their relationship with foreign entities, including the name, address, principal place of business, amount of contribution exceeding \$5000 to lobbying activities, and approximate percentage of ownership in the client of any foreign entity.¹⁸⁰

The *HLOGA* amended the *LDA* to require semi-annual disclosure of campaign and presidential library contributions. These reports are due within 30 days of the end of the semi-annual reporting period.¹⁸¹ The *LDA* is unique in its financial disclosure requirements; Canada's *LA* does not adequately address transparency concerns related to campaign financing.

7.5.1.2 UK

The disclosure requirements under the *TLA* are minimal. As noted above, registration requirements under the *TLA* are only triggered when a lobbyist or lobbying firm fits the narrow definition of "consultant lobbyist." Registrants submit quarterly returns disclosing clients for whom they have made communications amounting to consultant lobbying in the previous three months. Individual communications and the number of communications on behalf of particular clients are not disclosed.¹⁸² Upon registration, lobbyists and lobbying firms must also disclose contact information, the name of any parent company, alternative trading names, and the names of directors or partners. Finally, consultant lobbyists must declare whether they follow a code of conduct and where to find that code of conduct. Lobbyists are not required to disclose who they are lobbying or the subject matter of their advocacy.

Until the two organizations merged in 2018, the APPC and PRCA maintained their own publicly available disclosure registries with client identities. The PRCA required disclosure of the identities of lobbying entities, lobbyists, and staff. The newly created Public Affairs Board, operated under PRCA, now oversees registration.¹⁸³ The CIPR also launched the UK Lobbying Register (UKLR) in July 2015. Any lobbyists, including in-house lobbyists and non-CIPR members, may register and the register is accessible to the public for free online.¹⁸⁴

¹⁸⁰ *Lobbying Disclosure Act*, *supra* note 96, § 4(b)(1)–(4); *Honest Leadership and Open Government Act*, *supra* note 93, § 202.

¹⁸¹ *Honest Leadership and Open Government Act*, *supra* note 93, § 203. According to the Congressional Research Service: "Items reported under this provision include funds donated to pay the cost of an event to honor or recognize a covered legislative branch official or covered executive branch official; to an entity that is named for a covered legislative branch official, or to a person or entity in recognition of such official; to an entity established, financed, maintained, or controlled by a covered legislative branch official, or to an entity designated by such official; or to pay the costs of a meeting, retreat, conference, or other similar event held by, or in the name of, one or more covered legislative branch officials or covered executive branch officials."

¹⁸² Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration*, *supra* 137 at 6.

¹⁸³ Public Relations and Communications Association, "The Register" (last visited 4 October 2021), online: PRCA <<https://register.prca.org.uk>>.

¹⁸⁴ "The UK Lobbying Register" (last visited 4 October 2021), online: UK Lobbying Register <<http://www.lobbying-register.uk/>>.

Outside of legislative requirements, UK government departments proactively disclose quarterly data on lobbyist meetings of government ministers and permanent secretaries and have done so since 2010. Data is available online.¹⁸⁵ The Cabinet Office monitors compliance with disclosure requirements and makes reports to Parliament on each department every six months, producing some pressure to comply.¹⁸⁶ However, Transparency International UK argues that “data quality and depth of information is very poor” because disclosure of data is often delayed, only formal meetings are disclosed and information on the subject matter of meetings is scarce.¹⁸⁷ Parliamentarians, Assembly members, less senior civil servants, local government officials and public agencies are not required to publish any information on meetings.¹⁸⁸ These gaps have led Transparency International UK to conclude that “[t]he level of transparency over lobbying meetings with legislators and the civil service is negligible to non-existent.”¹⁸⁹

In terms of lobbying by UK legislators, the Resolution of November 6, 1947, as amended in 1995 and 2002, requires MPs to disclose any consultancies or undertakings which might involve remuneration for the provision of advice on lobbying. MPs are not prohibited from entering into agreements to provide services in their parliamentary capacity, but must register these agreements. The House of Lords also has a register for peers’ consultancies or other financial interests in lobbying for clients.¹⁹⁰ MPs’ support staff must register any gainful occupation that might be advantaged due to their access to Parliament, and journalists must report any other paid employment relevant to their privileged access to Parliament.¹⁹¹

Finally, All-Party Parliamentary Groups in the UK, which meet to discuss certain issue areas, must register the names of officers of the group, benefits received by the group, and the source of those benefits.¹⁹² These disclosure requirements respond to the ability of lobby groups to gain access to all-party groups and improperly influence the MPs involved through financing and provision of hospitality.¹⁹³

7.5.1.3 Canada

Canada’s reporting requirements are expansive, requiring lobbyists to identify communication or intent to communicate with “any department or other governmental institution.”¹⁹⁴

¹⁸⁵ For an example, see: “Ministerial Gifts, Hospitality and Meetings with External Organisations in the Department of Business, Innovation and Skills (last updated 9 November 2016), online: *UK Government Data* <<http://data.gov.uk/dataset/disclosure-ministerial-hospitality-received-department-for-business>>.

¹⁸⁶ David-Barrett, *supra* note 100 at 53.

¹⁸⁷ *Ibid* at 52.

¹⁸⁸ *Ibid* at 22.

¹⁸⁹ *Ibid* at 52.

¹⁹⁰ Nicholls et al, *supra* note 112.

¹⁹¹ OECD Lobbyists 2009, *supra* note 9 at 75–76.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Lobbying Act*, *supra* note 134, s 5(2).

Under our paraphrasing of the *LA*, all three categories of lobbyists must disclose extensive information, including:

- the name and business address of the individual and, if applicable, the name and business address of the firm where the individual is engaged in business;
- the name and business address of the client and the name and business address of any person or organization that, to the knowledge of the individual, controls or directs the activities of the client and has a direct interest in the outcome of the individual's activities on behalf of the client;
- where the client is a corporation, the name and business address of each subsidiary of the corporation that, to the knowledge of the individual, has a direct interest in the outcome of the individual's activities on behalf of the client;
- where the client is a corporation that is a subsidiary of any other corporation, the name and business address of that other corporation;
- where the client is a coalition, the name and business address of each corporation or organization that is a member of the coalition;
- where the client is funded in whole or in part by a government or government agency, the name of the government or agency and the amount of funding received;
- particulars to identify the subject-matter in respect of which the individual undertakes to communicate with a public office holder or to arrange a meeting, and any other information respecting the subject-matter that is prescribed;
- particulars to identify any relevant legislative proposal, bill, resolution, regulation, policy, program, grant, contribution, financial benefit or contract;
- if the individual is a former public office holder, a description of the offices held, which of those offices, if any, qualified the individual as a designated public office holder and the date on which the individual last ceased to hold such a designated public office;
- the name of any department or other governmental institution in which any public office holder with whom the individual communicates in respect of a matter regulated by the *LA* or expects to communicate or with whom a meeting is, or is to be, arranged, is employed or serves; and
- if the individual undertakes to communicate with a public office holder in respect of any matter regulated by the *LA*, particulars to identify any communication technique that the individual uses or expects to use in connection with the communication with the public office holder, including any appeals to members of the public through the mass media or by direct communication that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place

pressure on the public office holder to endorse a particular opinion (grass-roots communication).¹⁹⁵

The *Lobbyists Registration Regulations* provide the form and manner in which lobbyists must file returns under the *LA*.¹⁹⁶

7.5.2 Timing

Unambiguous and strict reporting deadlines are as important as the content of reporting. In order to provide the public with meaningful information and the opportunity to mobilize counter-lobby initiatives, disclosure must be made and updated in a timely fashion.

7.5.2.1 US

The *LDA* requires registration within 20 days of either: (1) the date that the employee/lobbyist was retained to make more than one lobbying contact (and meets the 20% of time threshold) or, (2) the date the employee/lobbyist makes a second lobbying contact (and meets the 20% of time threshold). Communications with executive branch officials and Congressional support staff “serving in the position of a confidential, policy-determining, policy-making or policy-advocating character”¹⁹⁷ qualify as lobbying contacts. Following initial disclosure, reports must be updated semi-annually thereafter.¹⁹⁸

7.5.2.2 UK

Under the *TLA*, any organization that intends to engage in consultancy lobbying must apply to join the Register before doing so.¹⁹⁹ Registrants must submit a return listing clients for the pre-registration quarter.²⁰⁰ Lists of client names are updated quarterly and registrants must submit returns within two weeks of the end of each quarter.

7.5.2.3 Canada

In Canada, initial reporting is required within ten days of entering into a lobbying undertaking,²⁰¹ and communications with senior public officer holders must be updated monthly thereafter.²⁰² These communications include telephone calls, in-person meetings, and video conferences.²⁰³ Oral communication with a designated public office holder that is initiated by someone other than the public office holder and arranged in advance must be

¹⁹⁵ *Ibid*, ss 5(2)(a)–(k).

¹⁹⁶ *Lobbyists Registration Regulations*, SOR/2008-116.

¹⁹⁷ US, Committee on the Judiciary Report, *The Lobbying Disclosure Act of 1995* (HR Rep No 104-339) (Washington, DC: US House of Representatives, 1995).

¹⁹⁸ *Honest Leadership and Open Government Act*, *supra* note 93, § 201(a)(1)(A-D).

¹⁹⁹ Office of the Registrar of Consultant Lobbyists, *Guidance on the Requirements for Registration*, *supra* 137 at 5.

²⁰⁰ *Ibid* at 6.

²⁰¹ *Lobbying Act*, *supra* note 134, s 5(1.1).

²⁰² *Ibid*, s 5(3).

²⁰³ Office of the Commissioner of Lobbying, *Annual Report 2013–14*, *supra* note 122 at 4.

reported. However, communications that are initiated by the public office holder do not generally require reporting.²⁰⁴

7.5.3 Procedures for Collection and Disclosure

As mentioned, lobbying regulation has proliferated incrementally around the world. A consequence of this sporadic development is the creation and adoption of specific requirements and separate registries for certain industries and different levels of government. Responding to modern demands for transparency, reporting and disclosure mechanisms must maximize efficiency while encouraging compliance and facilitating access to information.

One way to promote compliance and improve accessibility is to utilize electronic filing and reporting. There are many benefits to electronic filing: lobbyists can submit information remotely; forms can solicit quantifiable information amenable to data analysis; data store costs are reduced and archival and retrieval simplified; and, electronic filing facilitates the use of the internet to decentralize information and improve public access.²⁰⁵ Policies regarding electronic filing should respect established rules and norms regarding the publication of private and privileged information, mitigate the risks of information overload and balance incentives for compliance with risks of disclosing proprietary corporate intelligence.

7.5.3.1 US

All documents required by the *LDA* must be filed electronically.²⁰⁶ The Secretary of the Senate and Clerk of the House of Representatives are required to maintain all registrations and reports filed under the *LDA* and make them accessible to the public over the internet, free of charge and in “a searchable, sortable and downloadable manner.”²⁰⁷

7.5.3.2 UK

Applications to join the UK Register can be completed online or on paper. The Register is available online and searchable by lobbyist and client name. Client lists from previous quarters are available.

7.5.3.3 Canada

In Canada, the Registry of Lobbyists is the *LA*’s core instrument of transparency.²⁰⁸ Lobbyists are required to file their returns electronically and the application process is provided in both official Canadian languages (English and French).²⁰⁹ Information collected under the *LA* is a matter of public record accessible over the internet. Anyone may search the database

²⁰⁴ *Ibid.*

²⁰⁵ OECD Lobbyists 2009, *supra* note 9.

²⁰⁶ *Honest Leadership and Open Government Act*, *supra* note 93, § 205.

²⁰⁷ *Ibid.*, § 209(a)(3).

²⁰⁸ OECD 2014, *supra* note 1 at 127.

²⁰⁹ “Registry of Lobbyists” (last visited 4 October 2021), online: *Office of the Commissioner of Lobbying of Canada* <<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/guest?lang=eng>>.

and generate reports. There were over 840,000 user searches of the Registry database in 2018–2019.²¹⁰

7.6 Codes of Conduct

Lobbying involves two principal parties: government and interest groups. Because “it takes two to lobby,” lobbyists share responsibility with public officials for maintaining the integrity of lobby regulatory schemes. As noted in Section 4.2.4, there are three types of codes. The Canadian system provides an example of a statutory code. The UK and the US systems provide examples of professional codes or self-regulation. Meaningful lobbying policy requires oversight of the conduct of public officials that is commensurate with regulation of lobbyists’ behaviour. Many jurisdictions, including Canada, the US, and the EU, have developed codes of conduct that apply to public officials in their interactions with lobbyists.²¹¹

7.6.1 US

Various professional associations for lobbyists in the US require their members to abide by codes of ethics. Members of the Public Relations Society of America must pledge to abide by the Society’s *Code of Ethics* (the *Code*), which lists professional values, such as honesty, independence, fairness, and provisions of conduct.²¹² For example, the *Code* requires members to reveal causes and sponsors for interests represented, disclose financial interests in a client’s organization and disclose potential conflicts of interest. The *Code* also includes examples of improper conduct. The *Code* is supplemented by *Ethical Standards Advisories*, which provide guidance on specific timely issues (e.g., “The Ethical Use of Interns”). The National Institute for Lobbying and Ethics (NILE) also requires members to abide by its code

²¹⁰ Office of the Commissioner of Lobbying of Canada, *Annual Report 2018–19*, (Office of the Commissioner of Lobbying, 2019) at 7, online (pdf): <<https://lobbycanada.gc.ca/media/1471/annual-report-2018-2019-en.pdf>>.

²¹¹ For public officials in Canada, see: “Values and Ethics Code for the Public Sector” (last visited 4 October 2021), online: *Government of Canada* <<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049§ion=HTML>>. For public officials in the US, see: “Employee Standards of Conduct” (1 January 2017), online: *US Office of Government Ethics* <<https://www.oge.gov/Web/oge.nsf/Resources/Standards+of+Ethical+Conduct+for+Employees+of+the+Executive+Branch>>; “Rules of the House of Representatives” (last visited 4 October 2021), online: *House Committee on Rules* <<https://rules.house.gov/rules-and-resources/rules-house-representatives>>; “Rules of the Senate” (last visited 4 October 2021), online: *The Rules Committee* <<https://www.rules.senate.gov/rules-of-the-senate>>. For public officials in the EU, see: European Parliament, *Code of Conduct for Members of the European Parliament with Respect to Financial Interests and Conflicts of Interest*, online (pdf): <<https://www.europarl.europa.eu/meeps/en/about#firstanchor>>.

²¹² Public Relations Society of America, *PRSA Code of Ethics*, (New York: PRSA, 2000), online (pdf): <https://www.prsa.org/docs/default-source/about/ethics/prsa_code_of_ethics1ee4daa82781492ab1589370d0ec198b.pdf?sfvrsn=aa659309_0>.

of ethics.²¹³ The code endorsed by the NILE is more general and emphasizes principles like honesty, integrity, and avoiding conflicts of interest.

7.6.2 UK

The UK relies on professional associations to provide codes of conduct for lobbyists. Each of the three associations for UK lobbyists has its own code to which members must adhere. The CIPR's code is fairly general and consists of best practices, not prohibitions.²¹⁴ Principles such as integrity, honesty, and competency are emphasized. The CIPR's code does not prohibit the exchange of gifts or compensation between lobbyists and public officials or the employment of public officials, and also does not provide for client identity disclosure.²¹⁵ The APPC's code of conduct was more potent and prohibited lobbyists from providing financial inducements and employment to public officials.²¹⁶ It also required registration of clients and lobbying staff on its own registry. The PRCA's code was aimed specifically at lobbyists and required public disclosure of clients' names.²¹⁷ Like the APPC, the PRCA code prohibited members from hiring MPs, peers, or Assembly members.²¹⁸ The APPC and PCRA merger led to a joint *Public Affairs Code* that replaced the APPC *Code of Conduct* and the PRCA *Public Affairs and Lobbying Code of Conduct*.²¹⁹ Given that the CIPR runs the UKLR, lobbyists, who register with the UKLR and are not already subject to a code of conduct, must agree to abide by the CIPR Code.²²⁰

7.6.3 Canada

The first *LCC* came into force in 1997. The most recent iteration of the *LCC* was published in the *Canada Gazette* and came into force on December 1, 2015.²²¹ The update ensured that the *LCC* was consistent with the *LA*. As with the *LA*, the objective of the *LCC* is to ensure transparency of communications between lobbyists and government. It is for this reason that the *LCC* does not contain provisions that regulate the interactions between lobbyists and

²¹³ The National Institute for Lobbying and Ethics has, for the time being, adopted the Code of Ethics used by the now defunct Association of Government Relations Professionals. The code can be found online at: "Code of Ethics" (last visited 4 October 2021), online: *National Institute for Lobbying & Ethics* <<https://www.lobbyinginstitute.com/ethics>>.

²¹⁴ Chartered Institute of Public Relations [CIPR], *Chartered Institute of Public Relations Code of Conduct, The CIPR Regulations*, Appendix A, online: <https://cipr.co.uk/CIPR/About_Us/Governance/_CIPR_Code_of_Conduct.aspx>.

²¹⁵ OECD 2012, *supra* note 13 at 44.

²¹⁶ Anna Lewicka-Strzalecka, "Ethical Model of Lobbying: An Analysis of the Codes Regulating Lobbying Activity" (2017) 20:8 *Annales Ethics Econ Life* 75 at 80.

²¹⁷ PRCA, *PRCA Professional Charter*, (London: PRCA, 2016), online (pdf): <<https://www.prca.org.uk/sites/default/files/downloads/PRCA%20Code%20of%20Conduct%20-%20updated%20September%202016.pdf>>.

²¹⁸ David-Barrett, *supra* note 100 at 28.

²¹⁹ Public Affairs Board, *Public Affairs Code*, PRCA, 2021 online: <<https://www.prca.org.uk/sites/default/files/Public%20Affairs%20Code%20February%202021%202.2021.pdf>>.

²²⁰ "Professional Standards" (last visited 4 October 2021), online: *UK Lobbying Register* <<https://lobbying-register.uk/professional-standards/>>.

²²¹ Office of the Commissioner of Lobbying, *The Lobbyists' Code of Conduct*, *supra* note 121 at 1.

their clients. The *LCC* also mandates respect for Canada's democratic institutions and enhanced rules regarding conflict of interest, preferential access, political activities, and the provision of gifts. Under the *LA*, the Commissioner of Lobbying is required to develop a lobbyists' code of conduct²²² and has authority to "conduct an investigation if he or she has reason to believe ... that an investigation is necessary to ensure compliance with the *Act* or *Code*."²²³ Canada is the only jurisdiction to legislate a mandatory code of conduct for lobbyists and the *LCC* is a statutory component of the lobbyist regulation regime.²²⁴ The purpose of the *LCC* is to "assure the Canadian public that lobbyists are required to adhere to high ethical standards, with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision-making."²²⁵ Breaches of the *LCC* are subject to the Commissioner's investigative reports submitted to Parliament, but the Commissioner does not have the authority to impose charges or sanctions under the *LA*.²²⁶ The Commissioner's investigative authority extends beyond registered lobbyists and applies to all individuals who are engaged in lobbying activity that is subject to registration.²²⁷

The Canadian *LCC* is structured around three guiding principles: respect for democratic institutions; openness, integrity, and honesty; and professionalism. These principles animate a series of related rules:

Transparency

Identity and purpose

1. Lobbyists shall, when making a representation to a public office holder, disclose the identity of the person or organization on whose behalf the representation is made, as well as the reasons for the approach.

Accurate information

2. Lobbyists shall provide information that is accurate and factual to public office holders. Moreover, lobbyists shall not knowingly mislead anyone and shall use proper care to avoid doing so inadvertently.

Duty to Disclose

3. Lobbyists shall inform each client of their obligations as a lobbyist under the *Lobbying Act* and the *Lobbyists' Code of Conduct*.
4. The responsible officer (the most senior paid employee) of an organization or corporation shall ensure that employees who lobby on the organization's or corporation's behalf are informed of their

²²² *Lobbying Act*, *supra* note 134, s 10.4(1).

²²³ *Ibid*, s 10.2(1).

²²⁴ OECD *Lobbyists 2009*, *supra* note 9.

²²⁵ Office of the Commissioner of Lobbying, *Annual Report 2013–14*, *supra* note 122 at 31.

²²⁶ *Makhija v Canada (Attorney General)*, 2010 FCA 342 at paras 7, 18, 414 NR 158; *Lobbying Act*, *supra* note 134, s 10.4–10.5.

²²⁷ Office of the Commissioner of Lobbying, *Annual Report 2013–14*, *supra* note 122.

obligations under the *Lobbying Act* and the *Lobbyists' Code of Conduct*.

Use of Information

5. A lobbyist shall use and disclose information received from a public office holder only in the manner consistent with the purpose for which it was shared. If a lobbyist obtains a government document they should not have, they shall neither use nor disclose it.

Conflict of Interest

6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.

In particular:

Preferential access

7. A lobbyist shall not arrange for another person a meeting with a public office holder when the lobbyist and public office holder share a relationship that could reasonably be seen to create a sense of obligation.
8. A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation.

Political activities

9. When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s).

Gifts

10. To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public officer holder is not allowed to accept.²²⁸

7.7 Compliance and Enforcement

Sanctions are an essential component of lobbying regulation but are rarely severe enough to constitute a true deterrent.²²⁹ Enforcement must be impartial, predictable and timely in order to be effective. Regulatory authorities must operate at arm's length from government, be sufficiently resourced and endowed with powers to investigate infractions and enforce

²²⁸ Office of the Commissioner of Lobbying, *The Lobbyists' Code of Conduct*, *supra* note 121 at 5–6.

²²⁹ OECD 2014, *supra* note 1.

policy. Lax enforcement of regulation can lead to a “culture of entitlement”²³⁰ in government decision-making. Where illicit lobbying practices and corruption have become normalized or are viewed as a cost of doing business, sanctions must be paired with educational initiatives to facilitate the slow development of a culture of integrity. Different systems of government will generate fewer or greater opportunities for lobbying; opportunities for corruption will be correspondingly few or abundant. For example, the openness of the American legislative process fosters not only a competitive advocacy environment, but also increased opportunities for illegitimate lobbying practices. It is important that legislators routinely look for evidence that those who lobby are authorized to do so.²³¹

In order for regulations to effectively limit corrupt practices, regulators must have the authority to investigate contraventions and apply sanctions. Sanctions may take the form of fines, imprisonment or the removal of privileges, such as access to public officials. The separation between regulatory and criminal law regimes will often require regulatory authorities to hand off investigations when criminal activity is uncovered. The implications of this relationship are two-fold. Disclosure requirements must provide regulatory bodies with adequate information to assist law enforcement agencies in their investigations. In turn, law enforcement agencies must follow through with investigations and ensure that corruption offences are not overtaken by more urgent priorities.

7.7.1 Sanctions

7.7.1.1 US

The *HLOGA* instituted a prohibition of gifts or travel by registered lobbyists to members of Congress and Congressional employees.²³² The Secretary of the Senate and Clerk of the House of Representatives are responsible for verifying the accuracy, completeness, and timeliness of registration and reports.²³³ They must notify any lobbyist in writing that may be in non-compliance.²³⁴ If the lobbyist or lobbying firm fails to provide an appropriate response, the United States Attorney for the District of Columbia must be alerted within 60 days of the original notice.²³⁵ The aggregate number of registrants cited for non-compliance is publicly available online.²³⁶ Any individual who fails to remedy a defective filing within 60 days of notice, or otherwise fails to comply with the *LDA*, may be subject to a fine not exceeding \$200,000.²³⁷ Any individual who knowingly and corruptly violates the *LDA* may be subject to a period of incarceration not exceeding five years.²³⁸

²³⁰ Canada, Commission into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Research Studies*, vol 2 (Ottawa: Public Works and Government Services Canada, 2006) at 203, online (pdf): <https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-03-06/www.gomery.ca/en/phase2report/volume2/cispaa_vol2_full.pdf>.

²³¹ OECD Lobbyists 2009, *supra* note 9.

²³² *Honest Leadership and Open Government Act*, *supra* note 93, § 206.

²³³ *Lobbying Disclosure Act*, *supra* note 96, § 6(2).

²³⁴ *Ibid*, § 6(7).

²³⁵ *Ibid*, § 6(8).

²³⁶ *Honest Leadership and Open Government Act*, *supra* note 93, § 210.

²³⁷ *Ibid*, § 211(a)(2).

²³⁸ *Ibid*, § 211(b).

The Public Relations Society of America and the National Institute for Lobbying and Ethics have no enforcement mechanisms for their codes of ethics. Both will revoke membership if an individual is convicted of an offense involving lobbying activities. The Society justifies its lack of internal enforcement and punishment by pointing out the expense and difficulty of enforcement in the past. Instead, the Society now focuses on promoting and inspiring ethical values through its *Code of Ethics* and professional development programs.

7.7.1.2 UK

Under the TLA, lobbyists commit an offence if they engage in consultancy lobbying without joining the registry or while their entry in the register is incomplete or inaccurate.²³⁹ Failing to submit complete, accurate quarterly returns on time is also an offence.²⁴⁰ If convicted of an offence under the Act, offenders are liable for a fine. The Registrar may also impose civil penalties for conduct amounting to an offence, in which case no due diligence defence is available.²⁴¹ Civil penalties may not exceed £7,500.²⁴² Transparency International UK has criticized this sanction as lacking in deterrent power.²⁴³

Both professional associations for lobbyists in the UK can investigate complaints and impose sanctions for member violations of their codes of conduct. Approximately four formal complaints and 20–30 informal complaints are received each year by the CIPR, most resolved through confidential conciliation agreements.²⁴⁴ If conciliation is unsuccessful, a Complaints Committee or a Disciplinary Committee for particularly egregious conduct takes over. Committee members are drawn from outside the public relations industry and committees can request information and call witnesses. From 2007–2012, the CIPR's Complaints Committee dealt with only one lobbying-related hearing, and the Disciplinary Committee conducted only two hearings between 2002 and 2012.²⁴⁵ Potential sanctions include reprimands, an order to repay fees for work involved in the complaint, an order to pay the CIPR's costs for the complaint process, or expulsion from the CIPR.²⁴⁶ Since APPC and PRCA merged, the Public Affairs Board investigates complaints against its members. Complaints are first assessed by independent adjudicators. *Prima facie* breaches of the *Public Affairs Code* are referred to a Professional Practice Panel for hearing. Disciplinary powers of the Professional Practice Panel include suspension and expulsion.²⁴⁷ The 2009 Public Administration Select Committee inquiry found that a scarcity of complaints and toothless

²³⁹ TLA, *supra* note 102, ss 12(1)–(2).

²⁴⁰ *Ibid.*, s 12(3).

²⁴¹ *Ibid.*, s 14.

²⁴² *Ibid.*, s 16.

²⁴³ David-Barrett, *supra* note 100 at 32.

²⁴⁴ OECD 2012, *supra* note 13 at 44.

²⁴⁵ *Ibid.*

²⁴⁶ "Professional Standards" (last visited 30 September 2021), online: *Chartered Institute of Public Relations* <https://cipr.co.uk/CIPR/About_Us/Professional_Standards.aspx>.

²⁴⁷ Public Affairs Board, *Public Affairs, Complaints, Determination, and Disciplinary Rules and Procedures* (Public Affairs Board, 2021) at 5–10, online (pdf): <<https://www.prca.org.uk/sites/default/files/Public%20Affairs%20Code%20February%202021%202021.pdf>>.

nature of the available sanctions contributed to the finding that self-regulation in the UK was inadequate.²⁴⁸

7.7.1.3 Canada

The *LA* contains various penalties and sanctions. It is an offence to fail to file a required return or knowingly make a false or misleading statement in a return.²⁴⁹ Authorities may proceed summarily or by indictment. On summary convictions, contraventions may be subject to a fine not exceeding CDN\$50,000 or imprisonment for a term not exceeding six months.²⁵⁰ On proceedings by way of indictment, contraventions may be subject to a fine not exceeding CDN\$200,000 or imprisonment for a term not exceeding two years.²⁵¹ Individuals convicted of an offence under the *LA* may be prohibited from lobbying for up to two years.²⁵² Although the first conviction under the *LA* was in 2013–2014,²⁵³ the Commissioner of Lobbying continues to include the number of cases referred to police in every *Annual Report*. During the period covered by the 2020-21 *Annual Report*, for example, the Commissioner referred three new files to police for investigation.²⁵⁴ As discussed, the LCC allows broad discretion for the Commissioner to investigate unscrupulous activity. This investigative authority extends beyond individuals who have registered and applies to all parties who undertake lobbying activity. Violations are subsequently reported to Parliament, encouraging compliance through the specter of “naming and shaming” unscrupulous lobbyists.

7.7.2 Education Programs

Education programs are less expensive than monitoring, investigating, and prosecuting misconduct, and the OECD suggests that they may also be more effective.²⁵⁵ These initiatives promote the legitimate role of lobbying in government decision-making and alert public officials and lobbyists to registration requirements and codes of conduct. Professional and industry associations may mandate ethics training as a condition of membership.

7.7.2.1 US

As in the UK, professional associations like the Public Relations Society of America provide ethical training to lobbyist members. At the state level, lobbyists in Louisiana, for example, are required under statute to complete yearly training on the *Louisiana Code of Governmental Ethics*.²⁵⁶

²⁴⁸ OECD 2014, *supra* note 1 at 217

²⁴⁹ *Lobbying Act*, *supra* note 134, s 14(1).

²⁵⁰ *Ibid*, s 14(1)(a).

²⁵¹ *Ibid*, s 14(1)(b).

²⁵² *Ibid*, s 14.01.

²⁵³ Office of the Commissioner of Lobbying, *Annual Report 2013–14*, *supra* note 122.

²⁵⁴ Office of the Commissioner of Lobbying, *Annual Report 2020–21*, *supra* note 124.

²⁵⁵ OECD Lobbyists 2009, *supra* note 9 at 39.

²⁵⁶ *Louisiana Code of Governmental Ethics*, RS 42:1170(4)(a)-(b).

7.7.2.2 UK

In the UK, there is no mandatory ethics or integrity training for lobbyists or public officials. Resistance to such training exists among public officials, partly due to potential exposure to ridicule for spending public money on the development of ethical behaviour.²⁵⁷ However, Transparency International UK recommends the institution of mandatory training.²⁵⁸ The UK's two professional associations provide training and education for lobbyists. The CIPR holds voluntary education events and classes and also runs industry-recognized certificate and diploma programs that incorporate ethical training. The PRCA offers regular, voluntary training sessions covering a wide range of topics, including ethics and regulation.²⁵⁹

7.7.2.3 Canada

In Canada, the Office of the Commissioner of Lobbying provides training sessions to help lobbyists understand the requirements and functioning of the reporting system. Each registrant in Canada is also assigned a Registration Advisor who provides guidance and individual support to lobbyists. As a matter of policy, the Office contacts every new registrant to introduce them to their Registration Advisor and inform them of their obligations. The Office also meets regularly with federal public officials and management teams in federal departments and agencies.

7.7.3 Revolving Door

The “revolving door” between the political world and the lobbying world threatens the integrity of lobbyists and public confidence in government.²⁶⁰ Revolving door provisions are intended to limit pre- and post-employment conflicts of interest.²⁶¹ The OECD defines conflict of interest as “a conflict between the public duty and private interests of a public official, in which the public official has private interests which could improperly influence the performance of their official duties and responsibilities.”²⁶² If former lobbyists are free to assume public sector roles, there is a risk of regulatory and institutional capture. If former public officials are free to assume positions as lobbyists, they may gain preferential access to current decision-makers. To prevent potential conflicts of interest, revolving door provisions

²⁵⁷ David-Barrett, *supra* note 100 at 22.

²⁵⁸ *Ibid* at 7.

²⁵⁹ “Training Courses” (last visited 30 September 2021), online: *Public Relations and Communication Association*

<https://www.prca.org.uk/training/courses?title=&level_68>All&skill_69=11&city>All&trainer_58=All>.

²⁶⁰ David-Barrett, *supra* note 100 at 48–52.

²⁶¹ In the OECD’s report *Government at a Glance 2015*, *supra* note 2, the under-regulation of pre-public employment in most member countries is criticized. Only seven OECD countries impose restrictions on public officials who have worked in the private sector, worked for suppliers to government, lobbied government, or negotiated public contracts on behalf of private companies prior to public employment. By contrast, 22 OECD countries impose rules or procedures for post-public employment.

²⁶² OECD, *Guidelines for Managing Conflicts of Interest in the Public Service: OECD Guidelines and Country Experiences*, (Paris: OECD, 2003) at 10, online (pdf):

<<https://www.oecd.org/gov/ethics/48994419.pdf>>.

must prescribe adequate “cooling-off” periods. These periods prohibit public officials from negotiating future lobbying jobs while in office or undertaking roles in the influence industry and lobbyists from assuming public sector roles until the proscribed duration has expired.

7.7.3.1 US

The *LDA* contains limited revolving door provisions. Under the *LDA*, individuals who have aided a foreign entity in any trade negotiation or dispute with the US are ineligible for appointment as United States Trade Representative or Deputy United States Trade Representative.²⁶³ As amended by the *HLOGA*, the *United States Code (USC)* provides extensive post-employment restrictions for past public officials. Generally, the *USC* prohibits any person who is a former officer or employee of the executive branch of the US from communicating or appearing before a current public official, with intent to influence that public official on matters in which the former public official participated substantially and personally, for a period of two years.²⁶⁴ Notably, the *USC*, as amended by the *HLOGA*, allows former lawmakers to assume lobbying activities provided they do not personally contact current legislators. The *USC* prohibitions were reinforced by Obama’s 2009 and now Biden’s 2021 Presidential *Executive Orders* that require all executive agency appointees to sign an ethics pledge.²⁶⁵ This pledge contains four revolving door prohibitions:

- **All Appointees Entering Government.** I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
- **Lobbyists Entering Government.** If I was registered under the Lobbying Disclosure Act, 2 U.S.C. 1601 et seq., or the Foreign Agents Registration Act (FARA), 22 U.S.C. 611 et seq., within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:
 - (a) participate in any particular matter on which I lobbied, or engaged in registrable activity under FARA, within the 2 years before the date of my appointment;
 - (b) participate in the specific issue area in which that particular matter falls; or
 - (c) seek or accept employment with any executive agency with respect to which I lobbied, or engaged in registrable activity

²⁶³ *Lobbying Disclosure Act*, *supra* note 96, § 21(b)(3).

²⁶⁴ *Honest Leadership and Open Government Act*, *supra* note 93, § 101.

²⁶⁵ US, Exec Order No 13989, 86 Fed Reg 7029 (20 January 2021), online: <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ethics-commitments-by-executive-branch-personnel/>>. Executive orders have no jurisdiction over the legislative branch. They remain effective only as long as the issuing President remains in office. The 2021 *Executive Order* will expire with the end of the Biden Administration.

under FARA, within the 2 years before the date of my appointment.

- **Appointees Leaving Government.** If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, and its implementing regulations, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment. I will abide by these same restrictions with respect to communicating with senior White House staff.
- **Appointees Leaving Government to Lobby.** In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee, or engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2021, would require that I register under FARA, for the remainder of the Administration or 2 years following the end of my appointment, whichever is last.²⁶⁶

Executive Orders of this kind are remarkable for two reasons. First, former public officials are prohibited from lobbying not only their former department or agencies, but the entire Executive Branch of government. Second, “reverse” revolving door provisions restrict, for the first time, the ability of lobbyists entering the public service from helping former clients. Legislation in neither Canada nor the EU contains similar ‘reverse’ revolving door provisions.

7.7.3.2 UK

In the UK, revolving door regulation applies to all Crown servants for two years after the last day of paid service. Senior officials are subject to an automatic cooling-off period of three months for all outside employment, which can be extended to two years or waived in certain situations. Senior officials are also prohibited from lobbying the government for two years after they leave their posts. In some situations, more junior officials will also require authorization to take new appointments in the two-year period after leaving their posts, including when potential employment involves lobbying the government. The Advisory Committee on Business Appointments implements the rules and provides advice.²⁶⁷ Transparency International UK argues that this regime is inadequate, stating:

Senior civil servants and ministers are required to consult the Advisory Committee on Business Appointments (ACoBA) before taking up appointments. ACoBA can impose waiting periods on individuals, so that they cannot take up appointments until a certain period after leaving office,

²⁶⁶ *Ibid.*

²⁶⁷ Jens Clausen & Vicky Cann, *Blocking the Revolving Door: Why We Need to Stop EU Officials Becoming Lobbyists* (Brussels: ALTER-EU, 2011) at 27, online (pdf): http://www.alter-eu.org/sites/default/files/AlterEU_revolving_doors_report.pdf.

and can advise that appointments should only be taken on condition that the individual will not engage in lobbying former colleagues. However, the Committee is only an advisory body. There is nothing to stop individuals from ignoring its advice.

A series of high-profile scandals suggest that the ACoBA regime is not working. In March 2010, Channel 4's Dispatches documentary showed secret recordings of several MPs and former Ministers offering their influence and contacts to journalists posing as representatives of a potential corporate employer, interested in hiring them for lobbying work. One former Cabinet Minister, Stephen Byers, said "I'm a bit like a sort of cab for hire" and offered examples of how he had used his influence and contacts in the past. [footnotes omitted]²⁶⁸

7.7.3.3 Canada

In Canada, DPOHs are subject to the *LA*'s five-year prohibition on lobbying after they leave office.²⁶⁹ This period begins when the DPOH ceases to carry out the functions of their employment. Anyone who violates the five-year cooling-off period commits an offence and is liable on summary conviction to a fine not exceeding CDN\$50,000.

8. COMPARING REGULATIONS IN THE EUROPEAN UNION

Brussels boasts the second-highest density of lobbyists in the world, after Washington, DC.²⁷⁰ Lobbying regulation for European Union (EU) institutions is distinct from that of the US, the UK, and Canada. The Transparency Register (TR) for lobbyist disclosures is a joint initiative of the European Parliament (EP) and European Commission (EC). It was launched in 2011 under Article 27 of the *Interinstitutional Agreement on the Transparency Register (IIA)*.²⁷¹ Registrants must comply with the *Code of Conduct for Interest Representatives (CCIR)*, which is codified in Annex III of the *IIA*. The European Council is not a party to the *IIA* and the TR does not extend to lobbying undertakings with the Council.

Unlike the registers in the US, UK, and Canada, registration with the TR is voluntary but incentivized. The TR is an example of an institutional register, meaning it provides

²⁶⁸ TI UK, *Cabs for Hire?: Fixing the Revolving Door Between Government and Business*, (London: TI UK, 2012) at 3, online (pdf): <http://www.transparency.org/files/content/pressrelease/20110517_UK_Revolving_Door_EN.pdf>.

²⁶⁹ *Lobbying Act*, *supra* note 134, s 10.1(1). Former public officials may apply to the Commissioner for an exemption from the five-year post-employment ban. The Commissioner will consider whether granting the exemption would be in keeping with the purpose of the *LA*.

²⁷⁰ Mulcahy, *supra* note 15 at 4.

²⁷¹ EC, *Agreement Between the European Parliament and the European Commission on the Transparency Register for Organisations and Self-employed Individuals Engaged in EU Policy-making and Policy Implementation*, [2014] OJ, L 277/11 [EC Agreement], online (pdf): <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0919\(01\)&from=en](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0919(01)&from=en)>.

registrants with access to government institutions.²⁷² Registrants gain access to EC and EP premises, as well as other advantages such as opportunities to participate as speakers in committee hearings.²⁷³ In order to be eligible to register, individuals and entities must meet the activity-based definition of lobbying in the *IIA*, which includes any “activities ... carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions.”²⁷⁴ This definition of lobbying includes communications with a broader range of government officials than the US, UK, and Canada. The *IIA* provides specific examples of lobbying activities, such as organizing events to which Members, officials or staff of EU institutions are invited. However, like the UK’s *TLA*, the TR has been criticized for under-inclusiveness, as registration can be avoided by conducting meetings away from EU premises and strategically not including lobbyists in expert groups.²⁷⁵ Also, just as formal meetings are emphasized in the *TLA*, the EU’s TR focuses on formal engagement with EU institutions, such as appearances before parliamentary and administrative committees, rather than informal communications.

After registration, registrants will be considered lobbyists and will be bound by the CCIR. Registrants are also required to self-identify as a certain type of lobbyist or entity, such as in-house lobbyists, think-tanks, or NGOs.

Registration imports mandatory annual disclosure requirements. Along with general contact and company information, lobbyists must disclose information on their lobbying activities and costs, including their lobbying objectives, fields of interest and targeted policies, and legislative proposals. The Register also provides information on specific activities in which the registrant engages, such as the registrant’s EU initiatives or participation in EU structures and platforms like expert groups. Unlike the registers in the US, UK, and Canada, the clients of lobbying firms are not disclosed. The Register is available online in a searchable database.²⁷⁶

Violations are punished by removal from the Register and resultant loss of incentives. Serious violations and noncompliance with the CCIR can be punished by removal for up to two years. Unlike the regimes in the US, the UK, and Canada, since registration is voluntary, failure to comply is not an offence and is not punishable by fines or incarceration.

9. CONCLUSION

Lobbying regulation is often enacted in the wake of political scandal. Public decision-making and confidence in government stand to benefit from policy that is forward-looking and

²⁷² Markus Krajewski, “Legal Study: Legal Framework for a Mandatory EU Lobby Register and Regulations” (2013), online (pdf): <http://www.foeeurope.org/sites/default/files/news/foee_legal_framework_mandatory_eu_lobby_register.pdf>.

²⁷³ EC Agreement, *supra* note 271 at 15.

²⁷⁴ *Ibid* at 12.

²⁷⁵ OECD Lobbyists 2009, *supra* note 9.

²⁷⁶ “Transparency Register” (last modified 24 September 2021), online: *Europa* <<https://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en>>.

proactive, rather than reactionary.²⁷⁷ The American approach sets a high standard for disclosure, and the Canadian regime is commendable. More stringent financial disclosure requirements would enhance the integrity of the Canadian regime. The UK's lobbying legislation would benefit from a broader definition of lobbying activity and more demanding and detailed disclosure requirements. Transparency in the EU would be greatly improved with the adoption of a mandatory registry; mandatory disclosure is the single most effective way to ensure standards of behaviour in lobbying, reduce corruption and promote confidence in public office. If a mandatory registry is adopted, the European Council should be a signatory.

The effectiveness of a lobbying regulatory regime demands that stakeholders are aware of responsibilities and obligations, and that enforcement mechanisms are objective and robust. American pluralism has produced a unique community of civil society watchdog groups that monitor lobby activity generally and in specific policy fields. These groups promote competency and understanding of lobbying regulations. Similar groups exist in Canada and the EU; however, in these jurisdictions the government has a greater responsibility to undertake education and awareness initiatives.

Lobbying remains an important component of democracy and will surely continue to operate as a mechanism for citizens to communicate with public officials and governments to acquire information from special interest groups. As jurisdictions such as Canada, the US, the UK, and the EU continue to improve upon their regulatory regimes, globalization will cause expectations to develop amongst diplomatic and economic partners. While nations with fledgling lobbying policy can benefit from lessons learned in other regions, lawmakers must be mindful of domestic requirements and traditional relationships between government, commercial interests, and the public at large. Nonetheless, in order for lobbying to maintain public legitimacy and promote principles of good governance, regulation must have clearly defined application and standards for information collection and disclosure that encourage compliance, and should integrate harmoniously within the broader regulatory and legal regime.

²⁷⁷ OECD 2014, *supra* note 1.

CHAPTER 12

PUBLIC PROCUREMENT

CONNOR BILDFELL AND GERRY FERGUSON

CONTENTS

- 1. INTRODUCTION**
- 2. RISKS AND STAGES OF CORRUPTION IN PUBLIC PROCUREMENT**
- 3. TYPES OF PUBLIC PROCUREMENT**
- 4. HALLMARKS OF A GOOD PROCUREMENT SYSTEM**
- 5. PRIVATE LAW ENFORCEMENT OF TENDERING FOR PUBLIC CONTRACTS**
- 6. PUBLIC LAW FRAMEWORK**
- 7. EVALUATION OF PROCUREMENT LAWS AND PROCEDURES**
- 8. OTHER ISSUES**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

Transparency International (TI) defines public procurement as “the acquisition by a government department or any government-owned institution of goods or services.”¹ Although large-scale items and projects, such as armaments or infrastructure buildings, are the most obvious examples of public procurement, the term also refers to the acquisition of supplies and services including school supplies (such as textbooks), hospital supplies (such as bed sheets), and financial or legal services.²

This chapter introduces the vast topic of corruption in public procurement.³ After setting out the context, including the negative effects and prevalence of corruption in public procurement, the chapter will explore how public procurement works and which industries suffer from the highest levels of procurement corruption, along with the key elements of effective procurement systems. It will conclude with a discussion of international legal instruments and standards for regulating procurement, as well as private and public law governing the public procurement process in the US, UK, and Canada.

For convenience, many examples of corruption and methods for reducing corruption tend to be drawn from the most prevalent area of public procurement corruption: the construction industry. This should not be taken as an indication that procurement corruption and its prevention are identical in all public procurement sectors. For example, military defence procurement is typically governed by a process separate from the general government procurement regime.⁴ The absence of a full discussion of other sectors and procurement regimes is primarily a product of the limited space that can be dedicated to the subject of procurement corruption in this book.

1.1 Adverse Consequences of Corruption in Public Procurement

The World Bank distinguishes between two broad categories of corruption:

- (1) **state capture**, which refers to actions by individuals, groups, or organizations to influence public policy formation by illegally transferring private benefits to public officials (i.e., efforts by private actors to shape the institutional environment in which they operate); and

¹ Susanne Kühn & Laura B Sherman, *Curbing Corruption in Public Procurement: A Practical Guide*, (Transparency International, 2014) at 6, online (pdf): <https://images.transparencycdn.org/images/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf>.

² *Ibid.*

³ Illustrating the vastness of this topic, the Public Procurement Research Group’s *Bibliography on Public Procurement Law and Regulation* amounts to 500 pages ((University of Nottingham, 2019), online (pdf): <<https://www.nottingham.ac.uk/pprg/documentsarchive/bibliographies/bibliography.pdf>>).

⁴ Canada, Parliamentary Information and Research Service, *Defence Procurement Organizations Worldwide: A Comparison*, by Martin Auger, Publication No 2019-52-E (Ottawa: Library of Parliament, 2020) at 2–4, online (pdf): <<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2019-52-e.pdf>>.

- (2) **administrative corruption**, which refers to the use of the same type of corruption and bribes by the same actors to interfere with the proper implementation of laws, rules, and regulations.⁵

Examples of public procurement corruption (i.e., corruption in the context of government acquisition of goods or services) can be found in either category. Corruption in the nature of “state capture,” for example, may involve attempts by private firms to influence the broader project appraisal, design, and budgeting process by making illicit campaign contributions. “Administrative corruption” could include, for example, a bidder’s attempt to bribe an administrative decision-maker in order to secure a lucrative public procurement contract. A further example would be the giving of a bribe by a contractor to a government engineer or inspector to “ease up” on their inspection of substandard goods or services provided by the contractor. Although such actions may be seen by the parties involved as relatively harmless, the reality is that the effects of corruption in public procurement, no matter how “small” the act, can be devastating.

Corruption in public procurement can have many detrimental effects. For instance, corruption often increases the cost and lowers the quality of goods or services acquired while reducing the likelihood that the goods or services purchased will meet the public’s needs.⁶ As the OECD describes, “Those paying the bribes seek to recover their money by inflating prices, billing for work not performed, failing to meet contract standards, reducing quality of work or using inferior materials, in case of public procurement of works. This results in exaggerated costs and a decrease in quality.”⁷ The OECD estimates that corruption drains off anywhere between 10-25% of national procurement budgets.⁸ Furthermore, corruption in public procurement may distort a country’s economy as corrupt officials allocate budgets

⁵ Elizabeth Anderson, “Municipal ‘Best Practices’: Preventing Fraud, Bribery and Corruption” (Vancouver, BC: International Centre for Criminal Law Reform and Criminal Justice Policy, 2013) at 2, online: <<https://icclr.org/wp-content/uploads/2019/06/Municipal-Best-Practices-Preventing-Fraud-Bribery-and-Corruption-FINAL.pdf>>. See also Joel S Hellman, Geraint Jones & Daniel Kaufmann,

“Seize the State, Seize the Day: An Empirical Analysis of State Capture and Corruption in Transition” (Paper prepared for the ABCDE 2000 Conference, Washington, DC, 18–20 April 2000), online (pdf): <https://openknowledge.worldbank.org/bitstream/handle/10986/19784/multi_page.pdf>.

⁶ Kühn & Sherman, *supra* note 1 at 4. Kühn and Sherman provide a number of examples of the detrimental effects of corruption in public procurement. According to TI, corruption can add as much as 50% to a project’s costs: “Public Procurement”, online: *Transparency International* <www.transparency.org/topic/detail/public_procurement>.

⁷ OECD, *Preventing Corruption in Public Procurement*, (2016) at 7, online (pdf): OECD <<http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf>>.

⁸ OECD, OECD Public Governance Reviews, *Implementing the OECD Principles for Integrity in Public Procurement: Progress Since 2008* (OECD, 2013), online: <www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en>. See also UNODC, Corruption and Economic Crime Branch, *Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances* (2013) at 1, online (pdf): UNODC <www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf> (noting that various studies suggest that between 10 and 25% of a public contract’s value may be lost to corruption); OECD, *supra* note 7 at 7(noting that it has been estimated that between 10 and 30% of the investment in publicly funded construction projects may be lost to mismanagement and corruption).

based on the bribes they can solicit rather than the needs of the country.⁹ This encourages approval of large-scale infrastructure projects because they provide greater opportunities for corruption ("it is easier to hide bribes and inflated claims in large projects than in small projects"¹⁰). When public infrastructure projects are tainted by corruption, nearly everyone suffers, and that includes project owners, funders, employees, construction firms and suppliers, government officials, and the general public.¹¹

Corruption in public procurement can also be detrimental to the environment. To illustrate, in the Philippines, a contract for a \$2 billion nuclear power plant (the Bataan Nuclear Power Plant) was controversially awarded to Westinghouse, who later admitted to having paid \$17 million in commissions to a friend of Ferdinand Marcos, the Filipino dictator.¹² The contract was initially denied, but Marcos reversed the decision. Westinghouse claimed these commissions were not a bribe. The nuclear reactor sits on a fault line, and if an earthquake occurs while the nuclear reactor is operational, there is a major risk of nuclear contamination. The power plant has not been operational or produced any electricity since its completion in the 1980s. This project was a massive misuse of public funds and would be a health and environmental nightmare if operational.

Corruption in public procurement can also lead to deaths and serious injuries. For example, the damage caused by natural disasters such as earthquakes may be magnified where buildings have not been built or maintained properly as a result of bribery.¹³ In southern Italy, a maternity wing of a six-story hospital collapsed and almost no occupants survived.¹⁴ Investigation into the incident found that although the planning for the hospital was designed to code and included adequate materials to prevent the collapse, the building had not been built to code.¹⁵ This failing is suspected to have been linked to Mafia involvement in Italy's construction sector.¹⁶ The builders' disregard for building regulations and the inspectors' failure to properly control and inspect the building resulted in a preventable catastrophe and many preventable deaths.

⁹ Paul Collier & Anke Hoeffler, "The Economic Costs of Corruption in Infrastructure" in Diana Rodriguez, Gerard Waite & Toby Wolfe, eds, *Global Corruption Report 2005* (London: Pluto Press in association with Transparency International, 2005) 12 at 13, online (pdf):

<https://images.transparencycdn.org/images/2005_GCR_Construction_EN.pdf>.

¹⁰ Giorgio Locatelli et al, "Corruption in Public Projects and Megaprojects: There is an Elephant in the Room!" (2017) 35 *Intl J Project Man* 252 at 256.

¹¹ Kühn & Sherman, *supra* note 1 at 4; "Impacts of Corruption", online: *Independent Broad-Based Anti-Corruption Commission* <<https://www.ibac.vic.gov.au/preventing-corruption/corruption-hurts-everyone>>. For an example of the complex web of different parties that can be involved in procurement projects, see "Why Corruption Occurs" (1 May 2008), online: *Global Infrastructure Anti-Corruption Centre* <www.giacentre.org/why_corruption_occurs.php>.

¹² Peter Bosshard, "The Environment at Risk from Monuments of Corruption" in Rodriguez, Waite & Wolfe, *supra* note 9, 19 at 20.

¹³ James Lewis, "Earthquake Destruction: Corruption on the Fault Line" in Rodriguez, Waite & Wolfe, *supra* note 9, 23 at 23.

¹⁴ David Alexander, "The Italian Mafia's Legacy of High-Rise Death Traps" in Rodriguez, Waite & Wolfe, *supra* note 9, 26 at 26.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

The effects of corruption in health sector procurement were felt acutely during the global COVID-19 pandemic, where corruption led to problems such as “[s]ubstandard ventilators, grossly overpriced equipment, [and] lucrative contracts awarded to companies with little or no expertise,” as well as “[p]rice rigging and gouging of essential items.”¹⁷ As Jillian Kohler and Tom Wright explain, the risk of corruption is heightened during times of emergency, including public health crises, as vast resources are deployed to “rapidly resolve a critical and complex problem, often through acquiring limited resources under large amounts of pressure.”¹⁸ The authors point to various instances of corruption across the globe during the COVID-19 crisis:

Examples of alleged corruption during the pandemic are already bountiful in many countries. In an effort to procure N95 face masks, the United States Federal Government gave a direct award of US\$ 55 million to a company that had no experience in supplying medical supplies and no recorded employees. In the UK, the government directly procured 3.5 million testing kits, which later turned out to be unusable, while a senior procurement official for the National Health Service (NHS) in London was reported to have traded PPE for private gain. In Brazil, it was reported that the Federal Government purchased masks from a supplier with ties to President Jair Bolsonaro that were 67 percent more expensive than the other supplier bids in the same procurement competition.¹⁹

Corruption in public procurement can also have less tangible impacts. For example, it can lead to an erosion of public confidence in government institutions. As former managing director of TI Cobus de Swardt writes:

When the products that citizens ultimately pay for are dangerous, inappropriate or costly there will be an inevitable loss of public confidence and trust in governments. Corrupted bidding processes also make a mockery of the level playing field for businesses, especially for younger, innovative companies eager to compete in a fair manner who may not have the backdoor contacts to buy contracts.²⁰

¹⁷ Tom Wright & Sean Darby, “COVID-19 Has Created Conditions in Which Corruption in Health Procurement Can Flourish. Here’s How Open Contracting Would Help” (1 July 2020), online: *Transparency International UK* <<https://www.transparency.org.uk/covid-19-has-created-conditions-which-corruption-health-procurement-can-flourish-heres-how-open>>.

¹⁸ Jillian Clare Kohler & Tom Wright, “The Urgent Need for Transparent and Accountable Procurement of Medicine and Medical Supplies in Times of COVID-19 Pandemic” (2020) 13:58 *J Pharm Policy Pract*, online: <<https://www.ncbi.nlm.nih.gov/pubmed/32934820>>.

¹⁹ *Ibid* [citations omitted]. See also “Policy Measures to Avoid Corruption and Bribery in the COVID-19 Response and Recovery” (26 May 2020), online: *OECD* <<https://www.oecd.org/coronavirus/policy-responses/policy-measures-to-avoid-corruption-and-bribery-in-the-covid-19-response-and-recovery-225abff3/>>.

²⁰ Cobus de Swardt, “Transparency in Public Procurement: Moving Away from the Abstract” (27 March 2015), online (blog): *OECD Insights* <oecdinsights.org/2015/03/27/transparency-in-public-procurement-moving-away-from-the-abstract/>.

Thus, public procurement corruption results not only in immediate, tangible losses to the public, but also in a deeper erosion of public trust in the government. The effect may be to drive away good companies who are unwilling to buy their way into procurement contracts, leaving behind a pool of unscrupulous and inexperienced contractors to carry out the projects.

The broader implications of a loss of confidence in the state and its institutions are severe. Professor Larry Diamond observes:

In the absence of trust, citizens become cynical about their political system and disaffected with the existing order. Distrust may produce alienation and withdrawal from the political process, leaving behind a shallow, fragile state that cannot mobilize national resources or shape a collective vision for national development. If it festers for very long, widespread and intense distrust may eventually generate a backlash against the political order and a search for more radical, anti-system alternatives. Failed states, revolutions, civil wars, and other related traumatic failures of governance all share in common the absence or collapse of trust.²¹

1.2 How Much Money is Spent on Public Procurement?

Annually, governments worldwide spend approximately \$9.5 trillion on public procurement projects, which represents 10 to 20% of GDP and up to 50% or more of total government spending.²² The OECD estimates that corruption costs account for around \$2 trillion of this annual procurement budget.²³ Broadly speaking, this distorts competition, compromises the quality of public projects and purchases, wastes taxpayer dollars, and contributes to endemic corruption, thus eroding trust in government.²⁴ Some procurement projects—such as the construction of facilities for major sporting events like the Olympics or the construction of airports—are so large in relation to local economies that cost overruns

²¹ Larry Diamond, “Building Trust in Government by Improving Governance” (Paper delivered at the 7th Global Forum on Reinventing Government, Vienna, 27 June 2007) [unpublished].

²² Kühn & Sherman, *supra* note 1 at 4. Canadian federal departments and agencies alone spend about C\$22 billion annually: “The Procurement Process” (last updated 16 October 2020), online: *Public Services and Procurement Canada* <<https://buyandsell.gc.ca/for-businesses/selling-to-the-government-of-canada/the-procurement-process>>.

²³ Kühn & Sherman, *supra* note 1 at 4.

²⁴ *Ibid*; OECD, *supra* note 7 at 7. Like all forms of corruption, corruption in public procurement is extremely difficult to quantify. Even where corrupt activities are identified, it can be very difficult to trace and calculate the chain of losses that flow from incidences of corruption. It is often practically impossible to calculate the quantum of loss. See e.g. “Section 1: Understanding the Cost of Corruption in Relation to Infrastructure Projects” (last updated 10 April 2020), online: Global Infrastructure Anti-Corruption Centre <www.giaccentre.org/cost_of_corruption.php>.

may distort an entire country or region's economy.²⁵ To the extent that such cost overruns are due to corruption, corruption contributes to the destabilization of local economies.

1.3 Public Procurement Corruption within Developed Countries

Corruption in public procurement is not only a concern for the developing world. It also exists in developed countries. Therefore, adequate controls are needed in all countries. The US spends over \$550 billion a year on procurement,²⁶ and although it has extensive laws and regulations in place, its system is far from free of corruption.²⁷ For example, in 2013, a former manager of the US Army Corps of Engineers was found guilty of accepting bribes from construction contractors for certifying bogus and inflated invoices.²⁸ Italy provides another example:

Italian economists found that the cost of several major public construction projects fell dramatically after the anti-corruption investigations in the early nineties. The construction cost of the Milan subway fell from \$227 million per kilometre in 1991 to \$97 million in 1995. The cost of a rail link fell from \$54 million per kilometre to \$26 million, and a new airport terminal is estimated to cost \$1.3 billion instead of \$3.2 billion.²⁹

A further example of public procurement corruption within developed countries is provided by the findings of the Charbonneau Commission. The Charbonneau Commission, known officially as the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, was a major public inquiry into corruption in public contracting in Quebec.³⁰ Justice France Charbonneau chaired the commission, which was launched on October 19, 2011 by then-Premier Jean Charest. The Commission had a three-fold mandate:

²⁵ Bent Flyvbjerg & Eamonn Molloy, "Delusion, Deception and Corruption in Major Infrastructure Projects: Cases, Consequences, and Cures" in Susan Rose-Ackerman & Tina Søreide, eds, *International Handbook on the Economics of Corruption*, vol 2 (Cheltenham: Edward Elgar, 2011) at 87.

²⁶ US, Government Accountability Office, *A Snapshot: Government-Wide Contracting* (26 May 2020) online (blog): GAO <<https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2019-infographic>>.

²⁷ Daniel I Gordon, "Protecting the Integrity of the U.S. Federal Procurement System: Conflict of Interest Rules and Aspects of the System That Help Reduce Corruption" in Jean-Bernard Auby, Emmanuel Breen & Thomas Perroud, eds, *Corruption and Conflicts of Interest: A Comparative Law Approach* (Cheltenham: Edward Elgar, 2014) 39 at 39.

²⁸ "19-Year Corruption Sentence for Ex-Manager with Army Corps of Engineers", *The New York Times* (12 July 2013), online: <www.nytimes.com/2013/07/12/us/19-year-corruption-sentence-for-ex-manager-with-army-corps-of-engineers.html>.

²⁹ Tina Søreide, *Corruption in Public Procurement: Causes, Consequences, and Cures*, Report R 2002-1 (Norway: Chr Michelson Institute, 2002) at 1, online (pdf): <<https://www.cmi.no/publications/file/843-corruption-in-public-procurement-causes.pdf>>.

³⁰ For a concise summary of the Charbonneau Commission's activities and findings, see "Charbonneau Commission Finds Corruption Widespread in Quebec's Construction Sector", *CBC News* (24 November 2015), online: <www.cbc.ca/news/canada/montreal/charbonneau-corruption-inquiry-findings-released-1.3331577>.

- 1) Examine the existence of schemes and, where appropriate, paint a portrait of activities involving collusion and corruption in the provision and management of public contracts in the construction industry (including private organizations, government enterprises, and municipalities) and include any links with the financing of political parties.
- 2) Investigate possible infiltration of organized crime in the construction industry.
- 3) Consider possible solutions and make recommendations establishing measures to identify, reduce, and prevent collusion and corruption in awarding and managing public contracts in the construction industry.³¹

In her final report, Justice Charbonneau concluded that corruption and collusion in the awarding of government contracts in Quebec were far more widespread than originally believed.³² Influence peddling was found to be a serious issue in Quebec's construction sector and organized crime had infiltrated the industry. As Justice Charbonneau writes in the preamble to the full report, "[t]his inquiry confirmed that there is a real problem in Quebec, one that was more extensive and ingrained than we could have thought."³³

While Quebec has faced significant corruption issues, including ongoing corruption scandals involving Montreal-based construction company SNC-Lavalin, journalist Barrie McKenna argues that Quebec's corruption problem extends beyond provincial borders and affects Canada as a whole.³⁴ He provides three reasons for this assertion: (1) federal tax money is wasted, (2) the negative reputation of a Canadian company engaging in international business affects all Canadian companies, and (3) corruption spreads and is not necessarily stopped by provincial borders.³⁵ He claims that "[i]t defies logic that corruption would be a way of life in one province and virtually absent in the rest of the country."³⁶

The issue of corruption in Quebec's construction sector was thrust into the spotlight again in 2018–19 when Prime Minister Justin Trudeau was found to have attempted to influence a decision of the Attorney General and Minister of Justice Jody Wilson-Raybould relating to a

³¹ "Mandate" (last updated 12 February 2015), online: Government of Quebec <www.ceic.gouv.qc.ca/la-commission/mandat.html>.

³² Quebec, Commission on the Awarding and Management of Public Contracts in the Construction Industry (CEIC), *Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction* by France Charbonneau & Renaud Lachance (CEIC, November 2015), online (pdf): Government of Quebec <https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Integral_c.pdf>. An English translation of vol 3 of the report, which includes the report's recommendations, is available online (pdf): <https://www.allardprize.org/sites/default/files/charbonneau_inquiry_vol_3.pdf>.

³³ Martin Patriquin, "No One Can Deny It Now: Quebec Is Facing a Corruption Crisis", *Maclean's* (24 November 2015), online: <www.macleans.ca/news/canada/quebecs-now-undeniable-corruption-crisis/>.

³⁴ Martin Patriquin, "Quebec: The Most Corrupt Province", *Maclean's* (24 September 2010), online: <www.macleans.ca/news/canada/the-most-corrupt-province/>.

³⁵ Barrie McKenna, "Quebec's Corruption Scandal Is a Canadian Problem", *The Globe and Mail* (10 December 2012), online: <www.theglobeandmail.com/report-on-business/quebecs-corruption-scandal-is-a-canadian-problem/article6140631/>.

³⁶ *Ibid.*

criminal prosecution against SNC-Lavalin on corruption and fraud charges. As outlined in an August 2019 report published by the Canadian Conflict of Interest and Ethics Commissioner (Ethics Commissioner),³⁷ SNC-Lavalin was charged in February 2015 with criminal corruption and fraud offences that allegedly took place between 2001 and 2011. At the time, Canada did not have a regime to allow remediation agreements, also known as deferred prosecution agreements (DPAs). In early 2016, SNC-Lavalin began lobbying government officials to adopt such a regime. Following public consultations, amendments to the *Criminal Code* allowing for such a regime were adopted as part of the 2018 federal budget. On September 4, 2018, the Director of Public Prosecutions informed the Office of the Minister of Justice and Attorney General that she would not invite SNC-Lavalin to negotiate a possible remediation agreement. The Prime Minister's Office and the Minister of Finance's office were then informed of this decision by Ms. Wilson-Raybould's office. The Prime Minister then directed his staff to find a solution that would safeguard SNC-Lavalin's business interests in Canada and avoid potential adverse economic consequences. Having reviewed several possible means of intervening in the matter, Ms. Wilson-Raybould made it known that she would not intervene in the Director of Public Prosecutions' decision. The Ethics Commissioner found that, after doing so, "senior officials under the direction of Prime Minister Trudeau continued to engage both with SNC-Lavalin's legal counsel and, separately, with Ms. Wilson-Raybould and her ministerial staff to influence her decision, even after SNC-Lavalin had filed an application for a judicial review of the Director of Public Prosecutions' decision."³⁸ The commissioner found that the Prime Minister attempted "to circumvent, undermine and ultimately ... to discredit"³⁹ Ms. Wilson-Raybould's decision. The Ethics Commissioner found that the Prime Minister's conduct breached s. 9 of the *Conflict of Interest Act*, which prohibits public office holders from using their position to seek to influence a decision of another person so as to further their own private interests or those of their relatives or friends, or to improperly further another person's private interests.⁴⁰

Not long after the Commissioner's report was published in December 2019, a construction subsidiary of SNC-Lavalin pleaded guilty to one count of fraud over \$5,000 under s. 380 of the *Criminal Code* in connection with its activities in Libya between 2001 and 2011.⁴¹ The agreed statement of facts submitted in conjunction with this plea noted that SNC-Lavalin paid \$127 million to two shell companies between 2001 and 2011, and about \$47 million of that money was used to reward Saadi Gadhafi, son of the late dictator Muammar Gadhafi, for helping SNC-Lavalin to secure lucrative construction projects. SNC-Lavalin also paid for

³⁷ Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report*, by Mario Dion (Ottawa: Office of Conflict of Interest and Ethics Commissioner, August 2019), online (pdf): <https://publications.gc.ca/collections/collection_2019/ccie-ciec/ET4-28-2019-eng.pdf>. See also Mark Gollom, "What You Need to Know About the SNC-Lavalin Affair", *CBC News* (13 February 2019), online: <<https://www.cbc.ca/news/politics/trudeau-wilson-raybould-attorney-general-snc-lavalin-1.5014271>>.

³⁸ Ethics Commissioner, *ibid* at 1.

³⁹ *Ibid* at 44.

⁴⁰ *Conflict of Interest Act*, SC 2006, c 9, s 9.

⁴¹ SNC-Lavalin, Press Release, "SNC-Lavalin Group Settles Federal Charges" (18 December 2019), online: <<https://www.snc-lavalin.com/en/media/press-releases/2019/18-12-2019>>; Kamila Hinkson, "SNC-Lavalin Pleads Guilty to Fraud for Past Work in Libya, Will Pay \$280M Fine", *CBC News* (18 December 2019), online: <<https://www.cbc.ca/news/canada/montreal/snc-lavalin-trading-court-libya-charges-1.5400542>>.

Saadi Gadhafi's personal expenses, including decorating his Toronto condo. As part of the settlement, SNC-Lavalin agreed to pay a record fine of \$280 million, payable in equal instalments over five years, and to be subject to a three-year probation order. Weeks later, in January 2020, former SNC-Lavalin executive Sami Bebawi was sentenced to eight years and six months in prison for fraud, corruption, and proceeds of crime offences in connection with the same scheme.⁴²

These examples demonstrate that all countries, whether developed or developing, need effective procedures and laws in place to reduce the opportunity for corruption in public procurement.

1.4 Importance of Maintaining a Low-Risk Environment

Anti-corruption scholars and practitioners agree that increased opportunities for corruption have a positive relationship with actual incidences of corruption. It is therefore crucial to maintain a low-risk environment. The lack of accountability enabled by a loose regulatory framework produces opportunities for corruption. The World Bank explains the connection between accountability and decreased corruption risk as follows:

Accountability ... is the degree to which local governments have to explain or justify what they have done or failed to do.... Accountability can be seen as the validation of participation, in that the test of whether attempts to increase participation prove successful is the extent to which [the public] can use participation to hold a local government responsible for its actions.... In theory, ... more transparency in local governance should mean less scope for corruption, in that dishonest behavior would become more easily detectable, punished and discouraged in the future.⁴³

2. RISKS AND STAGES OF CORRUPTION IN PUBLIC PROCUREMENT

2.1 Risk by Industry and Sector

Transparency International's Bribe Payers Index (2011) ranked 19 industries for prevalence of foreign bribery. The public works and construction sector scored lowest, making it the

⁴² Sidhartha Banerjee, "Former SNC-Lavalin Executive Sami Bebawi Sentenced to 8½ Years in Prison for Fraud, Corruption", *The Globe and Mail* (10 January 2020), online:

<<https://www.theglobeandmail.com/business/article-former-snc-lavalin-executive-sami-bebawi-sentenced-to-8-years-in/>>.

⁴³ Decentralization Thematic Team, "Accountability, Transparency and Corruption in Decentralized Governance", World Bank, online: *Center for International Earth Science Information Network* <<https://www.ciesin.columbia.edu/decentralization/English/Issues/Accountability.html>>.

industry most vulnerable to bribery.⁴⁴ The list below ranks the industries and business sectors from highest prevalence of foreign bribery to lowest prevalence of foreign bribery:

1. Public works contracts and construction
2. Utilities
3. Real estate, property, legal and business services
4. Oil and gas
5. Mining
6. Power generation and transmission
7. Pharmaceutical and healthcare
8. Heavy manufacturing
9. Fisheries
10. Arms, defence, and military
11. Transportation and storage
12. Telecommunications
13. Consumer services
14. Forestry
15. Banking and finance
16. Information technology
17. Civilian aerospace
18. Light manufacturing
19. Agriculture

The OECD has reported that almost two-thirds of foreign bribery cases between 1999 and 2014 occurred in four industries: extractive (19%); construction (15%); transportation and storage (15%); and information and communication (10%).⁴⁵

TI suggests that the construction industry is particularly vulnerable to bribery because of the large size and fragmented nature of construction projects, which often involve multiple contractors and subcontractors.⁴⁶ The large and complex nature of many construction projects makes it difficult to monitor payments and implement effective policies and standards. Since major public infrastructure projects are often “special purpose, one-of-a-kind deals” that are massive in scale, produce high levels of economic rents, present difficulties in establishing benchmarks for cost and quality, and can be challenging to

⁴⁴ Deborah Hardoon & Finn Heinrich, *Bribe Payers Index 2011* (Transparency International, 2011) at 15, online: <https://issuu.com/transparencyinternational/docs/bribe_payers_index_2011>. The 2011 Bribe Payers Index is TI’s most recent Bribery Index.

⁴⁵ See also OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (2014) at 22, online: <<https://doi.org/10.1787/9789264226616-en>>

⁴⁶ Kühn & Sherman, *supra* note 1 at 20.

monitor, corruption risks abound.⁴⁷ Construction projects also involve many “touch points” at which private actors require government approval, resulting in increased opportunities for the offering or demanding of bribes.

2.2 Stages and Opportunities for Procurement Corruption

Corruption in public procurement can take many forms and can occur at any time throughout the procurement process. Most corruption experts agree that the following factors magnify opportunities for corruption: (1) monopoly of power, (2) wide discretion, (3) weak accountability, and (4) lack of transparency.⁴⁸ Government agencies in developing countries have a greater tendency to display these characteristics, creating more opportunities for procurement corruption in those countries. Procurement in developing countries can account for over 20% of the country’s GDP, and the high proportion of the economy occupied by public procurement makes it difficult for companies to find contracts outside the public sphere.⁴⁹ This motivates companies to resort to corruption when competing for contracts in developing countries,⁵⁰ while public officials in those countries are often motivated to resort to corruption in order to supplement their low wages.⁵¹ Meanwhile, the broad discretion afforded to officials in making procurement decisions and the lack of capacity to monitor and punish corruption exacerbate opportunities for corruption.

In “Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation,” Jill Wells explores how corruption opportunities arise, especially in the project selection and project preparation stages of the procurement process for public infrastructure projects.⁵² Since public infrastructure projects carry the highest risk for procurement corruption and consume “roughly one half of all fixed capital investment by governments,”⁵³ the public infrastructure sector is a worthy area for more detailed analysis. According to Wells, estimates of bribery payments in public infrastructure construction

⁴⁷ Susan Rose-Ackerman & Rory Truex, “Corruption and Policy Reform” (2012) Yale Law & Economics Research Paper 444 at 24, online: <papers.ssrn.com/sol3/Papers.cfm?abstract_id=2007152>. See also Locatelli et al, *supra* note 10.

⁴⁸ Glenn T Ware et al, “Corruption in Procurement” in Adam Graycar & Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Cheltenham: Edward Elgar, 2011) 65 at 67.

⁴⁹ Simeon Djankov, Federica Saliola & Asif Islam, “Is Public Procurement a Rich Country’s Policy?” (1 December 2016), online (blog): *World Bank Blogs* <<https://blogs.worldbank.org/governance/public-procurement-rich-country-s-policy>>. For data on procurement spending as a percentage of GDP and total government expenditures in OECD countries, see OECD, *Government at a Glance 2017* (Paris: OECD Publishing, 2017) at 173, online: <https://doi.org/10.1787/gov_glance-2017-59-en>.

⁵⁰ Ware et al, *supra* note 48 at 66.

⁵¹ Marie Chêne, “Low Salaries, the Culture of Per Diems and Corruption”, (23 November 2009), online: U4 Anti-Corruption Resource Centre <<https://www.u4.no/publications/low-salaries-the-culture-of-per-diems-and-corruption/>>.

⁵² Jill Wells, *Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation*, U4 Issue 8 (U4 Anti-corruption Resource Centre, 2015), online (pdf): <<https://www.u4.no/publications/corruption-in-the-construction-of-public-infrastructure-critical-issues-in-project-preparation-1.pdf>>.

⁵³ *Ibid* at 1.

"vary globally from 5% to 20% [of construction costs] or even higher."⁵⁴ However, focusing solely on bribe payments distorts the overall size and impact of corruption. Wells cites the work of Charles Kenny, who engages in a broader impact analysis and suggests that the most harmful forms of corruption for development outcomes are:

(1) corruption that influences the project appraisal, design, and budgeting process by diverting investment towards projects with low returns and towards new construction at the expense of maintenance and (2) corruption during project implementation that results in substandard construction that shortens the life of projects and hence drastically reduces the economic rate of return (ERR).⁵⁵

Wells provides an overview of corruption risks at various stages of the public procurement process for infrastructure projects:

Table 12.1 Overview of Corruption Risks during Public Procurement Process for Infrastructure Projects⁵⁶

| Stages | Risks | Main actors |
|--|--|--|
| Project appraisal | <ul style="list-style-type: none"> • Political influence or lobbying by private firms that biases selection to suit political or private interests • Promotion of projects in return for party funds • Political influence to favour large projects and new construction over maintenance • Underestimated costs and overestimated benefits to get projects approved without adequate economic justification | <ul style="list-style-type: none"> • Government ministers • Senior civil servants • Procurement officers • Private consultants (e.g., planners, designers, engineers, and surveyors) |
| Project selection, design, and budgeting | <ul style="list-style-type: none"> • Costly designs that increase consultants' fees and contractors' profits • Designs that favour a specific contractor • Incomplete designs that leave room for later adjustments (which can be manipulated) • High cost estimates to provide a cushion for the later diversion of funds • Political influence to get projects into the budget without appraisal | <ul style="list-style-type: none"> • Government ministers • Senior civil servants • Procurement officers • Private consultants (e.g., planners, designers, engineers, and surveyors) |

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at 18.

| | | |
|---|--|--|
| Tender for works and supervision contracts | <ul style="list-style-type: none"> Bribery to obtain contracts (leaving costs to be recovered at later stages) Collusion among bidders to allocate contracts and/or raise prices (potentially with assistance from procurement officers) Interference by procurement officers to favour specific firms or individuals Going to tender and signing contracts for projects that are not in the budget | <ul style="list-style-type: none"> Procurement officers Private consultants (e.g., supervising engineer) Contractors |
| Implementation | <ul style="list-style-type: none"> Collusion between contractor and the supervising engineer (with or without the client's knowledge) that results in the use of lower quality materials and substandard work Collusion between contractors and the supervising engineer to increase the contract price or adjust the work required in order to make extra profits, cover potential losses, or recover money spent on bribes | <ul style="list-style-type: none"> Procurement officers Private consultants (e.g., supervising engineer) Contractors and subcontractors |
| Operation and maintenance, including evaluation and audit | <ul style="list-style-type: none"> Agreement by the supervising engineer to accept poor quality work or work below the specification, leading to rapid deterioration of assets A lack of allocated funds for maintenance, as new construction takes precedence in the project identification stage for future projects | <ul style="list-style-type: none"> Procurement officers Private consultants (e.g., supervising engineer) Contractors and subcontractors |

Procurement scholars and practitioners agree that sound public investment in infrastructure projects requires an effective public investment management system (PIM system).⁵⁷ Wells notes that such management systems should include an analysis of whether the proposed project is a strategic priority, whether there are alternatives, whether the proposed project is likely to be economically feasible, and whether the project is likely to survive environmental and social impact assessments. Before an infrastructure project is chosen, it should be subject to an independent, professional appraisal to ensure that improper, irrelevant, or corrupt influences were not driving the project proposal. Once a project is selected, a detailed design and budget must be prepared in a manner that ensures against, or at least minimizes the risk of, corruption influencing the design and budget phases.

Public procurement projects face the potential problem of inaccurate estimations of costs and benefits. First, public officials may promote and support “low-ball” estimates of projects in order to gain public support for the project. Subsequently, as the project evolves, those initial estimates may prove to be wildly low. Studies showcase the role that “delusion,

⁵⁷ Anand Rajaram et al, “A Diagnostic Framework for Assessing Public Investment Management” (2010) World Bank Policy Research Working Paper No 5397, online (pdf): <<https://openknowledge.worldbank.org/bitstream/handle/10986/3881/WPS5397.pdf>>.

deception, and corruption" play in explaining underperformance with regard to cost estimates and benefit delivery of major infrastructure projects.⁵⁸ Research by Flyvbjerg and Molloy suggests that an important step in curbing corruption is focusing on accurate cost and benefits estimates at the planning and approval stage. They suggest that "planning fallacy," a psychological phenomenon that influences planners and project promoters to "make decisions based on delusional optimism rather than on rational weighing of gains, losses, and probabilities,"⁵⁹ contributes to the tendency of projects to run significantly over budget. Planning fallacy, or "optimism bias," may result in the incorrect tender being chosen, as it rewards individuals for exaggerating the benefits of their design and underestimating the cost of the project.⁶⁰ Optimism bias can also be dangerous because when contracts are awarded for below their reasonable cost, contractors may cut corners by using inferior materials and compromising on quality in order to stay within the budget.⁶¹

Planners need to be aware of optimism bias in order to take steps to prevent it. Flyvbjerg and Molloy suggest that strategically implementing procedures to monitor and review forecasts can assist in reducing the prevalence of corruption and deception in public procurement.⁶² Their suggestions include developing financial, professional, or criminal penalties for "consistent and unjustifiable biases in claims and estimates of costs, benefits, and risks."⁶³ The Treasury of the UK addressed this issue by denying access to funding for infrastructure project proposals that do not show that they have accounted for optimism bias in their planning.⁶⁴

Corruption that occurs in the planning and project development stages is of particular concern. Corrupt politicians may choose projects that do not provide significant, or any, benefit to the public because they know that certain projects allow them to extract more bribes from contractors or because they owe a contractor a favour. This kind of deliberate manipulation during project planning is likely to facilitate corrupt acts throughout the project lifecycle.⁶⁵ As construction projects provide significant opportunity for corruption, countries may be infrastructure-heavy and yet have insufficient capacity to maintain and use the infrastructure. For example, a country may build hospitals that it cannot afford to staff or supply. As noted by the consulting firm Mott Macdonald, once a public need is found and officials determine that public funds will be allocated to meet this need, care must be taken in setting the parameters and budget for the project:

During the project preparation period, significant opportunities arise for the diversion of public resources to favour political or private interests. This

⁵⁸ Flyvbjerg & Molloy, *supra* note 25, at 81.

⁵⁹ *Ibid* at 88.

⁶⁰ *Ibid* at 99.

⁶¹ Wells, *supra* note 52.

⁶² Flyvbjerg & Molloy, *supra* note 25 at 104.

⁶³ *Ibid*.

⁶⁴ UK, Her Majesty's Treasury, *Review of Large Public Procurement in the UK* by Matt MacDonald (London: HM Treasury, 2002), online (pdf): <www.parliament.vic.gov.au/images/stories/committees/paec/2010-11_Budget_Estimates/Extra_bits/Mott_McDonald_Flyvberg_Blake_Dawson_Waldron_studies.pdf>.

⁶⁵ *Ibid* at 2.

stage of the project cycle is when some of the worst forms of grand corruption and state capture occur. But this is not all. Failures in project preparation (whether due to corruption, negligence, or capacity constraints) can also open up opportunities for corruption at later stages of the project cycle. For example, inadequate project preparation may lead to subsequent implementation delays that may require changes that can be manipulated to benefit individuals or companies. The preparation stage is especially likely to facilitate corrupt acts at a later stage when failures at this stage are deliberate.⁶⁶

It is important to screen out projects with high costs and grossly negative rates of return as early as possible, as this is the most serious consequence of inadequate project screening.⁶⁷ Governments spend a significant amount of money on consulting during appraisal and planning of the project, and thus should ensure projects are feasible and valuable to the public prior to expending public funds for consulting.⁶⁸

Wells refers to an index developed by Era Dabla-Norris et al. to measure the efficiency (effectiveness) of public management of public investments in various countries.⁶⁹ Wells summarizes the index and the results of its application:

The index records the quality and efficiency of the investment process across four stages: (1) ex ante project appraisal, (2) project selection and budgeting, (3) project implementation, and (4) ex-post evaluation and audit.... A total of 71 low and middle income countries were scored on each of the four stages. The scoring involved making qualitative assessments on 17 individual components in each stage, with each component scored on a scale of 0 to 4 (with a higher score reflecting better performance). The various components were then combined to form a composite PIM index.

Unsurprisingly, Dabla-Norris et al. (2011) found that low income countries and oil exporting countries had the lowest overall scores. The overall median score was 1.68, but scores ranged from a low of 0.27 (Belize) to a high of 3.50 (South Africa). The highest scores were among middle income countries (South Africa, Brazil, Colombia, Tunisia, and Thailand). Across regions, Eastern Europe and central Asian countries had relatively more developed PIM processes, followed by Latin America, East Asia, and the Pacific. The Middle East, North Africa, and sub-Saharan Africa regions trailed furthest behind.

More interesting than variations across countries and regions was the considerable variation in individual scores for each of the four stages. Generally, the first and last stages (ex-ante appraisal and ex post evaluation)

⁶⁶ *Ibid.*

⁶⁷ *Ibid* at 9.

⁶⁸ *Ibid.*

⁶⁹ Era Debla-Norris et al, "Investing in Public Investment: An Index of Public Investment Efficiency" (2010) IMF Working Paper WP/11/37, online (pdf): <<https://www.imf.org/external/pubs/ft/wp/2011/wp1137.pdf>>.

were the weakest. The median score for project appraisal was only 1.33, with country scores ranging from 4 for South Africa and Colombia down to 0 for a number of low income countries. These included several in sub-Saharan Africa (Guinea, Chad, Sierra Leone, the Republic of Congo, and Sao Tome and Principe), as well as Trinidad and Tobago, Belize, the West Bank and Gaza, and the Solomon Islands.

The conclusion emerging from this exercise is that, while a number of countries have improved their project implementation (mainly through the introduction of procurement reforms), only a handful of developing countries have been able to improve the processes of project appraisal, design, and selection – hence moving towards better construction project management.⁷⁰

Public officials and others may abuse infrastructure procurement projects for improper personal gain (e.g., through bribes, kickbacks, etc.) or for overt or clandestine political purposes. Wells refers to a study in Uganda in which David Booth and Frederick Golooba-Mutebi⁷¹ found that the price of road construction per kilometer in Uganda was twice as high as similar road construction in Zambia:

Booth and Golooba-Mutebi (2009, 5) concluded, “All of the evidence indicates that, under the pre-2008 arrangements, the roads divisions of the Ministry of Works operated as a well-oiled machine for generating corrupt earnings from kickbacks.” They went on to show how this operated as a complex system of political patronage. In addition to ensuring the personal enrichment of the minister, chief engineer, and many senior civil servants, the arrangement also provided a reliable means of accumulating funds to be made available to state house and other top government offices for “political” uses (such as patronage and campaign finance). Public officials raised money through a variety of means including accepting bribes for awarding contracts and signing completion certificates. The relative difficulty of skimming resources from donor-funded projects led to a situation where only a fraction of project funds made available by donors was being utilised.⁷²

The evidence before the Charbonneau Commission, discussed in Section 1.3, in relation to corruption in public infrastructure projects in Quebec and the connection between those corrupt funds and illegal campaign financing demonstrate that these types of corrupt public

⁷⁰ Wells, *supra* note 52 at 5.

⁷¹ David Booth & Frederick Golooba-Mutebi, “Aiding Economic Growth in Africa: The Political Economy of Roads Reform in Uganda” (2009) Overseas Development Institute Working Paper No 307, online (pdf): <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4965.pdf>>.

⁷² Wells, *supra* note 52 at 7.

infrastructure practices can also exist in countries, such as Canada, that are perceived to have low levels of corruption.⁷³

Effective project screening will align proposed investment with actual development needs. Wells notes that inadequate independent pre-screening of infrastructure projects can lead to the proverbial “white elephant” phenomenon. She refers to a 2013 World Bank study that describes three types of white elephant projects:

- [Projects involving e]xcess capacity infrastructure, such as a road or airport with little or no traffic demand;
- Projects for which there is no operational budget to provide services that will be needed for success (such as hospitals or schools); and
- Capital investment in projects that are never completed (sometimes not even started) but are used to secure access to the contract value.⁷⁴

An example of the first type can be found in Angola, where close examination of the list of projects in 2011 revealed a bridge to be built in a remote area of the country’s southeast region for which there were no connecting roads—quite literally, this was a “bridge to nowhere.” This project could not have been approved with even a cursory evaluation (Wells, 2011).

The second type (also in Angola) is illustrated by the expansion of power generation capacity that was not matched by investment in transmission and distribution, so that the power could get to the users (Pushak and Foster, 2011).

The third type has been well-illustrated by the award of a contract for major road projects in Uganda. Part of the contract value was siphoned off and used for patronage payments, and many of the projects were never completed (Booth and Golooba-Mutebi, 2009) [footnotes omitted].⁷⁵

2.3 Procurement Offences

Corruption in public procurement occurs most frequently through bribes, extortion, bid-rigging, and other forms of fraud. These types of corruption are discussed in more detail below.

⁷³ For example, it has been reported that Quebec pays 30% more for building stretches of road than elsewhere in Canada. See Patriquin, *supra* note 34.

⁷⁴ World Bank Poverty Reduction and Economic Management Network, *Investing to Invest: Strengthening Public Investment Management*, Country Clearance Version (May 2013) [unpublished].

⁷⁵ Wells, *supra* note 52 at 10.

2.3.1 Bribery

Bribery refers to the improper offering, giving, soliciting, or receiving of anything of value in order to influence a public official's exercise of a public duty. The OECD estimates that bribery in government procurement in OECD countries increases contract costs by 10 to 20%, suggesting that at least \$400 billion is lost to bribery every year.⁷⁶ The following are a few examples of how bribery of public officials can manifest in public procurement:

- a contractor may bribe a government official to provide planning permission for a project or to approve a design that does not meet standards;
- a bidder may offer bribes to a government official in order to receive improper favourable treatment throughout the bidding process or to induce the official to manipulate the tender evaluation; or
- a bidder may make a donation to a political party in exchange for preferential treatment.⁷⁷

2.3.2 Extortion

Extortion refers to the attempt to secure a benefit or advantage by making a demand backed by force or threat. The following are some examples of how extortion can manifest in public procurement:

- a bidder may threaten to harm a government official or the official's family unless the official gives unwarranted favourable treatment to the bidder;
- a government official may demand something in return for assisting a company to win a bid or for fair treatment in the bidding process; and
- bribery can include an element of extortion.

2.3.3 False Invoicing, Bid-Rigging, and Other Forms of Fraud

Fraud refers to any intentionally deceptive act or omission designed to secure a benefit or advantage. Public procurement attracts fraudulent behaviour in part because it can involve the exchange of massive amounts of money and resources.⁷⁸ The following are a few examples of how fraud can manifest in public procurement:

- a bidder may deliberately submit false invoices or other false documentation (with or without collusion of public officials);
- bidders may form a cartel and secretly pre-select the winners for certain projects (a form of bid-rigging);

⁷⁶ OECD, *OECD Principles for Integrity in Public Procurement*, (OECD Publishing, 2009) at 9, online (pdf): <<https://www.oecd.org/gov/ethics/48994520.pdf>>.

⁷⁷ "How Corruption Occurs" (last updated 10 April 2020), online: *Global Infrastructure Anti-Corruption Centre* <<https://giaccentre.org/how-corruption-occurs/>>.

⁷⁸ Paul Fontanot et al, "Are You Tendering for Fraud?" (April 2010) 62:3 Keeping Good Companies 146 at 146.

- a contractor may submit false information in order to receive more money or more time to complete a project; or
- bidders and public officials may illegally divert funds through money laundering or embezzlement.

These are just a few of the ways corruption manifests in public procurement. Given the great potential for many types of corrupt practices to arise in public procurement, regulation of public procurement procedures should be a priority at all levels of government.

3. TYPES OF PUBLIC PROCUREMENT

This section will describe the three main ways procurement occurs: public-private partnerships (P3s), sole sourcing, and competitive bidding.

3.1 Public-Private Partnerships

Procurement of large-scale, complex projects such as public infrastructure can involve public-private partnerships (P3s). Broadly speaking, a P3 is a cooperative venture between public and private actors in which the private sector assumes a defined level of responsibility for the financing, provision, and/or operation of public infrastructure or services.⁷⁹

Although P3s in the public infrastructure context can take many forms and can include a variety of attributes, at least three features tend to be present: (1) bundling of construction and operation, (2) private but temporary ownership of assets, and (3) risk sharing over time between the public and private sector.⁸⁰ One distinguishing feature found in most major infrastructure P3s is that the private sector bears considerable (if not complete) responsibility for project financing (i.e., providing the funds necessary to realize the project). This follows from a core conceptual underpinning of the P3 model: project risks should be transferred to the party best able to manage those risks.⁸¹ The transfer of financing responsibilities to the private sector is said to alleviate strains on public budgets and harness the efficiency and depth of private finance markets. Through a P3 arrangement, the costs of a project can be paid off over the project lifecycle, which poses less risk to both governments and taxpayers

⁷⁹ See also World Bank, *Public-Private Partnerships Reference Guide*, 3rd ed (2017) at 1, online: <<https://library.pppknowledgebase.org/documents/4699/download>> (defining a P3 as “[a] long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance”).

⁸⁰ Eduardo Engel, Ronald Fischer & Alexander Galetovic, “Public-Private Partnerships: When and How” (19 July 2008) Universidad de Chile Centro de Economía Aplicada Working Paper 257 at 49, online (pdf): <<https://library.pppknowledgebase.org/documents/2212>>. Also reproduced at (July 2009) Stanford King Center on Global Development Working Paper 379, online (pdf): <<https://siepr.stanford.edu/sites/default/files/publications/379wp.pdf>>.

⁸¹ “Frequently Asked Questions: What Is a P3?” (archived), online: *PPP Canada* <<https://web.archive.org/web/20160314121323/http://p3canada.ca/en/about-p3s/frequently-asked-questions/>>.

as compared to front-loaded arrangements.⁸² In addition, many P3 arrangements take some form of a “concession” model, whereby a private sector concessionaire undertakes investment and operation of the project for a fixed period of time, after which ownership of the assets reverts to the public sector.

Each P3 arrangement sits along a continuum between “purely public” and “purely private.”⁸³ A project sitting closer to the “private” end of the spectrum might include an agreement whereby private sector participants build, own, and operate the infrastructure. This is commonly referred to as a “BOO” (build-own-operate) arrangement.⁸⁴ By contrast, a project sitting closer to the “public” end of the spectrum might involve an agreement whereby private sector participants merely operate and maintain the infrastructure. This is referred to as an “OM” (operate and maintain) arrangement.⁸⁵

Despite substantial private sector involvement in many P3 arrangements, governments continue to maintain a substantial role in ensuring that P3 projects operate effectively. The government must provide a favourable investment environment, establish adequate regulatory frameworks and chains of authority, select a suitable procurement process, and maintain active involvement throughout the project lifecycle.⁸⁶ These responsibilities highlight the need to ensure that government officials are acting with honesty and integrity.

To distinguish between P3s and the other two models discussed below, we can look to the list of five essential differences between so-called “conventional procurement” and P3s, as outlined by the World Bank:

- 1) Conventional public procurement contracts for major public infrastructure typically last, at most, for only a few years (generally expiring within five years). P3s, by contrast, are generally long-term contracts that can exceed 30 years in duration. This creates an ongoing partnership relationship of interdependency and, as a result, the selection requirements, expectations, and procedures are very different.
- 2) Conventional public procurement contracts typically have as their object the construction of facilities, and the final product—which is often designed and planned by the public authority—can be tested and accepted at the end of the construction. P3s often focus instead on the provision of a service with private sector participation in the delivery of that service. As such, conventional procurement tends to be more *input oriented*, whereas P3s are more *output oriented*.

⁸² Engel, Fischer & Galetovic, *supra* note 80 at 49.

⁸³ Young Hoon Kwak, YingYi Chih & C William Ibbs, “Towards a Comprehensive Understanding of Public Private Partnership for Infrastructure Development” (2009) 51:2 Calif Manage Rev 51 at 54. Some suggest that based on the nature of the public-private relationship inherent in P3s, governments *set* policy while the private sector *implements* policy, invoking the metaphor of “governments steering and the private sector rowing”: Joan Price Boase, “Beyond Government? The Appeal of Public-Private Partnerships” (2000) 43:1 Can Public Admin 75 at 75.

⁸⁴ Kwak, Chih & Ibbs, *ibid* at 54.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

- 3) In most P3s, the project proponent (i.e., the lead firm carrying out the project) creates a Special Purpose Vehicle (SPV) to develop, build, maintain, and operate the asset(s) for the life of the contract. The SPV constitutes a consortium that includes the building contractor, bank lender(s), and other private sector participants. The SPV is the entity that signs the contract with the government, and the SPV subcontracts out its various obligations. This unique way of structuring the contract and the various obligations is not typically found in conventional procurement.
- 4) Conventional procurement is typically financed by the public sector. It relies ultimately on taxpayer dollars. By contrast, P3s are often financed through user fees, tariffs, direct payments from the public authority, loans, guarantees from lenders, equity contributions from P3 partners, or some combination thereof.
- 5) P3s, some argue, can reduce costs by allocating risks such as project failure or delays to parties best able to manage them, and private sector participants have stronger incentives to reduce costs in P3s as compared to conventional procurement.⁸⁷

PPP Canada, a now-defunct Crown corporation created to promote adoption of the P3 model across Canada, suggested that the P3 model may be preferred over alternative models such as competitive bidding where the following conditions are present:

- You have a major project, requiring effective risk management throughout the lifecycle;
- There is an opportunity to leverage private sector expertise;
- The structure of the project could allow the public sector to define its performance needs as outputs/outcomes that can be contracted for in a way that ensures the delivery of the infrastructure in the long term;
- The risk allocation between the public and private sectors can be clearly identified and contractually assigned;
- The value of the project is sufficiently large to ensure that procurement costs are not disproportionate;
- The technology and other aspects of the project are proven and not susceptible to short-term obsolescence; and
- The planning horizons are long-term, with assets used over long periods and are capable of being financed on a lifecycle basis.⁸⁸

⁸⁷ World Bank, *Procurement Arrangements Application to Public-Private Partnerships (PPP) Contracts Financed under World Bank Projects*, Guidance Note (September 2010) at 14, online (pdf):

<https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/GuidanceNote_PPP_September2010.pdf>.

⁸⁸ PPP Canada, *supra* note 81.

The likelihood that the P3 model will be selected over alternative models, such as competitive bidding, increases where there is significant scope for innovation and a long project lifecycle (e.g., the design, construction, and operation of state-of-the-art hospitals). By contrast, where the project is comparatively simple and has a short project lifecycle (e.g., the installation of a simple transmission line), the likelihood that some other form of procurement will be selected increases.

Professors Engel, Fischer, and Galetovic suggest that P3s are the superior choice where there is a need to provide strong incentives to reduce or control project lifecycle costs.⁸⁹ This is because in the P3 arrangement, the private sector participant involved in the operation of the project has an incentive to minimize costs while still meeting project standards, since the firm shares in the economic savings derived from any cost-cutting measures that enhance the project. This can, however, present problems to the extent that such measures reduce the quality of service.⁹⁰ Engel, Fischer, and Galetovic also suggest that P3s may be the superior choice where demand risk is largely exogenous and there is a large upfront investment.⁹¹ The authors add, however, that any form of public procurement—such as P3s or competitive bidding—should be pursued only where full privatization is not possible.⁹² This will generally be the case where competition is not feasible.⁹³

Despite the foregoing observations, P3s can—and often do—contain elements of the competitive bidding model. For example, private sector partners are often selected based on a competitive bidding process, as described in Section 3.3.

P3s have gained ascendency on the world stage as a preferred model of delivering large-scale infrastructure goods and services to the public. Between 1985 and 2004, 2,096 P3 infrastructure projects were undertaken worldwide, with a combined capital value of nearly \$887 billion.⁹⁴ The World Bank estimates that the private sector financed approximately 20% of infrastructure investments in developing countries in the 1990s, totalling about \$850 billion.⁹⁵

However, views on P3s are mixed. As with any method of public procurement, the P3 model has advantages and disadvantages.⁹⁶ Detractors argue that P3s—rather than being efficient,

⁸⁹ Engel, Fischer & Galetovic, *supra* note 80 at 49.

⁹⁰ *Ibid* at 50.

⁹¹ *Ibid* at 49.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ AECOM Consult, Inc, “Synthesis of Public-Private Partnership Projects for Roads, Bridges & Tunnels from Around the World, 1985-2004” (United States Department of Transportation, 2005), cited in Kwak, Chih & Ibbs, *supra* note 83 at 56.

⁹⁵ See Mona Hammami, Jean-Francois Ruhashyankiko & Etienne B Yehoue, “Determinants of Public-Private Partnerships in Infrastructure”(2006) International Monetary Fund Working Paper 06/99 at 3, online (pdf): <www.imf.org/external/pubs/ft/wp/2006/wp0699.pdf>.

⁹⁶ For discussion of the advantages and disadvantages of P3s, see Kwak, Chih & Ibbs, *supra* note 83; Engel, Fischer & Galetovic, *supra* note 80; Heather Fussell & Charley Beresford, *Public-Private Partnerships: Understanding the Challenge*, 2nd ed (Columbia Institute, Centre for Civic Governance, 2009) at 84, online (pdf): <https://columbiainstitute.eco/wp-content/uploads/2019/11/columbiap3_eng_v8-webpdf.pdf>.

revolutionary models of delivering public goods and services—“cost more and deliver less.”⁹⁷ Some scholars, such as Martha Minow, Dominique Custos, and John Reitz, have criticized P3s for failing to sufficiently protect public values and interests.⁹⁸ Scholars who espouse this view argue, *inter alia*, that P3s can open the door to private capture of public decision-makers.

3.2 Sole Sourcing

Although most public procurement now occurs through a competitive bidding process, the sole source contracting method is still used for some goods and services. Sole source contracting involves two parties negotiating a contract without an open competitive process.⁹⁹ Sole sourcing may be preferred for efficiency purposes in emergencies, for small-value contracts, or where there are confidentiality concerns.¹⁰⁰ However, as sole sourcing is not a public and transparent process, it can be difficult for public bodies to justify this method due to concerns relating to fairness and discrimination.¹⁰¹ From an anti-corruption perspective, a public entity should sole source its contracts as seldom as possible.

One added complication in the sole-sourcing context is the phenomenon of unsolicited bids.¹⁰² Some public authorities are willing to consider project proposals initiated, designed, and submitted by private firms, rather than the authority itself. This flips the traditional competitive bidding model on its head: the idea for the project comes not from the public authority, but from the private sector.

Although unsolicited bids may be seen as a welcome opportunity to introduce greater private sector participation in the identification of public needs as well as to inject private sector innovation into the delivery of public goods and services, they may also be a dangerous proposition. The result of increased acceptance of unsolicited bids may be to allow private firms to intrude upon the government’s role in formulating policy and designing public infrastructure to achieve public policies.

⁹⁷ See e.g. Toby Sanger, “Ontario Audit Throws Cold Water on Federal-Provincial Love Affair with P3s” (2 February 2015), online: *Canadian Centre for Policy Initiatives*, <<https://www.policyalternatives.ca/publications/monitor/ontario-audit-throws-cold-water-federal-provincial-love-affair-p3s>>.

⁹⁸ Martha Minow, “Public and Private Partnerships: Accounting for the New Religion” (2003) 116 Harv L Rev 1229; Dominique Custos & John Reitz, “Public-Private Partnerships” (2010) 58 Am J Comp L 555.

⁹⁹ Robert C Worthington, “Legal Obligations of Public Purchasers” (last modified 14 May 2002), online: *Government of Canada* <www.tbs-sct.gc.ca/cmp/doc/lopp_olap/lopp_olap-eng.asp>.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² For a detailed discussion of unsolicited bids, see John T Hodges & Georgina Dellacha, “Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency” (2007) Public Private Infrastructure Advisory Facility Working Paper No 1, online (pdf): <<https://ppiaf.org/documents/3094/download>>.

Perhaps the principal issue with unsolicited bids is that they may be associated with a lack of competition and transparency.¹⁰³ In an unsolicited bid, where there is only one party seeking an exclusive contract for a project that was drawn up by that party, the public might perceive the proposed project as serving special interests or being tainted by corruption.¹⁰⁴

Professors Graeme Hodge and Carsten Greve summarize the concerns raised over unsolicited bids:

[Unsolicited bids add] a whole new dimension to project initiation, planning and completion with new powerful interest groups moving in alongside elected governments. Thus, we see today new infrastructure projects being suggested by real estate agents as well as various project financiers and merchant bankers, rather than bureaucrats—whose purpose, one would have thought, would be to do just this, as well as analyzing a range of smaller packages of alternative improvement options. Whilst such government-business deals may well end up meeting the public interest, it would seem more by coincidence than by design.¹⁰⁵

John Hodges and Georgina Dellacha suggest that with unsolicited bid submissions, it may be best for the public authority to hold a tendering process nonetheless in order to preserve some level of competition and enhance transparency, even if there is only one bidder.¹⁰⁶ This is said to evidence the government's commitment to transparency and demonstrate that there is in fact only one interested bidder.¹⁰⁷ The effect is to lend the project greater legitimacy in the public eye.

At the end of the day, whether unsolicited bids serve the public interest will depend on the particular circumstances surrounding the proposed project including the actors involved, the need for the project, whether the party proposing the project is the only one who could successfully carry it out, and other factors.

3.3 Competitive Bidding

Public procurement more often occurs through the process of competitive bidding or tendering. Although tendering is often used synonymously with bidding, tendering is a specific type of competitive bidding. The tendering process involves particular contractual relationships and obligations, which will be discussed later in this chapter. Broadly

¹⁰³ *Ibid* at vi.

¹⁰⁴ *Ibid* at 1.

¹⁰⁵ Graeme Hodge & Carsten Greve, "The PPP Debate: Taking Stock of the Issues and Renewing the Research Agenda" (Paper delivered at the International Research Society for Public Management Annual Conference, Brisbane, Australia, 26–28 March 2008), cited in World Bank & Department for International Development of the United Kingdom, *Good Governance in Public-Private Partnerships: A Resource Guide for Practitioners* (June 2009) at 36, n 30, online: <<https://openknowledge.worldbank.org/bitstream/handle/10986/12665/708460ESW0P1050e0Practices0in0PPPs.pdf>>.

¹⁰⁶ Hodges & Dellacha, *supra* note 102 at 3.

¹⁰⁷ *Ibid.*

speaking, there are four stages of the traditional competitive bidding process: planning, bidding, bid evaluation, and implementation and monitoring.¹⁰⁸ These are also the basic stages in the P3 context, although some details vary. There can be many parties involved throughout the various stages of the bidding process. The bidder is the party or individual responding to the call for bids in the hope of winning the contract. The next section will focus on situations in which a government entity or official is the party requesting tenders. Other stakeholders can include contractors, engineers, agents, subcontractors and suppliers. The following four stages briefly describe the procurement process:

1. **Planning:** This stage involves needs assessment, advertising, the production of bidding documents, and the formation of a procurement plan.¹⁰⁹ At this stage, the government assesses what is necessary to serve the public interest, with consideration to factors such as cost and timeliness.¹¹⁰ The administrative and technical documents needed for launching the call for bids are prepared.¹¹¹
2. **Bidding:** Candidates are short-listed, the government holds pre-bid conferences, the bids are submitted, and questions about the respective bids are clarified.¹¹² There are various types of bidding procedures that may be employed at this stage. For example, the government may solicit tenders through an Invitation to Tender (ITT) or Request for Quotation (RFQ). Tenders are typically used when the government is searching for technical compliance with contract requirements and the lowest acceptable price for a specifically defined project. Alternatively, the government may issue a call for proposals through a Request for Proposal (RFP), Request for Standing Offer (RFSO), or Request for Supply Arrangement (RFSA). Proposal calls—particularly RFPs—are typically used for complex or lengthy construction projects and are most likely used in the P3 context. Where the government is contemplating a P3, a Request for Qualifications (RFQu) is often issued prior to RFPs.¹¹³ RFQs help the government identify a shortlist of qualified bidders who will be invited to submit proposals at the RFP stage.
3. **Bid evaluation:** The bids are evaluated, the government compiles a bid evaluation report, and the contract is awarded to the winning bidder. The process by which the bids are evaluated and the contract granted varies according to the bidding approach selected, as well as the governing legislation. For example, in Canada, PWGSC requires that RFPs be evaluated transparently and that debriefs be provided to losing bidders.¹¹⁴

¹⁰⁸ Kühn & Sherman, *supra* note 1 at 7.

¹⁰⁹ *Ibid.*

¹¹⁰ OECD, *supra* note 76 at 77.

¹¹¹ *Ibid* at 81.

¹¹² Kühn & Sherman, *supra* note 1 at 7.

¹¹³ The Canadian Council for Public-Private Partnerships, *Public-Private Partnerships, A Guide for Municipalities* (November 2011) at 29.

¹¹⁴ *Ibid* at 30.

4. **Implementation and monitoring:** The final contract between the bidder and the government is drafted and implemented, any changes are incorporated, the bidder's project is monitored and audited, and any appeals are launched.¹¹⁵

4. HALLMARKS OF A GOOD PROCUREMENT SYSTEM

Governments have many goals in enacting public procurement laws, including fair competition, integrity, transparency, efficiency, user satisfaction, best value, wealth distribution, risk avoidance, and uniformity. Transparency, competition, and integrity are three hallmarks of a good procurement system.¹¹⁶

4.1 Transparency

Transparency was explained at the 1999 International Anti-Corruption Conference in the following terms:

Transparency, in the context of public procurement, refers to the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed. This requires the release, as a minimum, of information sufficient to allow the average participant to know how the system is intended to work, as well as how it is actually functioning. Transparency is a central characteristic of a sound and efficient public procurement system and is characterized by:

- Well-defined regulations and procedures open to public scrutiny.
- Clear, standardized tender documents.
- Bidding and tender documents containing complete information; and
- Equal opportunity in the bidding process.

Transparency requires that published rules are the basis for all procurement decisions and that these rules are applied objectively to all bidders. Transparency is an effective means to identify and correct improper, wasteful—and even corrupt—practices.¹¹⁷

Transparency in a public procurement process is important because it reduces the risk of corruption and bribery by opening up the process to monitoring, review, comment, and

¹¹⁵ *Ibid.*

¹¹⁶ Steven L Schooner, "Desiderata: Objective for a System of Government Contract Law" (2002) 11:2 Pub Procurement L Rev 103 at 104.

¹¹⁷ Wayne A Wittig, "Good Governance for Public Procurement: Linking Islands of Integrity" (Paper delivered at the meeting of the OECD Public Governance Committee in Paris, France, 20–21 June 2005) at 11, online: <https://doi.org/10.1787/oecd_papers-v5-art35-en>.

influence by stakeholders.¹¹⁸ Former Secretary-General of the United Nations Ban Ki-moon describes the role of transparency in public procurement in the following terms:

Transparency is a core principle of high-quality public procurement. An open and transparent procurement process improves competition, increases efficiency and reduces the threat of unfairness or corruption. A robust transparency regime enables people to hold public bodies and politicians to account, thereby instilling trust in a nation's institutions. Transparency also supports the wise use of limited development funds, from planning investments in advance to measuring the results.¹¹⁹

Transparency in public procurement can be enhanced by implementing a number of best practices, including:

- advance publication of procurement policies and plans;
- advertisement of tender notices;
- disclosure of evaluation criteria in solicitation documents;
- publication of contract awards and prices paid;
- establishment of appropriate and timely complaint and dispute resolution mechanisms;
- implementation of financial and conflict of interest disclosure requirements for public procurement officials; and
- publication of supplier sanction lists.¹²⁰

Transparency encourages public confidence in the project, which is particularly important in a democracy. Without transparency, corruption is free to continue in the shadows. With transparency, corruption is subject to the glare of public scrutiny. As Justice Louis Brandeis once wrote, “[s]unlight is said to be the best of disinfectants.”¹²¹

Although transparency is recognized as a key condition for promoting integrity and preventing corruption in public procurement, it must be balanced with other imperatives of good governance.¹²² For example, demands for greater transparency and accountability may create some tension with the objective of ensuring an efficient management of public resources (administrative efficiency) or providing guarantees for fair competition.¹²³ The

¹¹⁸ Kühn & Sherman, *supra* note 1 at 12.

¹¹⁹ Ban Ki-moon, “Foreword” in *Supplement to the 2011 Annual Statistical Report on United Nations Procurement*, UNOPS, 2012,) i, online (pdf): [<https://www.ungm.org/Areas/Public/Downloads/ASR_2011_supplement.pdf>](https://www.ungm.org/Areas/Public/Downloads/ASR_2011_supplement.pdf).

¹²⁰ Therese Ballard, “Transparency in Public Procurement” in UNOPS, *supra* note 119, 2 at 2.

¹²¹ Louis D Brandeis, *Other People’s Money*, online: *University of Louisville* [<https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>](https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v).

¹²² OECD, *Integrity in Public Procurement: Good Practice from A to Z*, (Paris: OECD, 2007) at 10, online (pdf): [<www.oecd.org/development/effectiveness/38588964.pdf>](http://www.oecd.org/development/effectiveness/38588964.pdf).

¹²³ *Ibid.*

challenge for policy-makers is to design a system in which an appropriate degree of transparency and accountability is present to reduce corruption risks while still pursuing other aims of public procurement.

4.2 Competition

Competition is seen as vital to the process because, under laissez-faire economic theory, it provides governments with the best quality for the best price.¹²⁴ Robert Anderson, William Kovacic and Anna Caroline Müller identify three leading reasons why competition is important in public procurement:

- 1) with free entry and an absence of collusion, prices will be driven towards marginal costs;
- 2) suppliers will have an incentive to reduce their production and other costs over time; and
- 3) competition drives innovation.¹²⁵

4.3 Integrity

TI defines integrity in the public procurement context as “behaviours and actions consistent with a set of moral or ethical principles and standards, embraced by individuals as well as institutions that create a barrier to corruption.”¹²⁶ Integrity requires that procurement be carried out in accordance with the law and without discrimination or favouritism.

In 2008, the OECD developed best practices guidance to “reinforce integrity and public trust in how public funds are managed”¹²⁷ and promote a good governance approach to procurement based on the following principles:

Transparency

1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.
2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

¹²⁴ Schooner, *supra* note 116 at 105.

¹²⁵ Robert D Anderson, William E Kovacic & Anna Caroline Müller, “Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance” in *UNOPS*, *supra* note 119, 9 at 10.

¹²⁶ Transparency International, *The Anti-Corruption Plain Language Guide*, (2009) at 24, online (pdf): <https://images.transparencycdn.org/images/2009_TIPlainLanguageGuide_EN.pdf>.

¹²⁷ OECD, *supra* note 76 at 3.

Good management

3. Ensure that public funds are used in procurement according to the purposes intended.
4. Ensure that procurement officials meet high professional standards of knowledge, skills, and integrity.

Prevention of misconduct, compliance and monitoring

5. Put mechanisms in place to prevent risks to integrity in public procurement.
6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.
7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

Accountability and control

8. Establish a clear chain of responsibility together with effective control mechanisms.
9. Handle complaints from potential suppliers in a fair and timely manner.
10. Empower civil society organizations, media and the wider public to scrutinise public procurement.¹²⁸

This list illustrates how the three key pillars of an effective procurement system—transparency, competition, and integrity—are closely connected to one another.

Although sound procurement rules are essential to the achievement of a robust procurement system, rules alone are not sufficient. As the OECD observes:

Implementing rules requires a wider governance framework that encompasses: an adequate institutional and administrative infrastructure; an effective review and accountability regime; mechanisms to identify and close off opportunities for corruption; as well as adequate human, financial and technological resources to support all of the elements of the system. They also require a sustained political commitment to apply these rules and regularly update them.¹²⁹

¹²⁸ OECD, *Checklist for Enhancing Integrity in Public Procurement* (2008), online (pdf): <<https://www.oecd.org/gov/41760991.pdf>>.

¹²⁹ OECD, *supra* note 8 at 24–25, online: <www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en>.

5. PRIVATE LAW ENFORCEMENT OF TENDERING FOR PUBLIC CONTRACTS

Private law remedies are not the focus of the analysis of public procurement in this chapter. However, the following is a brief overview of how companies may use private law tools to ensure that government bodies in the US, UK, and Canada follow tendering processes. Even where the purchaser is a government body, procurement contracts are considered “generally commercial in nature”¹³⁰ and therefore typically fall into the realm of private law remedies. Generally, the private law framework allows companies to seek a private law remedy (the principal one being damages) against the public body.

It is somewhat problematic that a private law action for damages is by far the most common remedy sought in public procurement disputes.¹³¹ Because civil actions are expensive, legal recourse is often inaccessible to smaller bidders who cannot afford the legal costs or where the value of the procurement contract does not economically warrant a lawsuit. Moreover, the settlement of private lawsuits often involves confidentiality agreements that impede public transparency. The US, UK, and Canada have public law bodies in place to hear complaints about the procurement process and resolve disputes between bidders and contracting bodies. However, the remedies available in the public law context do not always sufficiently account for the damages the contracting party has suffered.

5.1 US

The *Contract Disputes Act of 1978* (CDA) provides a mechanism for parties to make a claim in contract law against the federal government.¹³² Bid protests are heard by the Government Accountability Office (GAO) or the Court of Federal Claims. The GAO hears the majority of the protests.¹³³ The GAO has not allowed losing bidders to claim lost profits as part of their damages. Instead, companies are limited to seeking the costs of preparing their quotation and filing their protest.¹³⁴ This position was solidified in the Effective Learning decision:

[W]e know of no situation where anticipated profits may be recovered when the underlying claim is based upon equitable, rather than legal, principles.... Here, since a contract between the government and Effective Learning never came into being, the only relief possible was equitable in nature. Hence, the monetary recovery in this situation was limited to the

¹³⁰ *Irving Shipbuilding Inc v Canada (AG)*, 2009 FCA 116 at para 21, 314 DLR (4th) 340.

¹³¹ Decentralization Thematic Team, *supra* note 43.

¹³² *Contract Disputes Act of 1978*, codified as amended at 41 USC §§ 7101–7109.

¹³³ Congressional Research Service, *GAO Bid Protests: An Overview of Time Frames and Procedures* by Kate M Manuel & Moshe Schwartz (2016) at 1, online (pdf): <<https://www.fas.org/sgp/crs/misc/R40228.pdf>>.

¹³⁴ *Introl Corp B-218339*, 9 July 1985, 85-2 CPD 35, online: <<https://www.gao.gov/products/b-218339.2>>.

reasonable value of services and did not encompass any potential profits that might have been earned by Effective Learning.¹³⁵

The GAO's position on damages stems from precedential inability of parties who do not secure a contract to sue and seek damages.¹³⁶ US law requires a contract to exist between the parties before a plaintiff is entitled to seek anticipated profits.¹³⁷ Unlike in Canada and the UK, US law does not imply a contract between the party soliciting bids and the bidding parties; the only contract that exists is when the party soliciting bids selects one of the bids. At that point, the government agency and the bidding party form a contract for goods or services.

However, US law has developed to a point that allows bidding parties to bring an action against the federal government for failure to follow its procurement laws and procedures. In 1940, the US Supreme Court held in *Perkins v Lukens Steel Co* that aggrieved parties lacked standing in federal court to challenge government contract awards where they failed to receive the contract.¹³⁸ In a subsequent case, *Heyer Products Co v United States*, the US Court of Claims found an implied commitment in procurement requests to consider each bid fairly and honestly, and allowed an unsuccessful bidder to file a claim for "bid preparation expenses."¹³⁹ In *Scanwell Laboratories v Shaffer*, the US Court of Appeals for the District of Columbia Circuit held that the *Administrative Procedure Act*¹⁴⁰ reversed *Perkins* and that review of public procurement decisions was available in district courts.¹⁴¹

5.2 UK

Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council established that when an organization, particularly a public sector body, invites tenders to be submitted, it is giving an implicit promise to adhere to the tendering rules set out for the particular tender.¹⁴² Failure to do so will give aggrieved parties the right to bring an action for damages.

This principle was further developed in *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*, where the High Court held that when the public sector seeks tenders, a contract exists between the bidder and public body that requires all tenders to be considered fairly. In *Harmon*, the trial judge found that the bids had been manipulated and

¹³⁵ *Effective Learning, Inc – Request for Review of Prior Claim Decision*, B-215505, 19 Feb 1985, 85-1 CPD 207, online: <<https://www.gao.gov/products/b-215505>>.

¹³⁶ Duncan Fairgrieve & François Lichère, eds, *Public Procurement Law: Damages as an Effective Remedy* (Portland: Hart, 2011) at 202.

¹³⁷ *Heyer Products Co v United States*, 140 F Supp 409 (Ct Cl 1956) (denying an attempt by unsuccessful bidders to make a claim for lost profits because there was no contract upon which to base this claim); *Cincinnati Electric Corp v Kleppe*, 509 F (2d) 1080 (6th Cir 1975) (upholding the finding that the only loss the unsuccessful bidder could claim was the cost of preparing the bid).

¹³⁸ *Perkins v Lukens Steel Co*, 310 US 113 (1940).

¹³⁹ *Heyer Products Co v United States*, 140 F Supp 409 (Ct Cl 1956).

¹⁴⁰ *Administrative Procedure Act*, codified as amended at 5 USC §§ 551–59 (1946).

¹⁴¹ *Scanwell Laboratories v Shaffer*, 424 F (2d) 859 (DC Cir 1970).

¹⁴² *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, [1990] 1 WLR 1195 (CA).

the defendant had chosen a bid over the plaintiff's, who was in fact the lowest bidder.¹⁴³ The judge found this to be a breach of contract:

In the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenders fairly.¹⁴⁴

This creates a contract distinct from the contract being tendered for and requires that the purchaser abide by the terms it sets out in its call for tenders.

5.3 Canada

The legal framework for procurement in Canada was established in the seminal case *The Queen (Ont) v Ron Engineering*.¹⁴⁵ This case created the concept of dual contracts in procurement cases.¹⁴⁶ Contract A is formed when a call for tenders is issued (the offer) and a bid is submitted in response (the acceptance).¹⁴⁷ Contract B arises between the entity calling for tenders and the successful bidder.

In Quebec, although *Ron Engineering* has been applied by the courts, the same results are obtained under civil law principles of offer and acceptance.¹⁴⁸ This is because Quebec's *Civil Code* imposes obligations on the parties arising from pre-contractual negotiations even though no contractual relationship arises between the party calling for tenders and the bidder before acceptance of the bid.¹⁴⁹

The Supreme Court of Canada further developed this dual contract procurement paradigm in *MJB Enterprises Ltd v Defence Construction*, where the Court established that Contract A will form only between the procuring entity and compliant bidders.¹⁵⁰ A compliant bidder is one whose bid complies with the requirements of the tender documents. This requirement ensures a degree of fairness and transparency. *MJB* also clarified that the terms of Contract A are dictated by the terms and conditions of the tender call.¹⁵¹ In *Martel Building Ltd v*

¹⁴³ Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons, (1999) 67 Con LR 1, [1999] EWHC Technology 199.

¹⁴⁴ *Ibid.*

¹⁴⁵ *The Queen (Ont) v Ron Engineering*, [1981] 1 SCR 27, 1981 CanLII 17.

¹⁴⁶ Prior to *Ron Engineering*, *ibid*, it was believed that no formal contractual relationships arose until the acceptance of a bid. See e.g. *Belle River Community Arena Inc v WJC Kaufmann Co*, 20 OR (2d) 447, 87 DLR (3d) 761 (CA).

¹⁴⁷ This is a simplification. Contract A will not always be formed upon the submission of a tender. For example, a contract will arise only where there is a clear intention to contract. However, what is relevant is that the submission of a tender will often give rise to contractual obligations. See *MJB Enterprises Ltd v Defence Construction* (1951) Ltd, [1999] 1 SCR 619 at paras 17, 19, 23, 170 DLR (4th) 577.

¹⁴⁸ *Civil Code of Québec*, SQ 1991, c 64, arts 1385, 1396. See Halsbury's Laws of Canada (online), *Construction* at para HCU-18 (2013 Reissue).

¹⁴⁹ *Ibid.*

¹⁵⁰ *MJB Enterprises Ltd v Defence Construction* (1951) Ltd, [1999] 1 SCR 619 at para 30, 170 DLR (4th) 577.

¹⁵¹ *Ibid* at para 22.

Canada, the Supreme Court held that procuring entities have an obligation of fairness towards bidders with whom Contract A has formed.¹⁵² Purchasers must be “fair and consistent” and treat all bidders “fairly and equally.”¹⁵³ This means, at minimum, that when a purchaser sets the bid requirements, the purchasing entity must fairly evaluate each bidder based on the indicated criteria. *Design Services Ltd v Canada* clarified that the duty of care owed by the procuring entity to bidders does not extend to subcontractors.¹⁵⁴

The 2014 Federal Court case *Rapiscan Systems, Inc v Canada* held that government procurement decisions could be subject to the administrative law remedy of judicial review if an “additional public element” exists.¹⁵⁵ The Federal Court outlined numerous considerations to help determine the presence of an “additional public element.” Where the procurement decision is closely connected to the procuring entity’s statutory powers or mandate, it is more likely that the public law remedy of judicial review will be available.¹⁵⁶ The operative question is whether “the matter is coloured with a ‘public element’ sufficient to bring it within the purview of the public law and therefore review by the Court on the rationale that (i) it involves a breach of a statutory duty, or (ii) it undermines the integrity of government procurement processes.”¹⁵⁷

Judy Wilson and Joel Richler extract three principles from the line of jurisprudence emanating from *Ron Engineering*:

[F]irst, the law imposes obligations on both the procuring authorities and the bidders. Procuring authorities must, at all times, adhere to the terms and conditions of Contract A and cannot accept any non-compliant bids, no matter how attractive they may be. As well, procuring authorities must act towards all compliant bidders fairly and in good faith, particularly during the evaluation of any bidder’s submission. Also, procuring authorities cannot make their ultimate decisions to award or reject submissions based on criteria that are not disclosed in the terms and conditions of the procurement documents. Bidders, for their part, cannot revoke or supplement their submissions, unless permitted to do so by the terms and conditions of Contract A.

Second, the law *does* permit procuring authorities to create the terms and conditions of Contract “A” as they see fit. Thus, privilege clauses – clauses which provide the procuring authority with discretionary rights – are recognized as fully enforceable and, if properly drafted, allow procuring authorities to reserve to themselves the right to award contracts to bids that may not be for the lowest price, or not to award contracts at all. As well, procuring authorities are free to impose any number of criteria on bidders

¹⁵² This is a simplification. This will be true except where it is clear that the parties did not expect and intend fair and consistent treatment. See *Martel Building Ltd v R*, 2000 SCC 60 at para 88, 193 DLR (4th) 1.

¹⁵³ *Ibid* at paras 84, 88.

¹⁵⁴ *Design Services Ltd v Canada*, 2008 SCC 22, [2008] 1 SCR 737.

¹⁵⁵ *Rapiscan Systems, Inc v Canada (Attorney General)*, 2014 FC 68 at paras 50–51, 369 DLR (4th) 526.

¹⁵⁶ *Ibid* at para 51.

¹⁵⁷ *Ibid*.

such as: prior similar work experience; the absence of claims or prior litigation; local contracting; scheduling criteria; composition of construction teams; and so on.

Third, and perhaps somewhat contradictory of the second principle, while the list of requirements and criteria imposed on bidders may be extensive, it will always be open to the courts to impose limitations where the discretion retained by the procuring authority is extreme. The courts have made it clear that maintaining the integrity of competitive procurement processes was a fundamental goal of procurement law in Canada.¹⁵⁸

6. PUBLIC LAW FRAMEWORK

6.1 International Legal Instruments

6.1.1 UNCAC

Article 9(1) of United Nations Convention Against Corruption (UNCAC) requires State parties to “establish systems of procurement based on transparency, competition and objective criteria in decision making, and which are also effective in preventing corruption.”¹⁵⁹ As the *Legislative Guide* to UNCAC notes, Article 9 includes, at minimum:

- a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
- b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
- c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
- d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to paragraph 1 of article 9 are not followed;

¹⁵⁸ Jody Wilson & Joel Richler, “Canadian Procurement Law: The Basics” (23 September 2011) [emphasis in original], online: *Mondaq* <<https://www.mondaq.com/canada/government-contracts-procurement-ppp/146564/canadian-procurement-law-the-basics>>.

¹⁵⁹ UNODC, Division for Treaty Affairs, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed (New York: United Nations, 2012) at 28, online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

- e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.¹⁶⁰

As with other international agreements that address domestic procurement, UNCAC contemplates that these requirements may not apply to contracts below a certain dollar threshold.¹⁶¹ The *Legislative Guide* to UNCAC justifies this exception on the grounds that “excessive regulation can be counterproductive by increasing rather than diminishing vulnerability to corrupt practices,”¹⁶² but does not provide further elaboration.

6.1.2 OECD Convention

The OECD Convention contains no articles on public procurement. However, the *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials*, adopted in November 2009, includes the following as Recommendation XI:

Member countries should support the efforts of the OECD Public Governance Committee to implement the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement [C(2008)105], as well as work on transparency in public procurement in other international governmental organizations such as the United Nations, the World Trade Organization (WTO) and the European Union, and are encouraged to adhere to relevant international standards such as the WTO Agreement on Government Procurement.¹⁶³

Recommendation XI(i) states that member states should, through laws and regulations, permit authorities to suspend enterprises convicted of bribery of foreign public officials from competition for public contracts.

6.1.3 World Bank

The World Bank funds large infrastructure projects throughout the developing world. According to the World Bank, its procurement system includes a portfolio of approximately \$56 billion across 172 countries.¹⁶⁴ To combat corruption, the World Bank has created its own sanctioning system, which relies heavily on debarment as a penalty. Because of a reciprocal agreement between the World Bank and other development banks, debarment from World Bank projects also leads to debarment from projects funded by the African Development

¹⁶⁰ *Ibid* at 29–30.

¹⁶¹ *Ibid* at 29.

¹⁶² *Ibid*.

¹⁶³ OECD, Working Group on Bribery, *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), online (pdf): <www.oecd.org/daf/anti-bribery/44176910.pdf>.

¹⁶⁴ World Bank, Press Release, “New World Bank Procurement Framework Promotes Strengthened National Procurement Systems” (30 June 2016), online: *World Bank* <www.worldbank.org/en/news/press-release/2016/06/30/new-world-bank-procurement-framework-promotes-strengthened-national-procurement-systems>.

Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank.¹⁶⁵ This is commonly referred to as “cross-debarment.” For more on the World Bank’s sanctioning process, see Chapter 7, Section 8.3.

In July 2015, the World Bank announced a new Procurement Framework, which came into effect on July 1, 2016.¹⁶⁶ Most notably, the new framework allows contract award decisions to be based on criteria other than lowest price. In this respect, “value for money” was introduced as a core procurement principle. This signals “a shift in focus from the lowest evaluated compliant bid to bids that provide the best overall value for money, taking into account quality, cost, and other factors as needed.”¹⁶⁷ In addition, the World Bank prepared a series of “Standard Procurement Documents” requiring bidders to provide beneficial ownership information.¹⁶⁸ This followed after the World Bank announced it would be considering ways of collecting and disseminating information on beneficial ownership of entities participating in its procurement processes, having received a letter signed by 107 civil society organizations encouraging it to do so.¹⁶⁹

The procurement process has been subject to some criticism. After noting that the *Foreign Corrupt Practices Act (FCPA)* provides little deterrence to companies operating in countries where demand for bribes is high and profits to be made are great, US lawyer and academic Annalisa Leibold, criticized the World Bank’s conduct when financing a pipeline project in Chad:

Even the World Bank was ineffective at preventing corruption there. It rushed the pipeline project, ignored important information about the empirical nature of the resource curse, and divorced its own analysis from Chad’s political and economic context.¹⁷⁰

¹⁶⁵ Graham Steele, *Quebec’s Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (LLM Thesis, Dalhousie University Schulich School of Law, 2015) at 54, online: <dalspace.library.dal.ca/handle/10222/56272>.

¹⁶⁶ Guidance on the framework, as well as the framework itself, can be accessed online: “Procurement Framework and Regulations for Projects After July 1, 2016”, online: *World Bank* <www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework>.

¹⁶⁷ *Ibid.*

¹⁶⁸ These forms can be accessed online: *ibid.*

¹⁶⁹ Richard L Cassin, “Compliance Alert: World Bank Adopts More Flexible and Transparent Procurement Reforms” (22 July 2015), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2015/7/22/compliance-alert-world-bank-adopts-more-flexible-and-transpa.html>; Daniel Dudis, “World Bank Adopts Key Transparency International Goals in New Procurement Policies” (31 July 2015), online (blog): *Transparency International* <blog.transparency.org/2015/07/31/world-bank-adopts-key-transparency-international-goals-in-new-procurement-policies/>.

¹⁷⁰ Annalisa Leibold, “Chad: Corruption Is Real, the FCPA Not So Much” (8 July 2015), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2015/7/8/chad-corruption-is-real-the-fcpa-not-so-much.html>.

Another US academic Paul Sarlo, criticized the World Bank's "undisciplined lending practices," stating that "[t]he World Bank undermines the transnational anti-corruption regime through its failure to carry out due diligence of project-implementing agencies when it advances loans to notoriously corrupt governments."¹⁷¹ He points out that the personal success of World Bank officials "depend[s] on the number of loans they approve."¹⁷² Further, "whether a loan is stolen should make little difference to the World Bank because of its ability to earn interest and even accelerate payment on that loan."¹⁷³ Due to the lack of incentive to ensure loans are used for their intended purpose, Sarlo called for increased regulation of the World Bank's lending practices.

6.1.4 WTO Agreement on Government Procurement

The WTO Agreement on Government Procurement (WTO-AGP)¹⁷⁴ has the status of a binding international treaty among its more than 40 members.¹⁷⁵ Although the primary objective of the WTO-AGP is to ensure free market access among State parties, it is relevant to procurement in that it contains provisions that require fairness and transparency in government procurement.¹⁷⁶ For example, Article XVI.1 mandates that a procuring entity "promptly inform participating suppliers of the entity's contract award decisions ... [and], on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender."¹⁷⁷ Article XVII.1 requires that, upon request, "a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially, and in accordance with this Agreement, including information on the characteristics and relative advantages of the successful tender."¹⁷⁸ However, the WTO-AGP applies only to "covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values."¹⁷⁹ These thresholds and restrictions are in place "largely because it is a cumbersome and expensive process to open all contracts to international bidding."¹⁸⁰ In the context of government construction contracts in Canada, the WTO-AGP applies to:

¹⁷¹ Paul Sarlo, "The Global Financial Crisis and the Transnational Anti-Corruption Regime: A Call for Regulation of the World Bank's Lending Practices" (2014) 45:4 Geo J Intl L 1293 at 1308.

¹⁷² *Ibid* at 1309.

¹⁷³ *Ibid*.

¹⁷⁴ *Agreement on Government Procurement*, 15 April 1994, 1915 UNTS 103 (entered into force 1 January 1996) (being Annex 4(b) of the *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS 3).

¹⁷⁵ "Agreement on Government Procurement: Parties, Observers and Accessions", online: *World Trade Organization* <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>.

¹⁷⁶ "Agreement on Government Procurement", online: *World Trade Organization* <https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>.

¹⁷⁷ *Revised Agreement on Government Procurement*, Annex to the Protocol Amending the Agreement on Government Procurement, 30 March 2012, GPA/113 (entered into force 6 April 2014), online: <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm>.

¹⁷⁸ *Ibid*.

¹⁷⁹ "Agreement on Government Procurement", *supra* note 175.

¹⁸⁰ Canada, House of Commons, Standing Committee on International Trade, "Canada-United States Agreement on Government Procurement: Report of the Standing Committee on International

- listed central government entities procuring construction services in excess of C\$8.5 million;
- listed sub-central government entities (which do not include provincial legislatures or Crown corporations but do include provincial departments and ministries) procuring construction services in excess of C\$8.5 million; and
- all construction services identified in Division 51 of the United Nations Provisional Central Product Classification.¹⁸¹

6.1.5 United States–Mexico–Canada Agreement

Chapter 13 of the United States–Mexico–Canada Agreement (USMCA),¹⁸² the successor to the North American Free Trade Agreement (NAFTA), deals with government procurement. Unlike its predecessor chapter in NAFTA (Chapter 10) (which is largely preserved), this chapter does not apply to Canada.¹⁸³ As a result, suppliers in the US, Mexico and Canada no longer have a single trade agreement providing a common set of rules governing public procurement in North America.¹⁸⁴ Instead, there is one agreement between the US and Canada (the WTO-AGP), another between the US and Mexico (the USMCA), and another between Mexico and Canada (the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)).¹⁸⁵ While the procurement rules in these agreements are similar in many respects, they are not identical. From the perspective of contractors who operate internationally, this lack of uniformity is less than ideal.

The objective of Chapter 13 of the USMCA is to provide suppliers of goods and services in the US and Mexico with secure and guaranteed access to procurement opportunities in each other’s markets.¹⁸⁶ While a detailed discussion of Chapter 13 is beyond the scope of this text, it is significant that Article 13.17 sets out rules designed to promote integrity in procurement practices. This provision has four components:

Trade”, 40th Parl, 3rd Sess (May 2010) at 10, online:

<<https://www.ourcommons.ca/Content/Committee/403/CIIT/Reports/RP4416059/ciitrp01/ciitrp01-e.pdf>>.

¹⁸¹ “Agreement on Government Procurement: Coverage Schedules”, online: *World Trade Organization* <https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm>; “Thresholds in National Currencies (All Notifications by Canada)”, online: *World Trade Organization* <<https://e-gpa.wto.org/en/ThresholdNotification?PartyId=1012>>.

¹⁸² United States–Mexico–Canada Agreement, 30 November 2019 (entered into force 1 July 2020) [USMCA] [note also that in Canada, it is frequently referred to as CUSMA], online:

<<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/texte-texte/toc-tdm.aspx?lang=eng>>.

¹⁸³ *Ibid* at art 13.2(3).

¹⁸⁴ Clifford Sosnow, Marcia Mills & Faye Voight, “The USMCA: Is the Glass Half Empty or Is the Glass Half Full?” (13 December 2018), online: *Fasken LLP*

<<https://www.fasken.com/en/knowledge/2018/12/ott-newsletter-the-usmca-is-the-glass-half-empty-or-is-the-glass-half-full/>>.

¹⁸⁵ *Ibid*.

¹⁸⁶ “GBA+ of the Canada–United States–Mexico Agreement” (last modified 2 July 2020), online: *Government of Canada* <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/gba-plus_acs-plus.aspx?lang=eng>.

- 1) Each Party shall ensure that criminal, civil, or administrative measures exist that can address corruption, fraud, and other wrongful acts in its government procurement.
- 2) These measures may include procedures to debar, suspend, or declare ineligible from participation in the Party's procurements, for a stated period of time, a supplier that the Party has determined to have engaged in corruption, fraud, or other wrongful acts relevant to a supplier's eligibility to participate in a Party's government procurement.
- 3) Each Party shall ensure that it has in place policies or procedures to address potential conflicts of interest on the part of those engaged in or having influence over a procurement.
- 4) Each Party may also put in place policies or procedures, including provisions in tender documentation, that require successful suppliers to maintain and enforce effective internal controls, business ethics, and compliance programs, taking into account the size of the supplier, particularly SMEs, and other relevant factors, for preventing and detecting corruption, fraud, and other wrongful acts.

Chapter 13 also includes provisions designed to enhance transparency in government procurement that mirror provisions in the WTO-AGP. For example, Article 13.15 provides that “a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select the unsuccessful supplier’s tender or an explanation of the relative advantages of the successful supplier’s tender.” Similarly, Article 13.16 provides that “[o]n request of the other Party, a Party shall provide promptly information sufficient to demonstrate whether a procurement was conducted fairly, impartially and in accordance with this chapter, including, if applicable, information on the characteristics and relative advantages of the successful tender, without disclosing confidential information.”

Chapter 13 does not automatically apply to all government procurement. Coverage depends on the type and value of the goods or services being procured, the government entity involved and other criteria.

6.1.6 Comprehensive and Progressive Agreement for Trans-Pacific Partnership

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),¹⁸⁷ which incorporates by reference the Trans-Pacific Partnership (TPP) (which never entered into force due to the US’s withdrawal in January 2017), is a trade agreement between 11 countries (including Australia, Canada, Japan, and Mexico) designed to promote free trade among signatory countries. Like the USMCA, the CPTPP contains a chapter on government procurement (Chapter 15). The CPTPP contains a provision—Article 15.18—designed to promote integrity in procurement practices. It states:

¹⁸⁷ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018* (entered into force 30 December 2018) [CPTPP], online: <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng>>.

Each Party shall ensure that criminal or administrative measures exist to address corruption in its government procurement. These measures may include procedures to render ineligible for participation in the Party's procurements, either indefinitely or for a stated period of time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions in relation to government procurement in the Party's territory. Each Party shall also ensure that it has in place policies and procedures to eliminate to the extent possible or manage any potential conflict of interest on the part of those engaged in or having influence over a procurement.

Also like Chapter 13 of the USMCA, Chapter 15 of the CPTPP includes provisions designed to enhance transparency in government procurement that mirror provisions in the WTO-AGP. For example, Article 15.16 provides that "a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select the unsuccessful supplier's tender or an explanation of the relative advantages of the successful supplier's tender." Similarly, Article 15.17 provides that "[o]n request of any other Party, a Party shall provide promptly information sufficient to demonstrate whether a procurement was conducted fairly, impartially and in accordance with this chapter, including, if applicable, information on the characteristics and relative advantages of the successful tender, without disclosing confidential information."

Chapter 15 does not automatically apply to all government procurement. Coverage depends on the type and value of the goods or services being procured, the government entity involved, and other criteria.

6.1.7 Comprehensive Economic and Trade Agreement

The Comprehensive Economic and Trade Agreement¹⁸⁸ (CETA) is a treaty between Canada and the EU setting standards for trade in goods and services, non-tariff barriers, investment, government procurement, and other areas like labour and the environment.¹⁸⁹ Signed on October 30, 2016,¹⁹⁰ CETA has not yet fully come into force (though substantial parts have been provisionally applied since September 21, 2017). It will fully come into force once ratified by all signatories.

Chapter 19 of CETA deals with government procurement. This chapter includes provisions designed to promote integrity in government procurement. For example, Article 19.4(4) provides generally that a "procuring entity shall conduct covered procurement in a transparent and impartial manner that: ... (b) avoids conflicts of interest; and (c) prevents

¹⁸⁸ *Canada-European Union (EU) Comprehensive Economic and Trade Agreement*, 30 October 2016, (provisional application as of 21 September 2017) [CETA], online:

<<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/texte/toc-tdm.aspx?lang=eng>>.

¹⁸⁹ "CETA Explained" (last modified 24 September 2020), online: *Government of Canada* <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/ceta_explained-aecg_apercu.aspx?lang=eng>.

¹⁹⁰ "EU-Canada Summit: Newly Signed Trade Agreement Sets High Standards for Global Trade" (30 October 2016), online: *The European Commission* <trade.ec.europa.eu/doclib/press/index.cfm?id=1569>.

corrupt practices.” It also includes provisions designed to enhance transparency in government procurement. For instance, Article 19.15(1) provides that “[a] procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier’s tender.” Similarly, Article 19.16(1) provides that “[o]n request of the other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this chapter, including information on the characteristics and relative advantages of the successful tender.”

Chapter 19 does not automatically apply to all government procurement. Coverage depends on the type and value of the goods or services being procured, the government entity involved, and other criteria.

6.1.8 EU–UK Trade and Cooperation Agreement

On June 23, 2016, the UK held a referendum to decide whether it should leave the European Union.¹⁹¹ A narrow majority of voters elected to leave the EU, an event commonly referred to as “Brexit.” For the UK to formally leave the EU, however, it had to invoke Article 50 of the Lisbon Treaty, which provides that “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”¹⁹² and gives the parties two years to agree on the terms of the exit. That process formally concluded on January 31, 2020, when the UK officially left the EU.¹⁹³ However, both sides agreed to preserve many aspects of their existing trade relationship until December 31, 2020 to permit negotiation of a new trade agreement.¹⁹⁴ That agreement, the EU–UK Trade and Cooperation Agreement (TCA), was struck on December 24, 2020 and came into effect provisionally on January 1, 2021.¹⁹⁵ The UK Parliament implemented this agreement through the *EU (Future*

¹⁹¹ “Brexit: What You Need to Know About the UK Leaving the EU”, *BBC News* (30 December 2020), online: <www.bbc.com/news/uk-politics-32810887>.

¹⁹² *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007, OJ C306/01 (entered into force 1 December 2009). Article 50 came into force in 2009 after amendments were made to the Lisbon Treaty of 2007.

¹⁹³ BBC News, *supra* note 191.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part*, 30 December 2020, OJ L 444 at 14 (applied provisionally 1 January 2021, entered into force 1 May 2021) [TCA], online (pdf):

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf>. See also UK, Government of the United Kingdom, *UK-EU Trade and Cooperation Agreement: Summary* (London: Prime Minister’s office, 2020), online (pdf):

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948093/TCA_SUMMARY_PDF.pdf>; Tom Edgington, “Brexit: What Are the Key Points of the Deal?”, *BBC News* (30 December 2020), online: <<https://www.bbc.com/news/explainers-55180293>>.

Relationship) Bill on December 30, 2020.¹⁹⁶ The European Parliament and the Council of the European Union have yet to ratify the agreement.

Title VI of the TCA deals with public procurement and seeks “to guarantee each Party’s suppliers access to increased opportunities to participate in public procurement procedures and to enhance the transparency of public procurement procedures.”¹⁹⁷ It incorporates certain provisions of the WTO-AGP, extends the scope of covered procurement and includes additional provisions regarding the use of electronic means in procurement; electronic publication of notices; environmental, social and labour considerations; domestic review procedures; and other matters. Importantly, it puts EU and UK suppliers on an equal footing when bidding on procurement tenders covered by the agreement in one or the other jurisdiction.

The UK is currently in the process of acceding to the WTO-AGP.¹⁹⁸ The UK’s shift from the EU regime to the WTO-AGP regime is significant, as the latter is “less prescriptive” than the former.¹⁹⁹

6.1.9 African Union Convention on Preventing and Combating Corruption

Article 11(2) of the African Union (AU) Convention requires parties to establish mechanisms “to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights.”²⁰⁰ Article 11(3) requires state parties to adopt “other such measures as may be necessary to prevent companies from paying bribes to win tenders.”²⁰¹

¹⁹⁶ EU (*Future Relationship*) Bill, 2019-21 sess, online (pdf):

<<https://publications.parliament.uk/pa/bills/cbill/58-01/0236/20236.pdf>>. See also “Brexit: New EU Trade Arrangements to Begin After Parliament Vote”, *BBC News* (31 December 2020), online: <<https://www.bbc.com/news/uk-politics-55493437>>.

¹⁹⁷ TCA, *supra* note 195, at Title VI, preamble.

¹⁹⁸ “UK to Join Government Procurement Pact in Its Own Right in the New Year” (7 October 2020), online: *World Trade Organization* <https://www.wto.org/english/news_e/news20_e/gpro_07oct20_e.htm>; Department for International trade, Press Release, “Government Secures Access for British Business to £1.3 Trillion of Global Procurement Contracts” (7 October 2020), online: <<https://www.gov.uk/government/news/government-secures-access-for-british-business-to-13-trillion-of-global-procurement-contracts>>.

¹⁹⁹ John Forrest et al, “Continuity or Change? Procurement Rules after Brexit” (12 November 2020), online: *DLA Piper LLP* <<https://www.dlapiper.com/en/us/insights/publications/2020/11/procurement-rules-after-brexit/>>.

²⁰⁰ *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, 43 ILM 5 (entered into force 5 August 2006), online (pdf): <https://www.legal-tools.org/uploads/txt_pdb/AfricanUnionConventiononPreventingandCombatingCorruption_11-07-2003_E_04.pdf>.

²⁰¹ *Ibid.*

6.1.10 UN Commission on International Trade Law Model Law on Public Procurement

On July 1, 2011, the United Nations Commission on International Trade Law (UNCITRAL) published the UNCITRAL Model Law on Public Procurement (MLPP).²⁰² The MLPP is designed as a tool for “modernizing and reforming procurement systems” and assisting countries in implementing legislation where none is currently in place.²⁰³ It is an extensive, detailed model law (84 pages) and accompanied by a very detailed guide (419 pages).²⁰⁴

The objectives of the MLPP are outlined in its preamble:

- a) Achieving economy and efficiency;
- b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;
- c) Maximizing competition;
- d) Ensuring fair, equal and equitable treatment;
- e) Assuring integrity, fairness and public confidence in the procurement process; and
- f) Promoting transparency.²⁰⁵

The MLPP was intended to apply to all types of procurement and requires no threshold amount for its application to transactions. The MLPP also provides guidance in applying procurement law to security and defence contracts. The MLPP sets out minimum requirements and essential principles for effective procurement legislation:

- a) the applicable law, procurement regulations, and other relevant information are to be made publicly available (article 5);
- b) requirements for prior publication of announcements for each procurement procedure (with relevant details) (articles 33–35) and ex post facto notice of the award of procurement contracts (article 23);
- c) items to be procured are to be described in accordance with article 10 (that is, objectively and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on an objective basis);
- d) requirements for qualification procedures and permissible criteria to determine which suppliers or contractors will be able to participate,

²⁰² UNCITRAL Model Law on Public Procurement (adopted 1 July 2011), online (pdf): <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2011-model-law-on-public-procurement-e.pdf>>.

²⁰³ United Nations Commission on International Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* (New York: United Nations, 2014) at iii, online (pdf): <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guide-enactment-model-law-public-procurement-e.pdf>>.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid* at 3.

- with the particular criteria that will determine whether or not suppliers or contractors are qualified communicated to all potential suppliers or contractors (articles 9 and 18);
- e) open tendering is the recommended procurement method and the use of any other procurement method must be objectively justified (article 28);
 - f) other procurement methods should be available to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement, and the procurement of complex or specialized items or services) with conditions for use of these procurement methods (articles 29–31);
 - g) a requirement for standard procedures for the conduct of each procurement process (Chapters III–VII);
 - h) a requirement for communications with suppliers or contractors to be in a form and manner that does not impede access to the procurement (article 7);
 - i) a requirement for a mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force (article 22(2)); and
 - j) mandatory challenge and appeal procedures if rules or procedures are breached (Chapter VIII).²⁰⁶

The MLPP is a framework law and does not include all the regulations necessary for implementation. However, it does provide insight into some important aspects of procurement law and guidance on implementing effective procurement laws and regulations.

6.2 US

The US procurement system is considered by some to be one of the most sophisticated and developed in the world.²⁰⁷ Even so, it is unable to prevent all corruption, as demonstrated by the case of a senior US Department of Defense acquisition official who pled guilty to criminal conspiracy in connection with the negotiation of a \$23 billion acquisition from Boeing.²⁰⁸

US law on public procurement falls under the *Competition in Contracting Act* of 1984. The *Federal Acquisition Regulation* further details the rules of hosting and participating in public procurement. Although the Government Accountability Office (GAO) and the Court of

²⁰⁶ *Ibid* at 14–15.

²⁰⁷ Ware et al, *supra* note 48.

²⁰⁸ *Ibid*.

Federal Claims have heard hundreds of protests under the *Federal Acquisition Regulation*, these cases have rarely resulted in a finding that there was improper motivation for deviating from the rules.

6.2.1 *Competition in Contracting Act*

The *Competition in Contracting Act* (CICA) was passed in 1984 to promote competition and reduce government costs of procurement.²⁰⁹ The CICA requires that all procurement processes carried out by executive agencies involve a “full and open competition through the use of competitive procedures”²¹⁰ (subject to some exceptions); it also places various requirements on all contracts over \$25,000. The CICA governs all procurement contracts that do not fall under more specific procurement legislation. Exceptions to the CICA’s “full and open competition” requirements²¹¹ include:

- 1) single source contracts for goods or services;
- 2) cases of unusual and compelling urgency;
- 3) the maintenance of expertise or certain capacity;
- 4) requirements under international agreements;
- 5) situations with express authorization by statute;
- 6) national security interests; and
- 7) cases in which the head of the agency determines the exception is necessary and notifies Congress in writing.²¹²

“Full and open competition” is fulfilled when “all responsible sources are permitted to submit sealed bids or competitive proposals.”²¹³

6.2.2 *Federal Acquisition Regulation*

The *Federal Acquisition Regulation* (FAR) took effect on April 1, 1984. Its purpose is to codify and publish uniform policies and procedures for all acquisitions by executive agencies.²¹⁴ The system is designed to efficiently deliver the product or service necessary not only to fulfill public policy objectives, but also to provide the best value while promoting the public’s trust.

According to section 9.103 of the FAR, the US government will contract only with “responsible contractors.” To be deemed “responsible,” contractors must meet a set of standards contained in section 9.104, including a “satisfactory record of integrity and

²⁰⁹ *Competition in Contracting Act*, 41 USC § 253 (1984).

²¹⁰ *Ibid.* However, requirements change based on the dollar value of the contract.

²¹¹ For additional commentary on the “full and open competition” requirements, see generally Congressional Research Service, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by Kate M Manuel (30 June 2011), online (pdf): <<https://fas.org/sgp/crs/misc/R40516.pdf>>.

²¹² *Competition in Contracting Act*, 41 USC § 253 (1984).

²¹³ 41 USC § 403(6) (2009).

²¹⁴ *Federal Acquisition Regulation*, 48 CFR § 1.101 (1983).

business ethics.”²¹⁵ Contractors that fail to meet the standard of “presently responsible” can be debarred or suspended from public procurement. Causes for debarment include convictions for fraud, bribery, embezzlement or “any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”²¹⁶ The *FAR* also includes a catch-all provision that facilitates debarment for “any other cause of so serious or compelling nature that it affects the present responsibility of a Government contractor.”²¹⁷ Causes for debarment might arise from contract-related conduct or non-contractual conduct, such as environmental misdemeanours.²¹⁸ Officials in charge of debarment have wide discretion and may consider mitigating factors or remedial measures implemented by the contractor.²¹⁹ Debarment is government-wide and company-wide and generally lasts no more than three years.²²⁰

Suspensions are imposed pending investigations or legal proceedings when necessary to protect the government’s interest. The imposition of a suspension must be based on “adequate evidence.”²²¹ Causes for suspension are similar to causes for debarment, except only adequate evidence of the commission of an offence, rather than a conviction, is required.

Part 3.10 of the *FAR* introduces the *Contractor Code of Business Ethics and Conduct*. Section 3.1002 states that contractors must operate “with the highest degree of honesty and integrity” and have a written code of business ethics and conduct, along with a compliance training program and internal controls system that will promote compliance with that code of conduct. Other requirements for various types of contracts are laid out in section 52.203-13.

To promote accountability in decision-making, the GAO operates a bid protest system. This system allows parties who believe a federal agency has failed to comply with procurement laws and regulations on a specific bid to file a protest with the GAO in order to have their complaint resolved expeditiously.²²²

6.3 UK

Following the UK’s withdrawal from the EU, EU law, including EU procurement rules, no longer applies in the UK. This withdrawal did not, however, automatically result in the repeal of procurement rules (including those based on EU law) that had been implemented through domestic legislation and regulations. However, in the wake of Brexit, the UK

²¹⁵ *Ibid* at § 9.104(d).

²¹⁶ *Ibid* at § 9.406-2(a)(5).

²¹⁷ *Ibid* at § 9.406-2(c).

²¹⁸ Thomas P Barletta, “Procurement Integrity and Supplier Debarment – A U.S. Perspective” (Address delivered at the Transparency International Canada Day of Dialogue, Toronto, 6 May 2015) [unpublished].

²¹⁹ *Federal Acquisition Regulation*, *supra* note 214 at § 9.406-1.

²²⁰ Barletta, *supra* note 218.

²²¹ *Federal Acquisition Regulation*, *supra* note 214 at § 9.407-1(b)(1).

²²² “Bid Protests”, online: US Government Accountability Office <www.gao.gov/legal/bid-protests>.

government has proposed sweeping changes to its domestic procurement rules. In particular, in December 2020, the UK Cabinet Office published a green paper entitled “Transforming Public Procurement” that proposes an “overhaul” of the UK’s public procurement regime.²²³ Since major changes are on the horizon, the discussion below provides only a brief summary of the existing regime and the proposed new regime.

6.3.1 *Public Contracts Regulations 2015*

Currently, the UK has two main sets of regulations²²⁴ governing public procurement: the *Public Contracts Regulations 2015 (PCR)*,²²⁵ which apply in England, Wales and Northern Ireland, and the *Public Contracts (Scotland) Regulations 2015*, which apply in Scotland.²²⁶ Although broadly similar, the two sets of regulations differ in some respects.²²⁷ The discussion below focuses on the *PCR*.

The *PCR* were enacted to ensure the UK’s compliance with EU requirements (which are no longer binding in the UK). Generally speaking, these regulations apply if the following preconditions are met:

- 1) **The body doing the buying is a contracting authority.** The definition of “contracting authority” is wide and includes central government, local authorities, associations formed by one or more contracting authorities, and other bodies governed by public law;
- 2) **The contract is for public works, public services or public supplies.** Sometimes the contract will be a mixed contract (e.g., the supply and maintenance of computers). Where it is, a contracting authority must determine which element (e.g., the supply element or the service element) is the predominant element and, therefore, which set of rules will apply. This can be important to get right as the rules vary slightly depending on the type of contract (e.g., lower financial thresholds apply to services and supplies contracts than to works contracts); and
- 3) **The estimated value of the contract (net of VAT) equals or exceeds the relevant financial threshold.** The rules expressly prohibit deliberately splitting contracts to bring them below the thresholds.

²²³ UK, Cabinet Office, *Transforming Public Procurement* (Cm 353, 2020) at 5, online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944196/CCS001_CCS1020400576-001_Transforming_Public_Procurement_WebAccessible_1_.pdf>.

²²⁴ See also *Concession Contracts Regulations 2016*, SI 2016/273; *Utilities Contracts Regulations 2016*, SI 2016/274.

²²⁵ *Public Contracts Regulations 2015*, SI 2015/102.

²²⁶ *Public Contracts (Scotland) Regulations 2015*, SSI 2015/446. Scotland introduced further reforms to its public procurement regime through the *Procurement (Scotland) Regulations 2016*, SSI 2016/145.

²²⁷ See Jill Petrie, “Procurement Reform in Scotland: Update, January 2016” (15 January 2016), online (blog): *BTO Solicitors* <www.bto.co.uk/blog/procurement-reform-in-scotland---update-january-2016.aspx>.

The principles of procurement are set out in section 18 of the *PCR*: treating economic operators equally, without discrimination and in a transparent and proportionate manner.²²⁸ The *PCR* also provide that contracting authorities are not to design a procurement process to exclude it from certain provisions of the *PCR* or to artificially narrow competition.²²⁹ The *PCR* impose a duty on the contracting authority in relation to economic operators, and if this duty is breached and the breach causes loss, an economic operator can bring a claim under the *PCR*.²³⁰ The *PCR* specify the remedies that may be sought by economic operators. There are exclusions as to when the *PCR* apply, such as where the authority is buying for the defence and security sector, in which case the *Defence and Security Public Contracts Regulations 2011* may cover the situation.²³¹

In 2019 and 2020, in preparation for the UK's exit from the EU, amendments were made to the *PCR* (and other statutes and regulations relating to public procurement).²³²

6.3.2 *Public Services (Social Value) Act 2012*

The *Public Services (Social Value) Act 2012 (PSA)*²³³ creates a statutory requirement for public authorities in England and Wales "to have regard to economic, social and environmental well-being in connection with public services contracts."²³⁴ The *PSA* applies only to public service contracts, not public works or supplies contracts. A 2014 review of the *PSA* found that, although implementation was underway, there were struggles in defining the measurement technique of social value and lack of clarity on what should be measured. These issues made it difficult to compare bids objectively.²³⁵ In conducting this review, the government provided some guidance for public authorities on how to comply with the *PSA* and include *PSA* considerations in the tendering process. The *PSA* may be seen as a toothless initiative, as there are no penalties for non-compliance. However, the *PSA* does provide for holistic consideration of the environmental, societal and economic impacts of tender submissions, rather than limiting consideration to the actual cost of the initial procurement project.

²²⁸ *Public Contracts Regulations 2015*, *supra* note 225, s 18(1).

²²⁹ *Ibid* at s 18(2).

²³⁰ *Ibid* at s 91.

²³¹ Crown Commercial Service, "Guidance: Public Procurement Policy" (Last updated 1 January 2021), online: *Government of the United Kingdom* <<https://www.gov.uk/guidance/public-sector-procurement-policy#handbooks-and-guidance>>.

²³² *The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 (UK)*, SI 2019/560; *The Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (UK)*, SI 2019/623; *The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020*, SI 2020/1319. The former two regulations were repealed and replaced by the third. See *Government of the United Kingdom, Explanatory Memorandum to the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020*, online (pdf): <https://www.legislation.gov.uk/uksi/2020/1319/pdfs/uksiem_20201319_en.pdf>.

²³³ *Public Services (Social Value) Act 2012 (UK)*, 2012, c 3.

²³⁴ *Ibid*.

²³⁵ UK, Cabinet Office, *Social Value Act Review* (Cabinet Office, 2015) at 11, online (pdf): <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_150212.pdf>.

6.3.3 Proposed New Regime

In a December 2020 green paper entitled “Transforming Public Procurement,” the UK Cabinet Office proposed an “overhaul” of the UK’s public procurement regime.²³⁶ This proposal seeks to achieve the following objectives:

The Government’s goal is to speed up and simplify our procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery. The current regimes for awarding public contracts are too restrictive with too much red tape for buyers and suppliers alike, which results in attention being focused on the wrong activities rather than value and transparency. We need a progressive, modern regime which can adapt to the fast-moving environment in which business operates.²³⁷

The proposal seeks to achieve these objectives by “comprehensively streamlin[ing] and simplif[y]ing] the complex framework of regulations that currently govern public procurement” into a “single, uniform set of rules for all contract awards,”²³⁸ supplemented by sector-specific rules (e.g., defence or utilities).

From an anti-corruption perspective, the proposed regime seeks to “minimise the risk of corruption,” including by “embedding transparency by default throughout the commercial lifecycle,”²³⁹ requiring all contracting authorities to implement an open contracting data standard,²⁴⁰ introducing new discretionary and mandatory grounds for exclusion of suppliers (including a mandatory exclusion for any supplier with a criminal conviction related to fraud, a mandatory exclusion for non-disclosure of beneficial ownership, and a discretionary exclusion for suppliers who have entered into a deferred prosecution agreement)²⁴¹ and creating a centrally managed debarment list.²⁴²

The government has invited comments on its proposal, which will likely be followed by draft legislation.

6.4 Canada

This section on Canadian law and procedures is restricted to the public procurement policy framework at the federal level. Federal laws and policies aim not only to ensure good governance and enforce the rule of law, but also to ensure compliance with Canada’s international treaty obligations. As Canada is a federal state, federal laws and policies generally govern federal public procurement only. Any reference to “sub-federal procurement” refers to procurement that occurs below the federal level (i.e., provincial or

²³⁶ UK Cabinet Office, *supra* note 223.

²³⁷ *Ibid* at para 1.

²³⁸ *Ibid* at para 3.

²³⁹ *Ibid* at para 6.

²⁴⁰ *Ibid* at para 6.

²⁴¹ *Ibid* at paras 111–15.

²⁴² *Ibid* at para 10.

municipal). Describing procurement laws and procedures only at the federal government level is a serious limitation. Federal procurement laws and procedures are in general far more detailed and stringent than most provincial and municipal procurement regimes. Improvement of these latter regimes is a pressing need in Canada.

6.4.1 Canada-US Agreement on Government Procurement

The Canada-US Agreement on Government Procurement (CUSAGP) came into effect on February 16, 2010.²⁴³ Its primary goal, similar to the USMCA and the WTO-AGP, is to grant Canada and the US access to each other's public infrastructure industry.²⁴⁴ However, CUSAGP is significant in that it represents the first time Canada has made sub-federal procurement commitments in an international treaty.²⁴⁵ The CUSAGP also provides exemptions to "Buy American" provisions for Canadian bidders and guarantees US suppliers access to provincial markets and contracts, with the exception of Nunavut.²⁴⁶

The core principles of the CUSAGP address non-discrimination and transparency. For the purposes of transparency, entities subject to the CUSAGP are obligated to make their procurement policies readily accessible and to use competitive tendering processes except in certain circumstances.²⁴⁷ The exceptions cover the typical scenarios in which competitive tenders are not necessary, such as in the event of an emergency.

In Canada, the CUSAGP applies to procurement for construction services²⁴⁸ in the provinces where the value of the services is greater than or equal to C\$5 million.²⁴⁹ For Crown corporations and municipalities, it applies to contracts valued at C\$8.5 million or more.²⁵⁰ Relatively few municipal contracts meet this monetary threshold.

²⁴³ *Agreement Between the Government of Canada and the Government of the United States of America on Government Procurement*, Can TS 2010 No 5 (entered into force 12 February 2010), [US-Canada Procurement Agreement], online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/agreement-accord.aspx?lang=eng>.

²⁴⁴ For an overview of the CUSAGP, see "Canada-U.S. Agreement on Government Procurement" (last modified 2 March 2021), online: *Government of Canada* <tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/agreement-accord.aspx?lang=eng>.

²⁴⁵ Standing Committee on International Trade *supra* note 180 at 1.

²⁴⁶ "Canada-U.S. Agreement on Government Procurement", online: *Government of Canada* <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/other-autre/us-eu.aspx?lang=eng>>.

²⁴⁷ *US-Canada Procurement Agreement*, *supra* note 243 at Appendix C, Part A, ss 7–9.

²⁴⁸ A "construction services" contract is defined under the agreement as "a contract which has as its objective the realization by whatever means of civil or building works": *ibid* at Annex 5. Procurement in this context is defined as "contractual transactions to acquire property or services for the direct benefit or use of the government": *ibid*.

²⁴⁹ *Ibid* at Annex 2.

²⁵⁰ *Ibid* at Appendix C, Part B. All municipalities and Crown corporations in BC are subject to the agreement, though there is a list of Ontario ministries, agencies and municipalities that are not covered by the agreement.

6.4.2 Canadian Free Trade Agreement

The Canadian Free Trade Agreement (CFTA), which replaced the Agreement on Internal Trade (AIT), is an intergovernmental trade agreement between all federal, provincial, and territorial governments in Canada that entered into force on July 1, 2017.²⁵¹ Its purpose is “to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open, efficient, and stable domestic market.”²⁵² It commits federal, provincial, and territorial governments to a comprehensive set of rules governing internal trade.²⁵³ These rules are designed to align with Canada’s international commitments (including under CETA) and to offer Canadian firms the same access to the Canadian market as firms from Canada’s international trading partners.²⁵⁴ The CFTA applies to most areas of economic activity in Canada, except in respect of entities, goods, and services that are specifically listed in the schedules for Canada and each province and territory.²⁵⁵

Chapter 5 of the CFTA deals with government procurement. The purpose of this chapter is “to establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers.”²⁵⁶ The general principles set out in this chapter provide that each party “shall provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities”²⁵⁷ and shall treat the goods, services, and suppliers of any other party no less favourably than its own goods, services, and suppliers.²⁵⁸ The rules in this chapter generally apply to procurement by departments, ministries, boards, councils, publicly funded institutions (such as health or academic institutions), municipalities and other government bodies, enterprises, and agencies.²⁵⁹ However, they apply only if certain financial thresholds are met.²⁶⁰ Chapter 5 also provides for specific exceptions that are unique to Canada and each provincial and territorial government.

²⁵¹ *Canadian Free Trade Agreement: Consolidated Version* (entered into force 17 July 2017, consolidated 24 September 2020) (Governments of Canada, Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland and Labrador, the Northwest Territories, Yukon, and Nunavut) [CFTA], online (pdf): <https://www.cfta-alec.ca/wp-content/uploads/2020/09/CFTA-Consolidated-Text-Final-English_September-24-2020.pdf>.

²⁵² *Ibid* at Article 100.

²⁵³ “Backgrounder: Highlights of Canada’s New Free Trade Agreement” (7 April 2017), online (pdf): *Internal Trade Secretariat, CFTA* <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-general-backgrounder.pdf>>. See also Jon Tattrie, “Canadian Free Trade Agreement” in *The Canadian Encyclopedia* (edited 23 April 2018), online:

<<https://www.thecanadianencyclopedia.ca/en/article/canadian-free-trade-agreement>>.

²⁵⁴ *Ibid*.

²⁵⁵ *Ibid*.

²⁵⁶ CFTA, Article 500.

²⁵⁷ *Ibid* at Article 502.

²⁵⁸ *Ibid*.

²⁵⁹ *Ibid* at Article 103.

²⁶⁰ “Covered Procurement Thresholds”, online: *Internal Trade Secretariat (CFTA)* <<https://www.cfta-alec.ca/procurement/covered-procurement-thresholds/>>.

GLOBAL CORRUPTION

From a transparency and anti-corruption perspective, Article 516 sets out basic transparency requirements regarding the provision of information to suppliers, the publication of award information, and the collection and reporting of statistics.²⁶¹ Article 518 requires each party to provide a “timely, effective, transparent, and non-discriminatory” administrative or judicial review procedures for alleged breaches, as well as procedures that provide for appropriate remedies.

6.4.3 *Criminal Code*

Public procurement is also regulated or limited by a number of *Criminal Code* offences, including bribery of officers,²⁶² frauds on the government,²⁶³ breach of trust of a public officer,²⁶⁴ municipal corruption,²⁶⁵ fraudulent disposal of goods on which money has been advanced,²⁶⁶ extortion,²⁶⁷ and secret commissions.²⁶⁸ These offences are briefly described in Chapter 2, Section 2.5. Sections 121(1)(f) and 121(2) of the *Criminal Code* are specific offences in relation to federal and provincial procurement, but do not cover municipal procurement offences. At the time of writing, these *Criminal Code* sections have not been used to prosecute unlawful procurement actions. Instead, procurement offences are prosecuted under the fraud and breach of trust offences in the *Criminal Code*, or the offence of “bid-rigging” under s. 47 of the *Competition Act*²⁶⁹ (punishable by fine and/or a maximum of 14 years’ imprisonment).

6.4.4 Federal Policy Framework and Integrity Regime

The policy framework²⁷⁰ for federal public procurement is set out in the *Financial Administration Act*²⁷¹ (and subordinate Government Contracts Regulations), the *Federal Accountability Act*,²⁷² the *Auditor General Act*,²⁷³ and the *Department of Public Works and*

²⁶¹ *Ibid* at Article 516.

²⁶² *Criminal Code*, RSC 1985, c C-46, s 120.

²⁶³ *Ibid* at s 121.

²⁶⁴ *Ibid* at s 122.

²⁶⁵ *Ibid* at s 123.

²⁶⁶ *Ibid* at s 389.

²⁶⁷ *Ibid* at s 346.

²⁶⁸ *Ibid* at s 426.

²⁶⁹ RSC 1985, c C-34.

²⁷⁰ For a more detailed examination of this framework, see Public Services and Procurement Canada, *Supply Manual*, January 2021 version, effective 5 May 2021 (Strategic Policy Sector, Public Works and Government Services Canada, 2021) at s 1.15, online: <<https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/1>>.

²⁷¹ *Financial Administration Act*, RSC 1985, c F-11.

²⁷² *Federal Accountability Act*, SC 2006, c 9, ss 308, 301, 306. This act was largely the government’s response to the Sponsorship Scandal and the Gomery Commission’s Report that investigated the scandal: Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations* (Ottawa: Privy Council Office, 2006), online:

<<http://publications.gc.ca/site/eng/9.688112/publication.html>>. See also Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible? Fact Finding Report* (Ottawa: Public Works and Government Services Canada, 2005), online: <epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/default.htm>.

²⁷³ *Auditor General Act*, RSC 1985, c A-17.

*Government Services Act.*²⁷⁴ Within this legislative and regulatory framework, the principal source of federal public procurement policy in Canada is the Integrity Regime. In brief, the following are some of the key features of this regime:

- The purpose of the Integrity Regime is to “foster ethical business practices, ensure due process for suppliers and uphold the public trust in the procurement process.”²⁷⁵
- The Integrity Regime is administered by Public Services and Procurement Canada (PSPC), formerly Public Works and Government Services Canada (PWGSC), on behalf of the Canadian government.
- The Integrity Regime applies government-wide to procurement and real property transactions over \$10,000 (as well as any other contract that incorporates the regime by reference), subject to specified exceptions.²⁷⁶
- A supplier convicted of certain listed Canadian offences will be declared automatically ineligible for ten years (with the possibility of a reduction of up to five years under an administrative agreement).²⁷⁷
- A supplier convicted of an offence outside Canada that is “similar to” any Canadian offence for which a conviction would result in automatic ineligibility may be declared ineligible for ten years (with the possibility of a reduction of up to five years under an administrative agreement).²⁷⁸
- A supplier whose affiliate has been convicted of any Canadian offence for which a conviction would result in automatic ineligibility, or of a “similar offence” outside Canada and the supplier “directed, influenced, authorized, assented to, acquiesced in or participated in the commission of the offence,”²⁷⁹ may be declared ineligible for ten years (with the possibility of a reduction of up to five years under an administrative agreement).
- PSPC may suspend a supplier if the supplier has been charged with, or admits guilt of, any Canadian offence for which a conviction would result in automatic ineligibility, or has been charged with, or admits guilt of, a “similar offence” outside Canada.²⁸⁰

More information on the Integrity Regime can be found in Chapter 7, Section 8.6.

²⁷⁴ *Department of Public Works and Government Services Act*, SC 1996, c 16.

²⁷⁵ “About the Integrity Regime” (2020), online: *Government of Canada* <<https://www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html>>.

²⁷⁶ *Ibid.*

²⁷⁷ “Ineligibility and Suspension Policy” (2017), online: *Government of Canada* <<https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>>.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

6.4.5 Public Procurement in Quebec

An in-depth treatment of Quebec's efforts to curb public procurement corruptions is beyond the scope of this text. However, a few brief remarks are warranted.

The issue of corruption in Quebec's construction sector was thrust into the spotlight in 2009 after reports revealed widespread bid-rigging and collusion, causing public outrage. As mentioned in Section 1.3, then-Premier Jean Charest appointed the Charbonneau Commission to conduct a public inquiry into corruption in the awarding and management of public contracts in the province's construction industry. The Commission's report can be accessed online.²⁸¹ Evidence at the public inquiry revealed a thick web of corruption in the construction sector at the provincial and municipal level and a connection between this corruption and political party and election financing. The evidence also revealed that organized crime had infiltrated Quebec's construction industry.

In Quebec's 2012 elections, the Parti Québécois (PQ) under Pauline Marois was elected. Anxious to demonstrate the difference between the new government and the old, the PQ put together its first bill—the *Integrity of Public Contracts Act*—in about six weeks.²⁸² The central feature of Bill 1 was a new system of pre-authorization for companies involved in public procurement. Companies are required to obtain a certificate of integrity from the Autorité des marchés financiers (AMF), Quebec's securities markets regulator, before entering into construction and service contracts or subcontracts involving expenditures of CDN\$5 million or more, Ville de Montréal contracts covered by Orders in Council and certain P3 contracts.²⁸³ Beginning in November 2015, the threshold for pre-authorization of public service contracts was lowered to CDN\$1 million, and the Quebec government subsequently indicated its intention to eventually lower the threshold to CDN\$100,000 for all public contracts (except Ville de Montréal contracts, which are subject to different thresholds).²⁸⁴ The certificate will be automatically denied if any of a set of objective criteria are not met.²⁸⁵ The decision also depends on subjective criteria, as there is discretion to deny applications "if the enterprise concerned fails to meet the high standards of integrity that the

²⁸¹ France Charbonneau & Renaud Lachance, *supra* note 32.

²⁸² Bill 1, *Loi sur l'intégrité en matière de contrats public* [*Integrity in Public Contracts Act*], 1st Sess, 40th Leg, Quebec, 2012 (received assent and entered into force December 7, 2012), SQ 2012, c 25.

²⁸³ Louis Letellier, "Application of An Act Respecting Contracting by Public Bodies" (Address delivered at the Transparency International Canada 5th Annual Day of Dialogue, Toronto, 6 May 2015) [unpublished].

²⁸⁴ Linda Gyulai, "More Contract Bidders to Be Vetted under Provincial Decree", *The Montreal Gazette* (11 June 2015), online: <montrealgazette.com/news/local-news/more-contract-bidders-to-be-vetted-under-provincial-decree>; "Information on Public Contracts", online: *Autorité des marchés publics* <<https://amp.quebec/en/information-on-public-contracts/>>.

²⁸⁵ *An Act Respecting Contracting by Public Bodies*, CQLR c C-65.1, s 21.26 [*Contracting Public Bodies Act*]. The objective criteria in s 21.26 involve previous convictions for various offences. However, Bill 26 (enacted in April 2015) amended the *Act* by describing two situations in which the AMF need not automatically refuse to issue a certificate even though the objective criteria in s. 21.26 are met. See Bill 26, *An Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, 1st Sess, 41st Leg, Quebec, 2014, c 6, cl 26 (assented to 1 April 2015), SQ 2015, c 6.

public is entitled to expect from a party to a public contract.”²⁸⁶ The legislation identifies potentially relevant factors in making this determination.

Writing in 2015, Canadian lawyer and former politician Graham Steele, argued that this provision is “startlingly subjective.”²⁸⁷ He advanced a number of other critiques of Bill 1. For example, he claimed that “the Bill 1 debate is devoid of any real diagnosis of why or where the corruption is occurring.”²⁸⁸ He also argued that Quebec’s lawmakers had almost no objective evidence to support a belief that their anti-corruption legislation would work to stem corruption, yet no one opposed the bill.²⁸⁹ He suggested that the public outcry pushed legislators to simply “do something, and do it quickly,” therefore focusing efforts on “building an edifice that sounds like it *might* work to stem corruption, rather than examining the evidence, in the literature and precedents from around the world, for what was *likely* to work [emphasis in original].”²⁹⁰ Steele suggested that, while public outcry was placated, Bill 1 has had “an almost entirely nominal effect.”²⁹¹

In 2017, after Steele published his critique, the Quebec legislature passed Bill 108, the *Act to facilitate oversight of public bodies’ contracts and to establish the Autorité des marchés publics*,²⁹² which among other things amended the *Act Respecting Contracting by Public Bodies* and created a new, neutral, independent body responsible for overseeing public procurement and the application of legislation and regulations governing public contracts in Québec: the Autorité des marchés publics (AMP). The AMP, which took over the public procurement functions of the AMF, describes its role and mandate as follows:

The Autorité des marchés publics (AMP) is a neutral, independent body that is the sole gateway for oversight of public procurement and the application of legislation and regulations governing public contracts in Québec. Its oversight role covers the public sector, the health and education networks, government corporations, and the municipal sector.

However, a specific feature applies to the City of Montréal. The duties and powers attributed to the AMP, except those pertaining to the examination

²⁸⁶ *Contracting Public Bodies Act*, *ibid* at s 21.27.

²⁸⁷ Steele, *supra* note 165 at 79.

²⁸⁸ *Ibid* at 102.

²⁸⁹ *Ibid* at 114.

²⁹⁰ *Ibid* at 116.

²⁹¹ *Ibid* at 118. As of June 2015, 1,300 companies have been approved by the AMF and six or seven have been rejected. See Gyulai, *supra* note 284. SNC-Lavalin received approval to bid on public contracts in Quebec in February 2014: “SNC-Lavalin, WSP Green-Lit to Bid on Public Contracts in Quebec” *CBC News* (5 February 2014), online: <www.cbc.ca/news/canada/montreal/snc-lavalin-wsp-green-lit-to-bid-on-public-contracts-in-quebec-1.2524363>. For more on the realities of Bill 1 for companies, see Linda Gyulai, “Anti-Corruption Legislation Creates Niche Market for Private-Eye and Accounting Firms”, *The Montreal Gazette* (17 July 2014), online: <montrealgazette.com/news/local-news/anti-corruption-legislation-creates-niche-market-for-private-eye-and-accounting-firms>. For the first decision on the legality of the AMF’s refusal of authorization, see 9129-2201 *Québec inc c Autorité des marchés financiers*, 2014 QCCS 2070, leave to appeal to QCCA ref’d 2014 QCCA 1383.

²⁹² *An Act to facilitate oversight of public bodies’ contracts and to establish the Autorité des marchés publics*, 41st Leg, 1st Sess, Quebec (received royal assent 1 December 2017), SQ 2017, c 27.

of the contract management of a designated organization are, with respect to the City of Montréal or a person or an organization related to the City of Montréal and covered by the Act, exercised by the Inspector General of the City of Montréal. The Inspector General assumes the same obligations as the AMP would pursuant to its duties and powers.

The AMP's mission is to oversee all public contracts, in particular compliance with the tendering and contract award process and to receive complaints from interested persons. It is also responsible for the register of business enterprises that are authorized to enter into public contracts and subcontracts and the register of enterprises ineligible for public contracts.

The Act attributes various powers to the AMP, including audit and investigative authority that enables the AMP, as the case may be, to issue orders, make recommendations or suspend or cancel contracts.²⁹³

Thus, the AMP's role is not restricted to pre-authorization; it extends more broadly to overseeing public procurement and public contracts in the province.²⁹⁴ Lawyers Nathalie Beauregard and Marjolaine Verdon-Akzam summarize the AMP's key responsibilities and powers as follows:

Among other tasks, the AMP must

- examine the compliance of a tendering or awarding process for a public contract of a public body – the review may be done on the AMP's own initiative, or after a complaint is filed by an interested person, or on the request of the Chair of the Conseil du trésor or a bidder;
- maintain the register of enterprises ineligible to enter into a public contract or subcontract and the register of enterprises authorized to do so; and
- ensure that the contract management of the Ministère des Transports and any other public body the government designates is carried out in accordance with the normative framework to which the body is subject.

Various powers are given to the AMP to conduct audits and investigations and to give subsequent orders and recommendations. These may include, but are not limited to, orders to a public body to amend its tender documents or to cancel the public call for tenders, and to suspend the performance of any public contract or cancel such a contract.²⁹⁵

²⁹³ "About Us", online: *Autorité des marchés publics* <<https://amp.quebec/en/about-us/>>.

²⁹⁴ Sarah Chaster, "Public Procurement and the Charbonneau Commission: Challenges in Preventing and Controlling Corruption" (2018) 23 Appeal 121 at 141, online: <<https://journals.uvic.ca/index.php/appeal/article/view/18113>>.

²⁹⁵ Nathalie Beauregard & Marjolaine Verdon-Akzam, "Public Contracts: Québec Introduces the Autorité des Marchés Publics"(17 June 2016), online: *Osler LLP*

Notably, Bill 108 did not amend the provision creating subjective grounds to deny public contracts.²⁹⁶ However, Sarah Chaster notes that the bill has been hailed as a significant improvement:

Bill 108 helps to better situate Quebec's pre-authorization scheme within a more nuanced public procurement framework. Section 21.27 of the *ACPB*, which contains the provision allowing discretion to refuse authorization if an enterprise "fails to meet the high standards of integrity" expected by the public, is not amended by the bill. This means the same "startling subjectivity" raised by Steele would still be present in the legislation. However, the broad discretion might be tempered somewhat since pre-authorization would now be established within the concentrated expertise of the AMP, whose mission would include not only pre-authorization but also generally overseeing all public contracts and ensuring integrity and ongoing compliance with public procurement processes. Bill 108 has been lauded as a significant change that would bring positive developments and greater uniformity to Quebec's public procurement processes. It responds directly to one of the most central recommendations made by the Commission with regards to public procurement [i.e., the recommendation that Quebec create a public procurement authority].²⁹⁷

It remains to be seen whether the AMP will succeed in enhancing transparency and integrity in the Quebec public procurement. It is clear, however, that Quebec has taken an important step in the right direction.

6.4.6 Office of the Procurement Ombudsman

The Government of Canada has put in place a Procurement Ombudsman.²⁹⁸ As set out in s. 22.1(3) of the *Department of Public Works and Government Services Act*, the mandate of the Procurement Ombudsman is to:

- a) review the practices of departments for acquiring materiel and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices;
- b) review any complaint respecting the compliance with any regulations made under the *Financial Administration Act* of the award of a contract for the acquisition of materiel or services by a department to which the

<<https://www.osler.com/en/resources/regulations/2016/public-contracts-quebec-introduces-the-autorite-d>>.

²⁹⁶ Chaster, *supra* note 294 at 141.

²⁹⁷ *Ibid.*

²⁹⁸ "Frequently Asked Questions", online: *Office of the Procurement Ombudsman* <<http://opo-boa.gc.ca/faq-eng.html>>. An ombudsman is an "an independent, objective investigator of people's complaints against government and/or private sector organizations. After a fair and thorough review, an Ombudsman decides if the complaint is valid and makes recommendations in order to resolve the problem": *ibid.*

Agreement, as defined in section 2 of the *Canadian Free Trade Agreement Implementation Act*, would apply if the value of the contract were not less than the amount referred to in Article 504 of that Agreement.

- c) review any complaint respecting the administration of a contract for the acquisition of materiel or services by a department; and
- d) ensure that an alternative dispute resolution process is provided, on request of each party to such a contract.²⁹⁹

A primary function of the Procurement Ombudsman is to review the procurement practices of departments, including PSPC, and publicly report on the results. In order to ensure its independence in carrying out this duty, the Procurement Ombudsman operates at arm's length from PSPC.

The Office of the Procurement Ombudsman:

- works with suppliers and federal departments to clarify and address procurement issues;
- helps preserve the integrity of the federal procurement process by reviewing complaints from suppliers about the award or administration of a contract and making balanced recommendations;
- helps facilitate the resolution of contract disputes through alternative dispute resolution;
- reviews procurement practices in one or across a number of federal departments where recurring or systemic procurement issues are present;
- makes recommendations to strengthen fairness, openness and transparency in federal procurement practices; and
- shares information on effective practices identified in the federal government and other jurisdictions to highlight leadership and reinforce positive initiatives in the field of procurement.³⁰⁰

7. EVALUATION OF PROCUREMENT LAWS AND PROCEDURES

7.1 OECD Review of Country Compliance

The OECD established the OECD Working Group on Bribery (Working Group), a peer-monitoring group, to evaluate each country's performance in implementing the OECD Anti-Bribery Convention. Phase 1 evaluated the country's legislation, phase 2 evaluated whether the country was applying their legislation, phase 3 evaluated the country's enforcement of the Convention and phase 4 (currently ongoing) further evaluates the country's

²⁹⁹ *Department of Public Works and Government Services Act*, SC 1996, c 16, s 22.1(3).

³⁰⁰ Office of the Procurement Ombudsman, *supra* note 298.

performance. In each phase, the Working Group provides recommendations for the country to improve its compliance. The Working Group also publishes follow-up reports on each country's performance.³⁰¹

7.1.1 US

The 2010 *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the US* did not criticize the US's implementation of the Convention in respect of its public procurement regime. However, it did note that the US rarely chose to debar companies that were convicted of bribery of a foreign public official even though US laws provided that companies could be debarred from federal contracts for up to three years for convictions under domestic and foreign anti-bribery laws. Recommendation 4 suggested that debarments be applied equally to companies convicted of domestic and foreign bribery.³⁰²

The Working Group's 2012 follow-up for the US described the actions taken to implement the OECD's recommendation on debarment. The follow-up report confirmed that there is a statutory mechanism for the debarment of persons convicted of violations of the *Arms Export Control Act*.³⁰³ In addition, the report noted that although the *FCPA* does not impose mandatory statutory debarment, debarment was usually the result of indictment and/or conviction.³⁰⁴

The 2020 *Phase 4 Report* commended the US on its "strong enforcement" of the *FCPA* and on "maintaining its prominent role in the fight against transnational corruption."³⁰⁵ The report noted that these achievements resulted from "a combination of enhanced expertise and resources to investigate and prosecute foreign bribery, the enforcement of a broad range of offences in foreign bribery cases, the effective use of non-trial resolution mechanisms, and the development of published policies to incentivise companies' cooperation with law enforcement agencies."³⁰⁶ The report also made various recommendations for the US to:

- consider how it can enhance protections for whistleblowers who report suspected acts of foreign bribery by non-issuers and enhance guidance about the protections available to whistleblowers who report suspected acts of foreign bribery;

³⁰¹ For more information on the OECD monitoring process see "Country Monitoring of the OECD Anti-Bribery Convention", online: OECD <www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>.

³⁰² OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, (2010), online (pdf): <www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf>.

³⁰³ *Arms Export Control Act of 1976* (Title II of Pub L No 94–329, 90 Stat 729 (codified at 22 USC ch 39)).

³⁰⁴ OECD, Working Group on Bribery, *United States: Follow-Up to the Phase 3 Report and Recommendations*, (2012) at 13, online (pdf): <www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf>.

³⁰⁵ OECD, Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention – Phase 4 Report: United States*, (2020) at 7, online (pdf): <<https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf>>.

³⁰⁶ *Ibid.*

- consider having the Securities and Exchange Commission consolidate and publicize its policy and guidance on how it enforces the *FCPA*;
- continue to evaluate the effectiveness of whether the Corporate Enforcement Policy encourages self-disclosure and deters foreign bribery;
- ensure that law enforcement agencies make publicly available whether a non-prosecution agreement or a deferred prosecution agreement with a legal person in an *FCPA* matter has been extended or completed;
- when extending a deferred prosecution agreement, ensure the law enforcement agency makes available the groups for extension; and
- collect data, to the extent possible within its system, on debarment in foreign bribery cases to improve the monitoring of impact of sanctions.³⁰⁷

7.1.2 UK

The 2012 *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the UK* noted that while the UK had significantly enhanced its foreign bribery enforcement efforts since the previous review, it needed to be more transparent when resolving cases. The report made further recommendations for the UK to:

- maintain the role and resources of the Serious Fraud Office (SFO) in criminal foreign bribery investigations and prosecutions;
- avoid confidentiality agreements that prevent disclosure of key information about settled cases;
- promptly adopt a roadmap to proactively extend the Convention to overseas territories;
- continue to provide evidence to other countries after settlements, where appropriate; and
- ensure that companies effectively move towards “zero tolerance” of facilitation payments.³⁰⁸

The 2017 *Phase 4 Report* commended the UK on having “taken significant steps since Phase 3 to increase enforcement of the foreign bribery offence” and on becoming “one of the major enforcers among the Working Group countries.”³⁰⁹ The report also acknowledged that the UK had made “[i]mportant legislative reforms, including the introduction of deferred

³⁰⁷ *Ibid* at 111–13.

³⁰⁸ OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom*, (2012) at 58–62, online (pdf): <<https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>>.

³⁰⁹ OECD, Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention – Phase 4 Report: United Kingdom*, (2017) at 5, online: <<https://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>>.

prosecution agreements, and high-level political commitments.”³¹⁰ Further, the report noted that the UK had taken “taken significant steps to enhance its detection capabilities, including through intelligence analysis by the SFO [Serious Fraud Office], improved whistleblowing channels, and mobilisation of some of its government agencies.”³¹¹

On the other hand, the report identified a number of areas of concern. For example, it noted that “Scotland’s practices and frameworks for foreign bribery enforcement could be brought in line with those in place in England and Wales,” “there is also scope to improve communication between law enforcement authorities from England and Wales and those in Scotland,” “the persistent uncertainty about the SFO’s existence and budget is harmful,” “anti-money laundering measures should be enhanced to improve detection of foreign bribery, including adopting the Criminal Finances Bill,” and “the tax administration [should] conduct as a matter of priority a comprehensive review of its methods and capacity to detect and report foreign bribery.”³¹²

In its two-year follow-up report on its *Phase 4 Report*, the Working Group noted that the UK had “addressed a number of key Phase 4 recommendations, notably asserting the SFO’s role in foreign bribery cases and generally enhancing the capacity for enforcement of the foreign bribery and related offences.”³¹³ On the other hand, the report lamented that “no steps have been taken to address long-standing recommendations to ensure the independence of foreign bribery investigations and prosecutions, or to enhance detection through AML-reporting mechanisms.”³¹⁴ The report also observed that “[d]espite an increased level of enforcement of foreign bribery laws, the total number of finalised and ongoing cases relative to the UK economy remains relatively low.”³¹⁵

7.1.3 Canada

The 2011 *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* found that the CFPOA was lacking because it did not include civil or administrative debarment sanctions for companies convicted under the act.³¹⁶ The suggested sanction was exclusion from bidding on government contracts for a set period after conviction under the CFPOA.³¹⁷ Canada’s domestic bribery laws already provided for this:

Persons convicted under section 121 of the Criminal Code of bribing an official of the Government of Canada, government of a province, or Her Majesty in right of Canada or a province (“Frauds on the Government”),

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ OECD, Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention – Phase 4 Two-Year Follow-Up Report: United Kingdom*, (2019) at para 1, online (pdf):

<<https://www.oecd.org/corruption/United-Kingdom-phase-4-follow-up-report-ENG.pdf>>.

³¹⁴ *Ibid.*

³¹⁵ *Ibid* at para 2.

³¹⁶ OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, (2011), online (pdf):

<<https://www.oecd.org/canada/Canadaphase3reportEN.pdf>>.

³¹⁷ *Ibid* at recommendation 2.

have no capacity to contract with Her Majesty or receive any benefit under a contract with Her Majesty, pursuant to subsection 750(3) of the Criminal Code, under Part XXIII, entitled “Sentencing.”³¹⁸

This provision applies only to charges of domestic bribery, and thus it does not capture *CFPOA* offences. However, the Working Group’s 2013 follow-up report found that Canada had remedied this problem in July 2012, when PSPC added convictions for foreign bribery under s. 3 of the *CFPOA* to the list of offences that would automatically result in debarment.³¹⁹ For more information on PSPC’s debarment policies, see Chapter 7, Section 8.6.

Other key recommendations included that Canada:

- amend the *CFPOA* so that it is clear that it applies to bribery related to the conduct of all international business, not just for-profit business;
- ensure that sanctions applied in practice for *CFPOA* violations are effective, proportionate and dissuasive;
- take such measures as may be necessary to prosecute Canadian nationals for bribery of foreign public officials committed abroad; and
- clarify that police and prosecutors may not consider factors such as the national economic interest and relations with a foreign state, when deciding whether to investigate or prosecute allegations of foreign bribery.³²⁰

The Working Group’s 2013 follow-up report noted that Canada had introduced legislation (Bill S-14, subsequently enacted as the *Fighting Foreign Corruption Act*) addressing a number of its concerns. In particular, this legislation, among other things, clarified that the offence of foreign bribery: applies to all businesses, regardless of profit; extended the jurisdictional scope of the *CFPOA* so that Canada may prosecute foreign bribery committed by Canadians or Canadian companies, regardless of where the offence was committed; and established specific criminal offences for bookkeeping violations committed for the purpose of bribing foreign public officials or hiding such bribery.³²¹ The report also noted that the Public Prosecution Service of Canada was in the process of updating its policies.³²²

Canada’s Phase 4 evaluation is scheduled for 2023.³²³

³¹⁸ *Ibid* at 23.

³¹⁹ OECD, Working Group on Bribery, *Canada: Follow-Up to the Phase 3 Report and Recommendations*, (2013) at 6–7, online (pdf): <www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>.

³²⁰ For the full set of recommendations, see Canada’s *Phase 3 Report* *supra* note 316 at 59–61.

³²¹ *Ibid* at para 2.

³²² *Ibid* at para 3.

³²³ OECD, Working Group on Bribery, *Monitoring Schedule: December 2016 – June 2026*, (2020) online (pdf): <<http://www.oecd.org/daf/anti-bribery/Phase-4-Evaluation-Calendar.pdf>>.

8. OTHER ISSUES

8.1 Role of Discretion in Public Procurement

The degree to which discretion should be regulated is a key issue facing governments in designing effective procurement systems. Although discretion leaves space for corruption, some discretion is required in order to ensure that the best bid—not just the lowest—is selected. The need for discretion generally increases with the complexity of the project and the number of factors to consider. Italian economist Gustavo Piga, describes some of the problems associated with strict regulation of discretion:

Reducing discretion has other drawbacks that are seldom considered in the fight against corruption. First, rigid procedures may shield procurement officials/politicians from responsibility for poor performance and failures ('not my fault, the rules' fault), while favoritism may be hidden by a wall of complex procedural rules. Second, if the agent is competent, discretion offers valuable flexibility, especially in complex procurement situations.³²⁴

Instead of removing discretion, holding officials accountable for defects in the procurement process may be viewed as a more efficient way of reducing corruption.³²⁵ At a deeper level, creating a culture of integrity within government institutions is essential, though this cannot be achieved through laws and regulations alone.

8.2 Role of Technology in Combating Corruption in Public Procurement

Technology is increasingly being viewed as an important tool for combatting corruption in public procurement. TI describes the use and potential of technology to reduce corruption in public procurement as follows:

Information and communication technologies have been increasingly used by governments across the world as part of procurement reform processes. This so-called e-procurement, defined as "the use of any internet-based inter-organisational information system that automates and integrates any parts of procurement process in order to improve efficiency, transparency and accountability in the wider public sector" (Vaidya 2007) has been used by governments to conduct procurement-related tasks, such as the acquisition of goods and services, and the allocation of contracts to bidders (Neupane et al. 2014).

There are several types of e-procurement, including e-tendering, e-auctions, and contract management databases (OECD 2011). Each of them aims to

³²⁴ Gustavo Piga, "A Fighting Chance Against Corruption in Public Procurement?" in Rose-Ackerman & Søreide, *supra* note 25, 141 at 152.

³²⁵ Ariane Lambert-Mogiliansky & Konstantin Sonin, "Collusive Market-Sharing and Corruption in Procurement" (2006) 15:4 J Econ Manage Strategy 883 at 900.

address issues that are also seen as problematic from a corruption risk perspective in the different stages of the procurement process, namely, (i) contracting process, covering the initial needs assessment, budget allocation and initial market research through to the preparation of the tender, and (ii) evaluation of applications and (iii) award of contracts.

...

The literature highlights several benefits of e-procurement, including: improvements in market access and competition, promotion of integrity, reduction of costs of information, easy access to information, and increased transparency and accountability, among others. With regard to corruption, Schapper (2007) stresses that “the strength of e-procurement in the anti-corruption agenda arises from this capacity to greatly reduce the cost and increase the accessibility of information as well as automate practices prone to corruption”.

Nevertheless, the extent to which the use of technology in public procurement will de facto lead to less corruption and more accountability depends on a series of other factors, including a clear legal framework on public procurement that supports the e-procurement vision and objectives, effective training to both public officials and business, public awareness initiatives to develop civic oversight, as well as, strong oversight and law enforcement bodies that make use of the information available to investigate and punish corruption and mismanagement throughout the procurement process.

The establishment of an e-procurement system as a stand-alone reform is unlikely to bring about positive transformational results. Transparency and accountability must be built into e-procurement specifications and design in order to allow for a meaningful analysis of the information generated. For example, e-procurement should allow for the generation of meaningful management and audit reports, and the tracking of actions and decisions of individuals throughout the procurement cycle (Schapper 2007).

Within this framework, when well designed and implemented, e-procurement in the public sector usually enhances transparency and it has the potential to increase accountability and minimise the risks of corruption (OECD 2008).³²⁶

³²⁶ Transparency International, *The Role of Technology in Reducing Corruption in Public Procurement*, (28 August 2014) at 2–3, online (pdf):

<https://knowledgehub.transparency.org/assets/uploads/helpdesk/The_role_of_technology_in_reducing_corruption_in_public_procurement_2014.pdf>. See also Arjun Neupane et al, “Role of Public E-Procurement Technology to Reduce Corruption in Government Procurement” (Paper delivered at the 2012 International Public Procurement Conference, 17–19 August, Seattle, Washington), online (pdf): <https://eprints.usq.edu.au/21914/1/Neupane_Soar_Vaidya_Yong_PV.pdf>; “The Potential of Fighting Corruption Through Data Mining” (9 January 2015), online (blog): *Transparency International* <<https://blog.transparency.org/2015/01/09/the-potential-of-fighting-corruption-through-data-mining/>>.

As an illustration of recent efforts to use new technologies to combat corruption, in June 2020, the World Economic Forum published a report exploring the use of blockchain technology as a means of reducing corruption in public procurement.³²⁷ As this report describes, blockchain is an open, distributed ledger that can record transactions in a verified and permanent way. This technology “provides the unique combination of permanent and tamper-evident record-keeping, transaction transparency and auditability, automated functions with ‘smart contracts’, and the reduction of centralized authority and information ownership within processes. These properties make blockchain a high-potential emerging technology to address corruption.”³²⁸ The report reaches the following conclusions about blockchain’s potential to provide “technologically induced sunlight” in public procurement processes:

Overall, blockchain-based e-procurement systems provide unique benefits related to procedural transparency, permanent record-keeping and honest disclosure. However, blockchain technology also presents certain challenges, most notably scalability and vendor anonymity. A blockchain-based solution is also unable to reduce corruption risk in certain human activities that can occur outside the electronic procurement system, most notably bribery or collusion among vendors or between vendors and tenderers. Given the challenges and limitations, the case for a blockchain-based e-procurement system is ambiguous and depends most on the specific country context, institutional goals and the technology’s design, configuration and implementation.³²⁹

While technology offers a potentially powerful tool for enhancing transparency and combatting corruption in public procurement, it is no panacea. It is just one aspect of a sound public procurement system.

³²⁷ World Economic Forum, *Exploring Blockchain Technology for Government Transparency: Blockchain-Based Public Procurement to Reduce Corruption*, (June 2020), online (pdf):

<http://www3.weforum.org/docs/WEF_Blockchain_Government_Transparency_Report.pdf>.

³²⁸ *Ibid* at 4.

³²⁹ *Ibid* at 35. See also Carlos Santiso, “Will Blockchain Disrupt Government Corruption?”, *Stanford Social Innovation Review* (5 March 2018), online:

<https://ssir.org/articles/entry/will_blockchain_disrupt_government_corruption>.

CHAPTER 13

WHISTLEBLOWER PROTECTIONS

VICTORIA LUXFORD*

* Victoria Luxford thanks Gerry Ferguson for his supervision and additions to this chapter, especially its first version. She also thanks Professor Komarov for his various suggestions for this chapter. Section 7.3 on the Ontario Security Commission's Whistleblower Program was written by Jeremy Henderson for the 2018 edition and has been updated by Victoria Luxford for this 2022 version.

CONTENTS

- 1. INTRODUCTION**
- 2. WHAT IS WHISTLEBLOWING?**
- 3. INTERNATIONAL LEGAL FRAMEWORK**
- 4. “BEST PRACTICES” IN WHISTLEBLOWER PROTECTION LEGISLATION**
- 5. US: A PATCHWORK OF LEGISLATION**
- 6. UK: *PUBLIC INTEREST DISCLOSURE ACT 1998***
- 7. CANADA**
- 8. CONCLUSION: WHERE DO WE GO FROM HERE?**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

Whistleblowing is one method of uncovering corruption in public and private sector organizations. Indeed, whistleblowing may be seen as “among the most effective … means to expose and remedy corruption, fraud and other types of wrongdoing in the public and private sectors.”¹ Transparency International (TI) cites whistleblowing as one of the key triggers for effective corruption investigations.² Examples of prominent whistleblowers include Dr. Jiang Yanyong in China, who blew the whistle on the spread of the SARS virus contrary to explicit orders, and Allan Cutler in Canada, who “disclosed suspicions of fraud that led to the revealing of millions of misspent public funds in a sponsorship scandal, leading to the defeat of the Liberal party in the 2006 elections.”³ More recently, Dr. Li Wenliang in China has made headlines as a whistleblower for attempting to warn others of a “disease that looked like Sars”⁴—which would soon spread throughout the world in the COVID-19 pandemic. Whistleblowers can thus play pivotal roles in promoting political accountability and protecting public health and safety.

However, the benefits of whistleblowing can only be reaped if effective legal regimes are in place to safeguard reporting persons from retaliation, and to ensure that the appropriate parties act upon the disclosures in a timely and efficient manner. In the past 15–20 years, the need to enact and enforce whistleblowing laws has become one of the most prominent issues, nationally and internationally, in the global fight against corruption. The call for effective whistleblowing laws has gathered steam in international conventions against corruption, and a number of countries have responded by creating new whistleblower laws or improving their existing whistleblower laws.⁵

¹ Simon Wolfe et al, *Breaking the Silence: Strengths & Weaknesses in G20 Whistleblower Protection Laws* (Blueprint for Free Speech, October 2015) at 1, online (pdf):

<<https://www.blueprintforfreespeech.net/s/Breaking-the-Silence-Strengths-and-Weaknesses-in-G20-Whistleblower-Protection-Laws1.pdf>>. See also Kristine Artello & Jay S Albanese, "Rising to the Surface: The Detection of Public Corruption" (2020) 21:1 Criminology, Crim Just L & Society 1 at 7-8.

² Transparency International (TI), *Whistleblower Protection and the UN Convention Against Corruption*, (Berlin: TI, 2013) at 2, online: <http://www.transparency.org/whatwedo/publication/whistleblower_protection_and_the_un_convention_against_corruption>.

³ David Banisar, "Whistleblowing: International Standards and Developments" in Irma E Sandoval, ed, *Contemporary Debates on Corruption and Transparency: Rethinking State, Market, and Society* (Washington, DC: World Bank, Institute for Social Research, UNAM, 2011) at 6–7, online: <http://ssrn.com/abstract_id=1753180>.

⁴ “Li Wenliang: ‘Wuhan whistleblower’ remembered one year on”, *BBC News* (7 February 2021), online: <<https://www.bbc.com/news/world-asia-55963896>>.

⁵ Robert G Vaughn, *The Successes and Failures of Whistleblower Laws* (Cheltenham: Edward Elgar, 2012) at 243. For a global overview of whistleblowing laws and their effectiveness through whistleblower protection litigation, see: Samantha Feinstein et al, *Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Litigation*, (London: Government Accountability Project/International Bar Association, 2021), online (pdf):

<https://cfe.ryerson.ca/sites/default/files/Are%20Whistleblowing%20laws%20working%20REPORT_02March21.pdf>.

This chapter will set out international obligations concerning whistleblower protection, then identify best practices, and finally explore the current state of public sector whistleblower protection primarily in the United States, United Kingdom, and Canada.

2. WHAT IS WHISTLEBLOWING?

One of the most widely used academic definitions of whistleblowing originated in an article by Marcia Miceli and Janet Near in 1985. They defined “whistleblowing” as “the disclosure by organization members (former or current) of the illegal, immoral or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action.”⁶ This definition focuses only on the act of disclosure, rather than on whistleblowing as a process that needs to be examined before, during, and after disclosure. Many academics have now embraced broader conceptions of whistleblowing. David Banisar, for example, “treats whistleblowing as a means to promote accountability by allowing for the disclosure by any person of information about misconduct while at the same time protecting the person against sanctions of all forms.”⁷ In their study on public sector whistleblowing in Norway, Marit Skiveness and Sissel Trygstad identify several problems with Miceli and Near’s narrow definition of whistleblowing, and they advocate for a bifurcated definition which recognizes whistleblowing as a process:

[W]e suggest a distinction between weak and strong whistle-blowing. We see the general definition of Miceli and Near as the first step in the whistleblowing process, and we define this as ‘weak whistle-blowing’. ‘Strong whistle-blowing’ focuses on *process* and on cases where there is no improvement in, explanation for, or clarification of the reported misconduct from those who can do something about it.⁸

⁶ Janet P Near & Marcia P Miceli, “Organizational Dissidence: The Case of Whistle-Blowing” (1985) 4 J Bus Ethics 1 at 4. Reasons for adopting this definition are discussed by Rodney Smith in “The Role of Whistle-Blowing in Governing Well: Evidence from the Australian Public Sector” (2010) 40:6 Am Rev Pub Admin 704 at 708, and include maintaining consistency with how whistleblowing has been defined by governments (including its definition within legislation), maintaining consistency with other academic work, and using a definition “that allows for a wide range of propositions about whistle-blowing to be tested.”

⁷ Banisar, *supra* note 3 at 4.

⁸ Marit Skivenes & Sissel C Trygstad, “When Whistle-Blowing Works: The Norwegian Case” (2010) 63:7 Hum Relations 1071 at 1077; the three problems that the authors identify with Miceli and Near’s definition, in the context of their study, are:

whistle-blowing concerns all forms of communication where critical voices are raised about wrongdoing in the presence of someone who can stop the misconduct[,] … the definition rests on employees’ assessments of illegitimate, immoral and/or illegal situations and can thus cover many types of misconduct … [and] empirically, the definition does not seem to grasp how Norwegian employees and managers collaborate, nor how Norwegian working life is structured.

Thus, when whistleblowing is examined as a process it necessitates laws or policies that provide a clear description: (1) of what types of perceived wrongdoing should be disclosed, (2) to whom such disclosures should be made initially and subsequently (if the initial disclosure does not prompt an investigation), (3) how and by whom the alleged wrongdoing should be investigated, (4) the mechanisms and procedures that are in place to encourage persons to disclose wrongdoing while protecting the whistleblower from any disciplinary action or adverse consequence for reporting the wrongdoing, and (5) the steps to be taken if adverse consequences are, or appear to be, imposed on the whistleblower.

The question of what laws and practices produce the best whistleblowing regime is not one that is susceptible to a single answer. Section 4 of this chapter will review some features of whistleblowing regimes that arguably lead to more successful results. As will be seen, to be effective whistleblower laws must be examined in the overall context of a country's legal and political sophistication, as well as its social and economic realities.

3. INTERNATIONAL LEGAL FRAMEWORK

This section will briefly review existing regional and global treaties against corruption with mandates in regard to whistleblowing laws for member states. As will be seen, the standards for whistleblowing laws contained within these international agreements are generally rather weak and lacking in detail.

3.1 UNCAC

Article 33 of UNCAC provides for the protection of reporting persons (i.e., whistleblowers):

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.⁹

See also Björn Fasterling, "Whistleblower Protection: A Comparative Law Perspective" in AJ Brown et al, eds, *International Handbook on Whistleblowing Research* (Cheltenham: Edward Elgar, 2014) 331 at 334 for a critique of Miceli and Near's definition. The author argues:

[The] definition is problematic because rather than disclosing illegal, immoral or illegitimate practices, the whistleblower discloses information that he or she believes will provide evidence or at least a substantiated indication of illegal, immoral or illegitimate practice. The disclosure can under no circumstances be independent of the whistleblower's own subjective judgment.

⁹ United Nations Convention Against Corruption, 31 October 2003, I-42146 (entered into force 14 December 2005) [UNCAC], art 33.

The above Article is meant to cover individuals with “information that is not sufficiently detailed to constitute evidence in the legal sense of the word.”¹⁰ However, Article 33 is optional, not mandatory. A state need only “consider” adopting “appropriate measures” to protect whistleblowers, and the provision only provides protection from “any unjustified treatment” to those who acted “*in good faith* and on *reasonable grounds*” [emphasis added]. Thus, a State Party is free to deliberate, and then simply decide not to adopt any reporting protections.¹¹ Even with its obvious weaknesses, the protections offered under this section represent an expansion of previously recognized protections, and the UN in supporting documents has encouraged ratifying states to enact robust whistleblowing regimes under Article 33:

The UN Office on Drugs and Crime’s “Anti-Corruption Toolkit” notes that Article 33 is an advancement from previous agreements such as the 2000 Convention against Transnational Organized Crime which only protects witnesses and experts. The Toolkit extensively covers whistleblowing and recommends legal and administrative measures for reporting and protection including compensation, the creation of hotlines, and limits on libel and confidentiality agreements.¹²

In comparison, Article 32 of UNCAC provides for mandatory protection of witnesses, experts, and victims: it dictates that states “shall take appropriate measures … to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.”¹³ Unfortunately, this mandatory protection does not protect whistleblowers from retaliation or intimidation unless they are “witnesses or victims” to the wrongdoing and they give “testimony” in the prosecution of wrongdoers. Most potential whistleblowers do not fall into this narrow group. Moreover, the ultimate objectives of whistleblowing laws are not simply to assist in the prosecution of an alleged wrongdoer, but also to play a preventative role. As TI observed, “the ideal situation is where a whistleblower raises concerns in time so that action can be taken to prevent any offence.”¹⁴

¹⁰ United Nations Office on Drugs and Crime (UNODC), *The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons - Whistleblower Protection* (Vienna: UN, 2015) [UN Good Practices] at 6, online (pdf): <https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf>.

¹¹ Björn Fasterling & David Lewis, “Leaks, Legislation and Freedom of Speech: How Can the Law Effectively Promote Public-Interest Whistleblowing?” (2014) 153:1 *Intl Labour Rev* 71 at 76. The authors also suggest, at 76, that limiting protection in Article 33 to those who have “reasonable grounds” may be an unnecessary limitation of whistleblower protection: “It almost goes without saying that in some situations it will be difficult to distinguish between strong suspicions and reasonable grounds.”

¹² Banisar, *supra* note 3 at 13.

¹³ UNCAC, *supra* note 9, art 32.

¹⁴ TI, *supra* note 2 at 6.

Articles 32 and 33 are integral to the overall effectiveness of UNCAC. In fact, Marco Arnone and Leonardo Borlini argue that these provisions are essential to meeting all other objectives within UNCAC:

Articles 32 and 33 ... address the protection of witnesses, thereby complementing efforts regarding the prevention of public and private corruption, obstruction of justice, confiscation and recovery of criminal proceeds, as well as cooperation at the national and international levels. Even though the aim is far from easy to achieve, the underlying rationale is obvious: unless people feel free to testify and communicate their expertise, experience or knowledge to the authorities, all objectives of the Convention could be undermined.¹⁵

Without the protection offered in these provisions, countries attempting to operationalize UNCAC would be unnecessarily hobbled by difficulties in uncovering, investigating, and resolving corruption issues.

In 2017, the Corruption and Economic Crime Branch of the United Nations Office on Drugs and Crime (UNODC) released the *State of implementation of the United Nations Convention against Corruption*, a comprehensive analysis of the implementation of certain chapters of UNCAC.¹⁶ This flagship study found that there was

considerable variation among States parties with regard to the implementation of article 33 ... [m]ore than two thirds of States parties have not established comprehensive whistle-blower protection measures or were found to be only partially in compliance with the provision under review, although legislation was pending in a significant number of cases.¹⁷

Particular challenges reported in respect of Articles 32 and 33 were as follows:

The main challenge in respect of the implementation of article 32 is that of addressing inadequate normative frameworks and, in some States parties, the complete absence of comprehensive measures or programmes for the protection of witnesses, experts and victims, as well as their relatives or associates. This is explained by the significant costs of such programmes, limited awareness of state-of-the-art measures and practices for witness and expert protection, specificities of the national legal systems (including sometimes the small size or geographical isolation of the country), weak inter-agency coordination and limited capacities (e.g., in terms of human resources and technological and institutional infrastructure). A further

¹⁵ Marco Arnone & Leonardo S Borlini, *Corruption: Economic Analysis and International Law* (Cheltenham: Edward Elgar, 2014) at 429.

¹⁶ UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed, COSP, 7th Sess, (Vienna: UN, 2017), online: <https://www.unodc.org/unodc/en/corruption/tools_and_publications/state_of_uncac_implementati.on.html>.

¹⁷ *Ibid* at 152.

challenge concerns the non-application of existing measures in practice, owing to the novelty of witness protection laws and methods, lack of instructions and regulations for their implementation and lack of experience in running the relevant programmes. It was noted that most States parties have not entered into relocation agreements with other States parties, in some cases because of the alleged high complexity of such an operation. Finally, many States parties do not have provisions in place to enable the presentation and consideration of the views and concerns of victims.

...

The challenges reported as relevant to the implementation of article 33 are much the same as those related to witness protection. Additionally, the need was emphasized for carrying out ancillary programmes to raise awareness on the importance of disclosing acts of corruption, the reporting mechanisms and the means of protection available to whistle-blowers. This would facilitate the practical application of laws on the protection of whistle-blowers. Further suggested ancillary measures include the provision of financial incentives for whistle-blowers, the creation of institutionalized whistle-blower protection policies within companies, and the establishment of independent bodies specifically responsible for implementing the domestic public interest disclosure and whistle-blower protection policies.¹⁸

3.2 OECD Convention

The OECD Convention itself does not specifically include provisions on whistleblowing. Nevertheless, various subsequent OECD instruments encourage the adoption of whistleblower protections. For example, in 1998 the OECD issued a *Recommendation on Improving Ethical Conduct in the Public Service*. That recommendation stated that transparency and accountability in the decision-making process should be encouraged through "measures such as disclosure systems and recognition of the role of an active and independent media."¹⁹ That recommendation was abrogated and replaced by the *Recommendation of the Council on Public Integrity*, which was adopted in 2017.²⁰ This states that to "cultivate a culture of public integrity,"²¹ adherents should, among other things:

- 9. Support an **open** organisational culture within the public sector responsive to integrity concerns, in particular through:

¹⁸ *Ibid* at 152 and 157.

¹⁹ OECD, Public Governance Committee, *Recommendation on Improving Ethical Conduct in the Public Service*, C(98)70/FINAL (1998).

²⁰ OECD, *Recommendation of the Council on Public Integrity*, OECD/LEGAL/0435 (2017), online: <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0435#dates>>.

²¹ *Ibid.*

- a) encouraging an open culture where ethical dilemmas, public integrity concerns, and errors can be discussed freely, and, where appropriate, with employee representatives, and where leadership is responsive and committed to providing timely advice and resolving relevant issues;
- b) providing clear rules and procedures for reporting suspected violations of integrity standards, and ensure, in accordance with fundamental principles of domestic law, protection in law and practice against all types of unjustified treatments as a result of reporting in good faith and on reasonable grounds[;]
- c) providing alternative channels for reporting suspected violations of integrity standards, including when appropriate the possibility of confidentially reporting to a body with the mandate and capacity to conduct an independent investigation[.]²²

Further, to “enable **effective accountability**,”²³ adherents should “[a]pply an internal **control and risk management** framework to safeguard integrity in public sector organisations, in particular through ... ensuring control mechanisms are coherent and include clear procedures for responding to credible suspicions of violations of laws and regulations, and facilitating reporting to the competent authorities without fear of reprisal.”²⁴

The 2003 *Recommendation on Guidelines for Managing Conflict of Interest in the Public Service* stipulates that states ought to “[p]rovide clear rules and procedures for whistle-blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused.”²⁵ The 2009 *Recommendation of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* similarly recommends that member states should put in place “easily accessible channels ... for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with their legal principles.”²⁶ The 2019 *Recommendation of the Council on Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises* specifically addresses reporting persons and provides, in part:

High standards of conduct should be applied to the state, setting an example for conduct in SOEs and exhibiting integrity to the public as the

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ OECD, *Recommendation on Guidelines for Managing Conflict of Interest in the Public Service*, (June 2003) at 12, online (pdf): <<http://www.oecd.org/governance/ethics/2957360.pdf>>.

²⁶ OECD, Working Group on Bribery, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, (26 November 2009) at IX, online (pdf): <www.oecd.org/daf/anti-bribery/44176910.pdf>.

ultimate owner. To this end, representatives of the ownership entity and others responsible for exercising ownership on behalf of the state should:

...

Have clear rules and procedures for reporting concerns about real or encouraged illegal or irregular practices that come to their notice in the performance of their ownership functions. Procedures should include, as needed and where appropriate, reporting to competent authorities that are removed from the ownership function and that have the mandate and capacity to conduct investigations free from undue influence. Those reporting concerns should be protected in law and in practice against all types of unjustified treatments as a result.

...

The state should, without intervening in the management of individual SOEs, take appropriate steps to encourage integrity in SOEs, expecting and respecting that SOE boards and top management promote a “corporate culture of integrity” throughout the corporate hierarchy through, *inter alia*:

- (i) a clearly articulated and visible corporate policy prohibiting corruption;
- (ii) facilitating the implementation of applicable anti-corruption and integrity provisions through strong, explicit and visible support and commitment from boards and management to internal controls, ethics and compliance measures (hereafter referred to as “integrity mechanisms”);
- (iii) encouraging an open culture that facilitates and recognises organisational learning, and encourages good governance and integrity and protects reporting persons (also known as “whistleblowers”), and;
- (iv) leading by example in their conduct.

...

Encouraging the establishment of clear rules and procedures for employees or other reporting persons to report concerns to the board about real or encouraged illegal or irregular practices in or concerning SOEs (including subsidiaries or business partners). In the absence of timely remedial action or in the face of a reasonable risk of negative employment action, employees are encouraged to report to the competent authorities. They should be protected in law and practice against all types of unjustified treatments as a result of reporting concerns.²⁷

Recommendations such as these show a recognition of the important role that whistleblowers can play in reducing corruption in the public service and in business. Finally, the OECD publication *Committing to Effective Whistleblower Protection* refers to protection of

²⁷ OECD, *Recommendation of the Council on Guidelines on Anti-Corruption and Integrity in State Owned Enterprises*, OECD/LEGAL/0451 (2019), online:
<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0451>.

whistleblowers as the “ultimate line of defence for safeguarding the public interest,”²⁸ and identifies areas of reform for whistleblower protection frameworks in OECD countries. However, as Arnone and Borlini note, the whistleblower protections in OECD member states are far from uniform.²⁹

3.3 Other Regional Conventions and Agreements

References to whistleblower protection can be found in a number of other regional conventions and agreements. For example, the first inter-governmental agreement to tackle whistleblower protection was the Inter-American Convention against Corruption. This Convention came into force on March 6, 1997, under the purview of the Organization of American States, a group of 35 member states in the Americas (including Canada and the US) formed in 1948.³⁰ The Convention suggests that signatories consider introducing or

²⁸ OECD, *Committing to Effective Whistleblower Protection*, (Paris: OECD Publishing, 2016), online: <<http://www.oecd.org/corruption-integrity/reports/committing-to-effective-whistleblower-protection-9789264252639-en.html>>.

²⁹ See Arnone & Borlini, *supra* note 15 at 424. They state:

Whistleblower protection is seen as a horizontal issue which confronts its Member States. In its Report the WGB has engaged rather frequently with the issue. For instance:

The Phase 3 report on the UK points out that the law does not apply to nationals working abroad on contracts made under a foreign law. The Phase 3 report on South Korea cited the enactment of the 2011 law as an important development, since the law extends protective measures to private-sector employees who report foreign bribery cases. The Phase 3 report on Japan noted the requirement for a review of its 2004 law after approximately five years. As the Act came into force in 2006, the review took place in March 2011. It was conducted by the Consumer Commission—made up of representatives from academia, the business community, the legal profession, media, etc. They concluded there was no need to amend the Act but that, due to the insufficiency of legislative information for the review, further research was recommended. The Phase 2 report on Chile notes the 2007 law establishing whistleblower protection in the public sector, encourages the authorities to expand it to state companies, and recommends that Chile enhance and promote the protection of private- and public-sector employees. According to the 2009 follow-up report of the recommendations of the Phase 2 report, this recommendation has been only partially implemented. See TI (2013:21).

For an in-depth illustration of the OECD follow-up mechanism see Chapter 16 of Arnone & Borlini, *supra* note 15. The OECD report, *Government at a Glance 2017* ((Paris: OECD Publishing, 2017) at 121, online: <http://www.oecd-ilibrary.org/governance/government-at-a-glance-2015_gov_glance-2015-en>) states that 88% of member countries have whistleblower protection laws. Out of 26 respondent countries to the OECD’s survey, all have protections in place for public sector employees, while eight do not for private sector employees. One third of respondents provide incentives to whistleblowers. See the report at 120-121 for more detailed data.

³⁰ “Who We Are” (last visited 1 February 2021), online: *Organization for American States* (OAS) <http://www.oas.org/en/about/who_we_are.asp>. For information on signatories and ratification, see

strengthening whistleblower protections within their own legal and institutional systems as a means of preventing corruption: Article III, section 8, provides that “state parties agree to consider the applicability of measures … [and] systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems” [emphasis added].³¹ The whistleblower provision is thus optional, not mandatory. The agreement emphasizes the role that each signatory’s domestic legal context would play in the creation and maintenance of an effective whistleblower protection scheme. However, apart from Canada, the US and Peru, Arnone and Borlini reported that as of 2014, the other OAS Convention members have nonexistent, or weak, whistleblower laws.³² A March 2020 Report of the *Mechanism for Follow-Up on the Implementation of the Inter-*

“Signatories and Ratifications B-58: Inter-American Convention Against Corruption” (last visited 1 February 2021), online: *Organization of American States* <<http://www.oas.org/juridico/english/sigs/b-58.html>>.

³¹ *Inter-American Convention Against Corruption*, 29 March 1996, OAS Treaties Register B-58 (entered into force 6 March 1997), art III, point 8. The full text of the Convention can be found at “Inter-American Convention Against Corruption” (last visited 1 February 2021), online: *OAS* <<http://www.oas.org/juridico/english/treaties/b-58.html>>.

³² Arnone & Borlini, *supra* note 15 at note 9, state:

As detailed in Chapter 16 of this book, the Implementation of the Convention is overseen by the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC). The reports show that apart from Canada, the US and Peru, most OAS countries do not have specific whistleblower laws, but most have some protection for whistleblowers contained in criminal laws, procedural laws or labor laws. There is also a smaller group of countries without regulation on the subject. Reports frequently recommend measures of protection for whistleblowers where they are considered incomplete (e.g., Argentina, Brazil, Chile, Nicaragua, and Trinidad and Tobago). The latest reports on Bolivia and Paraguay call for the implementation of whistleblower systems, which have been enacted, but then left aside. The report finds that in Bolivia whistleblowers are often persecuted. On the other hand, Costa Rica argues that no whistleblower system is necessary as, surprisingly, there have never been any reprisals against whistleblowers. Notably, in 2010 the OAS agreed [to create] a model whistleblower law. This model law was updated and approved by the OAS Anti-Corruption Mechanism on 19 March 2013.

The model law in question can be found at OAS, *Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses*, Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, 21st meeting, SG/MESICIC/doc345/12 rev 2, (March 2013), online (pdf):

<http://www.oas.org/juridico/PDFs/model_law_reporting.pdf>. However, there are problematic aspects of this model law. For example, firstly, the “law” appears to resemble an agreement (both stylistically and substantially) more than it does a model of legislation, and it is unclear how this “model” could easily be adopted by OAS countries that want to implement legislation. Secondly, the model law (at Article 8) imposes a positive obligation on “[a]ny person having knowledge of an act of corruption” to report to the appropriate authorities. It is unclear how such an obligation could be effectively introduced or enforced, especially if protection against reprisals continues to be weak or nonexistent. Finally, many of the provisions are vague, and it is unclear how the legislative goals will be met: Article 16, for example, states that “[p]rotection for persons reporting acts of corruption must

GLOBAL CORRUPTION

American Convention against Corruption (MESICIC) lists, among the most common recommendations with regard to the provisions reviewed in the second round, a number of recommendations related to Article III, section 8. These include, *inter alia*, “[e]stablish mechanisms to protect all whistleblowers and their families, not only their physical integrity, but also to provide protection in the workplace, especially when the person is a public official and the acts of corruption involve his superior or co-workers” and “[e]stablish mechanisms for reporting, such as anonymous reporting or protection of identity reporting, that guarantee the personal security and the confidentiality of the identity of public servants and private citizens who in good faith report acts of corruption.”³³

On the other hand, at least one regional Convention “requires” state members to have whistleblowing laws. The Council of Europe, a human rights organization with 47 member states (of which 27 belong to the European Union), produced the Council of Europe Civil Law Convention on Corruption, which came into force on November 1, 2003.³⁴ Article 9 states: “Each Party *shall provide* in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities” [emphasis added].³⁵ The Council of Europe has also adopted Recommendation CM/Rec(2014)7 of the Committee of Ministers to member states on the protection of whistleblowers, which “sets out a series of principles to guide member states when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems.”³⁶

Another regional agreement is the *Anti-Corruption Action Plan for Asia and the Pacific*, which was created out of the joint efforts of the Asian Development Bank and the OECD. It was

safeguard their physical and psychological integrity and that of their family group, their property, and their working conditions, which could possibly be threatened as a result of their reporting an act of corruption.” While the model law goes on to suggest that this may involve legal advice, confidentiality, protection from dismissal, or even police protection, there is little indication of how such broad goals will be operationalized within OAS countries.

³³ OAS, *Hemispheric Report of the Fifth Round of Review*, Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, 34th meeting, SG/MESICIC/doc 564/20 rev 1, (March 2020) at 72, online (pdf):

<https://www.oas.org/en/sla/dlc/mesicic/docs/mesicic_inf_hem_final_5_ronda_ing.pdf>.

³⁴ “Who We Are” (last visited 1 February 2021), online: *Council of Europe* <<http://www.coe.int/en/web/about-us/who-we-are>>. For a list of signatories to the *Civil Law Convention on Corruption*, see “Chart of Signatures and Ratifications of Treaty 17” (last updated 8 August 2021), online: *Council of Europe* <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/181?module=signatures-by-treaty&treaty whole num=174>>.

³⁵ *Council of Europe Civil Law Convention on Corruption*, 4 November 1999, Eur TS 173 (entered into force 2002), art 9. The full text of the Convention can be found at “Details of Treaty No.174” (last visited 1 February 2021), online: *Council of Europe* <<http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>>.

³⁶ Council of Europe, Committee of Ministers, *Protection of Whistleblowers*, Recommendation CM/Rec(2014)7 and Explanatory Memorandum (adopted on 30 April 2014) at 6, online (pdf): <<https://rm.coe.int/16807096c7>>.

endorsed on November 30, 2001.³⁷ Pillar 3 of the action plan specifically identifies the protection of whistleblowers as a critical element in encouraging public participation in combating corruption.³⁸ However, the provisions of the action plan are not mandatory: under Implementation, the action plan states that “[i]n order to implement these three pillars of action, participating governments of the region concur with the attached Implementation Plan and will *endeavour to comply* with its terms” [emphasis added].³⁹

Two examples involve organizations in African countries. First, the African Union is made up of the majority of African states and was launched in 2002.⁴⁰ The Preamble to the 2003 African Union Convention on Preventing and Combating Corruption recognizes the serious detrimental effects that corruption has on the stability of African states, as well as people in Africa.⁴¹ It recognizes the potential of whistleblowing as a corruption prevention mechanism, and seems to have a scope wide enough to encompass ordinary citizens within its protection. The language of these provisions is mandatory—State Parties *undertake* to:

- 5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.
- 6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.
- 7. Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.⁴²

It should be noted that clause 5 on protection of informants and witnesses requires “legislative” measures, while clause 6 on protection of citizens who report corruption from fear of reprisals does not require “legislative” measures and is satisfied if a state implements

³⁷ “3rd regional Anti-Corruption Conference for Asia and the Pacific” (last visited 1 February 2021), online: OECD <<http://www.oecd.org/site/adboecdanti-corruptioninitiative/regionalseminars/3rdregionalanticorruptionconferenceforasiaandthepacific.htm>>.

³⁸ Asian Development Bank/OECD Anti-Corruption Initiative for Asia and the Pacific, *The Anti-Corruption Action Plan for Asia and the Pacific*, (Tokyo: OECD, 2001) at Pillar 3, online (pdf): <<http://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/35021642.pdf>>. Countries endorsing the Action Plan can be found at 1.

³⁹ *Ibid* at 5.

⁴⁰ “AU in a Nutshell” (last visited 1 February 2021), online: African Union <<https://au.int/en/au-nutshell>>.

⁴¹ *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, 43 ILM 5 (entered into force 5 August 2006) [AUCPCC], online (pdf): <https://www.legal-tools.org/uploads/tx_ltpdb/AfricanUnionConventiononPreventingandCombatingCorruption_11-07-2003_E_04.pdf>.

The AUCPCC Preamble emphasizes the negative consequences of corruption in Africa: “Concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples.”

⁴² *Ibid*, art 5. Arnone & Borlini, *supra* note 15 at 425, argue that, although the language is obligatory, “no particular penalizing scheme can be inferred for failure to comply with these requirements.”

some form of non-legislative protective measures. In addition, as Arnone and Borlini argue, clause 7 may act as a deterrent to truthful whistleblowers, since it is wide enough to punish honest whistleblowers who “reasonably” suspect corrupt behaviour, which on further investigation is not proven.⁴³ Finally, the effectiveness of the convention is weakened by the fact that there is no credible enforcement or evaluation mechanism: each state simply self-reports on its convention compliance.⁴⁴

Second, the South African Development Community is composed of 15 member states in the southern region of Africa. The 2001 *Southern African Development Community Protocol Against Corruption*, Article 4, encourages the creation and maintenance of “systems for protecting individuals who, in good faith, report acts of corruption.”⁴⁵ This provision, like that of the African Union Convention, contains mandatory language.⁴⁶ Furthermore, both of these documents contain strongly worded provisions denouncing individuals who make false reports.⁴⁷ This is problematic because it may have a chilling effect on information disclosures:

Such provision, the aim of which is to prevent a misuse of the Convention itself, might paradoxically well result in a general impasse of the investigation. What is more, in many countries the menace of such punishment is an effective deterrent to truthful whistleblowers who expose the guilty.⁴⁸

⁴³ Arnone & Borlini, *supra* note 15 at 425-426.

⁴⁴ AUCPCC, *supra* note 41, art 22(7). Kolawole Olaniyan, “The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal” (2004) 4 Afr Hum Rts LJ 74 at 76, states that “the Convention lacks any serious, effective or meaningful mechanism for holding states accountable for the obligations they assume under it, or for resolving disputes among State Parties, including a potential claim by one party that another is failing to properly carry out its obligations.” However, Lucky Bryce Jatto Jnr, in “Africa’s Approach to the International War on Corruption: A Critical Appraisal of the *African Union Convention on Preventing and Combating Corruption*” (2010) 10 Asper Rev Intl Bus & Trade L 79 at 93-94, suggests that the Advisory Board (created pursuant to Article 22(1)) could, potentially, exert some influence over effectively reviewing and encouraging development of anti-corruption policies, through its power to create its own rules of procedure:

[U]nlike the practice with most peer-review monitoring mechanisms, which rely to some extent on ‘country self-assessments based on a questionnaire’ and allow room for subjective and unreliable results, the AU Advisory Board receives annual reports on the progress made in the implementation of the *AU Convention* from the *independent* national anti-corruption authorities or agencies created pursuant to the *AU Convention* by the State Parties. In addition, given its mandate to ‘build partnerships,’ the AU Advisory Board may invite submissions from civil society and private sector organizations.

⁴⁵ *Protocol Against Corruption*, Southern African Development Community, 14 August 2001 (entered into force 6 August 2003) [SADCPAC], art 4 , online (pdf): <http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf>.

⁴⁶ *Ibid*, art 4: “each State Party *undertakes* to adopt measures”.

⁴⁷ *Ibid*. Article 4(1)(f) of SADPAC suggests that there should be “laws that punish those who make false and malicious reports against innocent persons.” The AUCPCC, *supra* note 41, art 5, clause 7, has almost identical requirements.

⁴⁸ Arnone & Borlini, *supra* note 15 at 426.

The potential chilling effect of denouncing those who make false reports, coupled with the lack of oversight and monitoring of ratification and enforcement, makes it unlikely that these agreements will have any significant influence in causing member states to create effective whistleblower protection regimes.

Finally, although not a regional agreement *per se*, the European Union—the political and economic union of 27 member states in the European region—in 2019 issued Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the Protection of Persons Who Report Breaches of Union Law (the Whistleblower Directive).⁴⁹ It came into force on December 16, 2019. The recitals acknowledge the “fragmented” state of whistleblower protection in the EU. The Whistleblower Directive sets out minimum standards for the protection of persons reporting breaches of EU law (Article 1), and defines the material scope to which it applies (Article 2). It addresses, among other things, both internal and external reporting (chapters II and III), as well as public disclosures (chapter IV). EU member states are required to bring into force the laws, regulations, and administrative provisions necessary to comply with the Whistleblower Directive by December 17, 2021 (Article 26).

4. “BEST PRACTICES” IN WHISTLEBLOWER PROTECTION LEGISLATION

4.1 Limitations of Best Practices

Various organizations and academics have developed suggestions for “best practices” and standards for whistleblower protection legislation. These best practices are suggestions as to how to most effectively draft whistleblower legislation and they provide ideas for countries attempting to develop or improve whistleblower legislation.⁵⁰ By way of an important introductory observation, Paul Latimer and AJ Brown note that effective whistleblower protection can only exist in a democratic society that values accountability and transparency; in other words, “[a] precondition for whistleblower laws is the rule of law, including an independent legal system and independent judiciary.”⁵¹ This precondition will be met in varying degrees from country to country. In a similar vein, the efficacy of whistleblower protection will be dependent not only on what is found within the four

⁴⁹ EC, *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons who Report Breaches of Union Law*, [2019] OJ, L 305/17 [EC Directive].

⁵⁰ The role of best practices was highlighted by TI, which suggests that UNCAC implementation reviews ought to provide special guidance regarding the implementation of Article 33, which “should take into consideration material developed by other institutions such as the TI ‘International Principles for Whistleblower Legislation’ as well as best-practice materials, guiding principles and model legislation produced by the Organisation for Economic Co-operation and Development (OECD), Organization of American States (OAS) and others”: TI, *supra* note 2 at 5.

⁵¹ Paul Latimer & AJ Brown, “Whistleblower Laws: International Best Practice” (2008) 31:3 UNSW LJ 766 at 769.

corners of the applicable legislation, but more importantly in how the appropriate bodies put legislative protections into practice.

It is also important to recognize that it is seldom, if ever, effective to simply transplant successful legislative regimes from one cultural setting to another⁵² or from developed countries to developing countries.⁵³ Whistleblowing schemes in developed democracies may not be appropriate or effective in the “specific context of developing countries who do not always have an institutional framework in place that supports the rule of law and [where] a culture of transparency and accountability remains questionable.”⁵⁴ Thus, in discussing best practices, it is crucial to take into account the cultural and institutional environments of the countries that are considering the adoption of whistleblower protection legislation. If such contextual factors are not taken into account, the efficacy of whistleblower legislation will be seriously undermined.⁵⁵ Brown warns that best practices models should be examined with a careful eye on the legal, administrative, and political context of each country:

[T]he search for “ideal” or “model” laws is complicated by three problems: the diversity of legal approaches attempted by jurisdictions that have sought to prioritise whistleblower protection through special-purpose legislation (sometimes inaccurately called ‘stand-alone’); the frequent lack of evidence of the success of these approaches; and the lack of a common conceptual framework for understanding policy and legal approaches to

⁵² For example, in Heungsik Park et al, “Cultural Orientation and Attitudes Toward Different Forms of Whistleblowing: A Comparison of South Korea, Turkey, and the UK” (2008) 82:4 J Bus Ethics 929 at 937, the authors conclude that legislative and organizational responsiveness to cultural context may play a large role in the efficacy of whistleblower protection:

[O]rganizational systems for dealing with an employee’s response to wrongdoing should be based on an understanding of the impact of nationality and cultural orientation on employees’ preferred ways to blow the whistle. This has obvious implications for policy and practice, suggesting as it does that organizations seeking to improve the likelihood of employees reporting wrongdoing may need to tailor their policies and procedures to a country-specific context.

See also Wim Vandekerckhove et al, “Understandings of Whistleblowing: Dilemmas of Societal Culture” in Brown et al, *supra* note 8, 37.

⁵³ For example, in Sajid Bashir et al, “Whistle-Blowing in Public Sector Organizations: Evidence from Pakistan” (2011) 41:3 Am Rev Pub Admin 285 at 286, the authors suggest:

[S]tudies in developed countries cannot be generalized and may not necessarily have any applicable lessons for organizations in developing countries such as Pakistan because of the absence of a robust legal system and the cultural dimensions of being a closely knit society where everyone is related to someone significant through common sect, cast [sic] or creed.

⁵⁴ Marie Chêne, *Good Practice in Whistleblowing Protection Legislation (WPL)*, (U4 Helpdesk, TI, 2009) at 1, online: <<http://www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/>>.

⁵⁵ *Ibid*. For example, the author, at 9, cites the impact of the use of informants in past authoritarian regimes as a factor that stigmatizes the actions of whistleblowers.

whistleblowing across different legal systems, including those where whistleblower protection may be strong but not reflected in special-purpose legislation.

[N]otwithstanding international interest, there is no single ‘ideal’ or ‘model’ law that can be readily developed or applied for most, let alone all countries. This is due to the diverse and intricate ways in which such mechanisms must rely on, and integrate with, a range of other regimes in any given jurisdiction.⁵⁶

4.2 Sources for Best Practices

What should a good whistleblower law look like? There are various sources that one can turn to in order to try to extract the best aspects or elements of a “good” whistleblower law. Some of the leading sources for determining best practices in regard to designing a sound and effective legal regime for whistleblowers include the following:

1. David Banisar, “Whistleblowing: International Standards and Developments” in Irma E Sandoval, ed, *Contemporary Debates on Corruption and Transparency: Rethinking State, Market, and Society* (Washington, DC: World Bank, Institute for Social Research, UNAM, 2011), online: <http://ssrn.com/abstract_id=1753180>.
2. Tom Devine, *International Best Practices for Whistleblower Policies*, (Washington, DC: Government Accountability Project, 2015), online (pdf): <http://www.ourcommons.ca/content/Committee/421/OGGO/WebDoc/WD8991016/421_OGGO_reldoc_PDF/DevineTom-e.pdf>.
3. Paul Latimer & AJ Brown, “Whistleblower Laws: International Best Practice” (2008) 31:3 UNSW LJ 766, online: <http://papers.ssrn.com/abstract_id=1326766>.
4. TI, *Recommended Draft Principles for Whistleblowing Legislation*, (Berlin: TI, 2009), online (pdf): <https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf>.
5. Marie Terracol, *A Best Practice Guide for Whistleblowing Legislation*, (Berlin: TI, 2018), online (pdf): <https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf>.
6. Simon Wolfe et al., *Breaking the Silence: Strengths & Weaknesses in G20 Whistleblower Protection Laws* (BluePrint for Free Speech, October 2015) at 1, online (pdf): <<https://www.blueprintfreespeech.net/s/Breaking-the-Silence-Strengths-and-Weaknesses-in-G20-Whistleblower-Protection-Laws1.pdf>>.
7. United Nations Office on Drugs and Crime (UNODC), *The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of*

⁵⁶ AJ Brown, “Towards ‘Ideal’ Whistleblowing Legislation? Some Lessons from Recent Australian Experience” (2013) 2:3 E-J Intl & Comp Labour Stud 4 at 5 (and citing the work of Fasterling, *supra* note 8 at 334).

- Reporting Persons*, (Vienna: UN, 2015), online (pdf):
<https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf>.
8. Canadian Standards Association, *Whistleblowing Systems — A Guide*, EXP01-16 (Toronto: CSA Group, 2016), online (pdf):
<<https://community.icann.org/download/attachments/59643288/CSA%20Whistleblower%20Guideline.pdf?version=1&modificationDate=1470853787000&api=v2>>.

4.3 General Characteristics

While the scope and significance of the appropriate elements of best practices are open to reasonable disagreement, academics and organizations tend to focus on five broad areas: (1) scope and clarity of legislation (2) mechanisms for disclosure (3) protection of identity (4) protection against retaliation, and (5) remedies available for wronged whistleblowers. This section will briefly discuss each of these areas in turn.

4.3.1 Scope and Clarity of Legislation

The scope of whistleblower protection legislation, especially in regard to the range of people protected and the types of disclosures covered, is an area of central concern for organizations and academics. Banisar suggests that most legislation dedicated to whistleblower protection is too narrow, and that the efficacy of these laws is difficult to measure.⁵⁷ Best practices in whistleblowing legislation favour wide coverage; indeed, “in time there may be a case for whistleblowing laws to move to a full ‘no loopholes’ approach, targeting public sector and private sector whistleblowing with sector-blind principles and practices.”⁵⁸ Closing the “loopholes” in legislation involves increasing the range of people who fall within legislative protection. TI, for example, suggests that legislative protections should apply to all whistleblowers, regardless of whether they work in the public or private sector.⁵⁹ In addition, members of the public may be a “useful” information source, and they may require protection from intimidation or reprisals.⁶⁰ According to Tom Devine, Legal Director of the Government Accountability Project, “[s]eamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect.”⁶¹

⁵⁷ Banisar, *supra* note 3 at 2.

⁵⁸ Latimer & Brown, *supra* note 51 at 775.

⁵⁹ TI, *supra* note 2 at 13. See also Tom Devine, “International Best Practices for Whistleblower Statutes” in David Lewis & Wim Vandekerckhove, eds, *Developments in Whistleblowing Research* (London: International Whistleblowing Research Network, 2015) 7 at 9 [Devine, *Whistleblower Statutes*], online (pdf): <<http://www.whistleblowingimpact.org/wp-content/uploads/2017/06/prev1-Whistleblowing-And-Mental-Health.pdf>>, wherein he notes that whistleblower protection should protect all citizens who have relevant disclosures regardless of their formal employment status. He cites broad US whistleblower protection laws (primarily in the criminal realm) as a good example of legislation affording protection to all those who take part in or are impacted by the activities of an organization: “[o]verarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings.”

⁶⁰ UN Good Practices, *supra* note 10 at 9-10.

⁶¹ Devine, *Whistleblower Statutes*, *supra* note 59 at 8.

Whistleblower protection also should provide protection against “spillover relation”; that is, it should protect those who are not whistleblowers, but who may be perceived as whistleblowers, have assisted whistleblowers, or are preparing to make a disclosure.⁶² The UK’s *Public Interest Disclosure Act 1998 (PIDA)*,⁶³ which protects workers in the public and private sectors as well as those working as independent contractors, has been seen as a model of expansive coverage.⁶⁴ In a 2013 Report, TI emphasizes *PIDA*’s broad coverage:

In 1998, the UK passed one of the most comprehensive whistleblower protection laws in the world: the Public Interest Disclosure Act. Known as PIDA, the law applies to the vast majority of workers across all sectors: government, private and non-profit. It covers a range of employment categories, including employees, contractors, trainees and UK workers based abroad.

...

Several countries have used PIDA as a template for their own laws and proposals, including Ireland, Japan and South Africa.⁶⁵

In addition, the *types* of disclosures protected should be broad and should cover a wide range of wrongdoing; that is, “[p]rotected whistleblowing should cover “any” disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions.”⁶⁶ TI notes that “[l]imiting the scope of information for which individuals will be protected hinders whistleblowing. Indeed, if people are not fully certain that the behaviour they want to report fits the criteria, they will remain silent, meaning that organisations, authorities and the public will remain ignorant of wrongdoing that can harm their interests.”⁶⁷ The substance of the disclosure should be paramount, rather than the form of the disclosure or the category within which the disclosure is made to fit.⁶⁸ Here, again, *PIDA* has been seen as a leading example, despite its use of enumerated categories of wrongdoing rather than a completely open-ended approach:

⁶² *Ibid* at 9.

⁶³ *Public Interest Disclosure Act 1998 (UK), c 23 [PIDA]*.

⁶⁴ Mark Worth, *Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU*, (Berlin: TI, 2013) at 10, online (pdf):

<https://images.transparencycdn.org/images/2013_WhistleblowingInEurope_EN.pdf>.

⁶⁵ *Ibid* at 83.

⁶⁶ US, Government Accountability Office, *International Best Practices for Whistleblower Policies* by Tom Devine (Washington, DC: Government Accountability Project, 2015) [Devine, *Whistleblower Policies*], online (pdf):

<http://www.ourcommons.ca/content/Committee/421/OGGO/WebDoc/WD8991016/421_OGGO_reldoc_PDF/DevineTom-e.pdf>. Similarly, Banisar, *supra* note 3 at 25, suggests that “comprehensive whistleblowing laws generally have broad definitions of wrongdoing that apply to the revealing of information relating to criminal acts, to dangers to health or safety, and to abuses of power.”

⁶⁷ Marie Terracol, *A Best Practice Guide for Whistleblowing Legislation*, (Berlin: TI, 2018) at 7, online (pdf):

<https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf>.

⁶⁸ Latimer & Brown, *supra* note 51 at 785.

Under PIDA, whistleblowers are able [to] disclose a very broad range of crimes and wrongdoing, including corruption, civil offences, miscarriages of justice, dangers to public health or safety, dangers to the environment, and covering up of any of these.⁶⁹

The sectoral approach, which offers protection to disclosures in certain areas (such as public health) but not others, has been criticized as unnecessarily narrow. A piecemeal approach, wherein protection to different types of whistleblowers is provided for in different pieces of legislation, may similarly result in loopholes and a less effective disclosure regime overall. This was one of the major criticisms in a TI review of whistleblower protection in European countries, where “research found that whistleblowing legislation in the countries covered by this report is generally fragmented and weakly enforced.”⁷⁰ The report recommends that a “single, comprehensive legal framework” be provided for the protection of whistleblowers.⁷¹ Generally speaking, there seems to be a consensus that dedicated legislation is preferred in a whistleblower protection regime, and that broad coverage (in terms of those protected and the types of wrongdoing that may be disclosed) is vitally important.

A related best practices concern is the need to provide clarity in whistleblowing laws and policies, regardless of the scope and framework of the legal regime. As TI states:

[a]n important requirement of any whistleblowing legislation is to make sure that it clearly sets out its scope of application, that is, what types of wrongdoing are covered, whom it applies to and what level of belief in the concern raised the whistleblower should have.... Loopholes and lack of clarity might lead to situations where individuals decide to speak up in the belief that they are protected, when in fact they are not and as such are vulnerable to unfair treatments.⁷²

The public may not understand the meaning of terms such as “the public interest,” and therefore clarity may require setting out a more detailed list of the types of wrongdoing covered by the legislation.⁷³ Lack of clarity in legislation, whether related to the breadth of coverage or the manner of required disclosure, can have significant impacts on the overall efficacy of the legal regime. For example, TI discusses how confusion regarding Latvian laws made investigating and acting upon disclosures difficult, if not impossible:

In Latvia, the lack of a clear set of steps for receiving and responding to a disclosure has even been evidenced within the Ombudsman’s Office, a

⁶⁹ Worth, *supra* note 64 at 83.

⁷⁰ Anja Osterhaus & Craig Fagan, *Alternative to Silence: Whistleblower Protection in 10 European Countries*, 2nd ed (Berlin: TI, 2009) at 3, online (pdf): <<https://transparency.hu/wp-content/uploads/2016/04/TI-Alternative-to-Silence-report-ENG.pdf>>. The countries studied in the report were Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia, and the report found that at the time the only country with a dedicated and comprehensive piece of legislation was Romania.

⁷¹ *Ibid* at 4.

⁷² Terracol, *supra* note 67 at 7.

⁷³ UN Good Practices, *supra* note 10 at 22.

government institution which oversees matters related to the protection of human rights and good governance. In 2007, nearly half of the Ombudsman's Office employees complained of alleged misconduct by the Office's director. The lack of clear reporting channels internally led to confusion about how to investigate and resolve the case. After pressure from non-governmental organisations, including the local TI chapter, the case was heard by a parliamentary body, which did not investigate the root of the claims. As a result, the case was ultimately dismissed.⁷⁴

Whatever the preferred route, the prescribed mechanisms for disclosure ought not to be overly complicated or formalistic. As Banisar notes:

An overly prescriptive law which makes it difficult to disclose wrongdoing undermines the basic philosophy of promoting disclosure and encourages informal or anonymous releases. However, at the same time, a law that allows for unlimited disclosures will not encourage internal resolution and promote the development of a better internal culture of openness.⁷⁵

4.3.2 Mechanisms for Disclosure

Certain disclosure procedures have also been identified as preferable. Based in part on Australian studies, TI recommends that internal reporting (where the first line of reporting should be to the appropriate authorities *within* the organization) be encouraged through the establishment and maintenance of internal systems of disclosure, which offer the benefits of ease and accessibility to potential whistleblowers.⁷⁶ Key to the efficacy of such internal mechanisms is ensuring "a thorough, timely and independent investigation of concerns ... [with] adequate enforcement and follow-up mechanisms."⁷⁷

However, external means of disclosure should also be available and accessible, and it should be possible to disclose information to other bodies such as regulators or the media (albeit,

⁷⁴ Osterhaus & Fagan, *supra* note 70 at 11.

⁷⁵ Banisar, *supra* note 3 at 26.

⁷⁶ TI, *Recommended Draft Principles for Whistleblowing Legislation*, (Berlin: TI, 2009) at point 7, online (pdf):

<https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf>.

⁷⁷ *Ibid.* Rodney Smith, "The Role of Whistle-Blowing in Governing Well: Evidence From the Australian Public Sector" (2010) 50:6 Am Rev Pub Admin 704 at 719, concludes that large-scale research into whistleblowing in the Australian public sector suggests that internal reporting is overwhelmingly popular amongst whistleblowers, even when there are external reporting agencies available. The study showed:

[B]etter outcomes ... were associated with public sector organizations that publicized good whistle-blowing procedures, had well-trained managers and specialist staff, and that offered specialist support for whistle-blowers.

External agencies became important in the relatively small number of cases in which reprisals occurred.

possibly along different tiers of disclosure).⁷⁸ This is because the circumstances of the particular case may make a certain avenue of disclosure more appropriate than another, and “a variety of channels need to be available to match the circumstances and to allow whistleblowers the choice of which channel they trust most to use.”⁷⁹ TI states that “[i]f there is a differentiated scale of care in accessing these channels, it shall not be onerous and must provide a means for reporting on suspicion alone.”⁸⁰ Similarly, Banisar recommends that internal disclosures should be encouraged and facilitated, but that “procedures should be straightforward and easily allow for outside organizations to seek the counsel of higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective.”⁸¹ The October 2015 G20 Report likewise called for:

[C]lear rules for when whistleblowing to the media or other third parties is justified or necessitated by the circumstances ... [and] clear rules for defining the internal disclosure procedures that can assist organisations to manage whistleblowing, rectify wrongdoing and prevent costly disputes, reputational damage and liability, in the manner best suited to their needs.⁸²

The stepped or tiered approach can be observed in *PIDA*:

PIDA uses a unique “tiered” system by which whistleblowers can make their disclosures and be legally protected from retaliation. Employees can disclose information to their employer, regulatory agencies, “external” individuals such as members of Parliament, or directly to the media. However, the standards for accuracy and urgency increase with each tier, so whistleblowers must heed this in order to be legally protected.⁸³

A similar approach can be observed in the EU Whistleblower Directive. Article 7(2) provides that “Member States shall encourage reporting through internal reporting channels before reporting through external reporting channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation.” Articles 8 and 9 address the obligation to establish reporting channels and procedures for internal reporting and follow-up.

⁷⁸ For example, Paul Stephenson & Michael Levi, *The Protection of Whistleblowers: A Study on the Feasibility of a Legal Instrument on the Protection of Employees Who Make Disclosures in the Public Interest*, CDCJ(2012)9FIN (Strasbourg: Council of Europe, 2012) at 5, online:

<<http://rm.coe.int/doc/0900001680700282>>, suggest that external routes (such as regulatory authorities and law enforcement) are required where internal reporting proves ineffective, and that “[g]oing to the press is – or should be – an option of last resort, albeit a vital one.” At 29, the authors explicitly recommend “a ‘stepped approach,’ with different grounds required at each stage ... [and] if at any stage there is no response, then it is clear the whistleblower can go to the next level.”

⁷⁹ OECD, Public Sector Integrity Division and Anti-Corruption Division, *Committing to Effective Whistleblower Protection*, (Paris, OECD Publishing, 2016) at 53, online:

<<http://dx.doi.org/10.1787/9789264252639-en>>.

⁸⁰ TI, *supra* note 76 at point 8.

⁸¹ Banisar, *supra* note 3 at 57.

⁸² Wolfe et al, *supra* note 1 at 5.

⁸³ Worth, *supra* note 64 at 83.

Article 10 then provides that “[w]ithout prejudice to point (b) of Article 15(1) [circumstances in which the reporting person’s reasonable grounds of belief would support public disclosure], reporting persons shall report information on breaches using the channels and procedures referred to in Articles 11 and 12, after having first reported through internal reporting channels, or by directly reporting through external reporting channels.” Articles 11, 12, 13, and 14 address, in turn, the obligation to establish external reporting channels and follow up on reports, the design of external reporting channels, information regarding the receipt of reports and their follow-up, and review of the procedures by competent authorities.

Finally, Article 15 provides for public disclosures. It states:

1. A person who makes a public disclosure shall qualify for protection under this Directive if any of the following conditions is fulfilled:
 - (a) the person first reported internally and externally, or directly externally in accordance with Chapters II and III, but no appropriate action was taken in response to the report within the timeframe referred to in point (f) of Article 9(1) or point (d) of Article 11(2); or
 - (b) the person has reasonable grounds to believe that:
 - (i) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or
 - (ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.
2. This Article shall not apply to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information.

Certain provisions are applicable to internal and external reporting: the duty of confidentiality (Article 16), processing of personal data (Article 17), and record keeping of the reports (Article 18).

In an article comparing the UK and US legislative regimes, Jenny Mendelsohn argues that a model law would be explicit in its preference for internal or external disclosure, and she suggests that internal reporting ought to be preferred. However, she also argues that while internal reporting should be afforded “almost automatic protection,” this does not mean that external reporting should be subject to a multitude of preconditions.⁸⁴ Furthermore,

⁸⁴ Jenny Mendelsohn, “Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing” (2009) 8:4 Wash U Global Stud L Rev 723 at 743.

Mendelsohn's model law would allow for disclosures to the media only when reporting through internal and external channels has proven to be ineffective.⁸⁵

After a disclosure is made, it may be appropriate to keep the reporting person informed of the outcome of the disclosure. A 2015 guide by the UNODC indicated that not only must all reports be assessed according to their merits, but also that those who disclose information should be informed of decisions made on the basis of their report (e.g., whether the matter will be investigated).⁸⁶ Similarly, Devine recommends that the corrective action process should be transparent, and that the reporting person who disclosed the issue "should be enfranchised to review and comment on the draft report resolving alleged misconduct, to assess whether there has been a good faith resolution."⁸⁷

4.3.3 Protection of Identity

Protection of identity is an area in which there is disagreement as to the appropriate best practice. There is widespread recognition of the need for ensuring whistleblower confidentiality; indeed, Devine suggests that channels of disclosure must protect confidentiality to ensure that the flow of information is maximized, including name protection and the protection of identifying information.⁸⁸ If the identity of a whistleblower must be revealed (e.g., because of the need for testimony in a criminal proceeding), the whistleblower should be provided with "as much advance notice as possible."⁸⁹ However, while there is general agreement with respect to the need for whistleblower confidentiality, there is controversy over the role of anonymous reporting.

TI suggests that not only should the identity of a whistleblower be protected (i.e., kept confidential), but that legislation should also allow for anonymous disclosure.⁹⁰ Similarly, Banisar argues that anonymity may have a place in a model whistleblower protection law, despite the general exclusion of anonymous disclosures from current legislation: for example, "[a]nonymity may be ... useful (not to say essential) in some cases, such as in jurisdictions where the legal system is weak or there are concerns about physical harm or social ostracization."⁹¹ The October 2015 G20 Report concluded that a central area of concern was the need for "clear rules that encourage whistleblowing by ensuring that anonymous disclosures can be made, and will be protected."⁹²

In contrast, Latimer and Brown suggest that anonymous disclosures should be used only as something of a "last resort," given the perception that anonymity would discourage whistleblower accountability and might, in fact, encourage intentionally false reports.⁹³

⁸⁵ *Ibid* at 744.

⁸⁶ UN Good Practices, *supra* note 10 at 72.

⁸⁷ Devine, *Whistleblower Policies*, *supra* note 66 at 14.

⁸⁸ *Ibid* at 10. See also OECD, *supra* note 28 at 64, wherein it is noted that "[i]t is important that confidentiality extends to all identifying information."

⁸⁹ *Ibid* at 10. See also OECD, *supra* note 28 at 65, wherein the authors discuss the possibility of imposing sanctions for the disclosure of a whistleblower's identity.

⁹⁰ TI, *supra* note 76 at point 12. See also Terracol, *supra* note 67 at 18.

⁹¹ Banisar, *supra* note 3 at 34.

⁹² Wolfe et al, *supra* note 1 at 5.

⁹³ Latimer & Brown, *supra* note 51 at 774.

Allowing anonymous disclosures might, therefore, increase the volume of disclosures so as to make reporting systems less effective and increase the difficulty of investigations.⁹⁴ Paul Stephenson and Michael Levi, in a report commissioned by the Secretary General of the Council of Europe, similarly question the need for anonymous disclosures where confidentiality is protected:

Legal and social problems stem from anonymous disclosures: anonymous information is rarely admissible as evidence in courts. There have been cases where, because the whistleblower has remained anonymous, another worker has been suspected and sacked ... research results indicate that auditors attribute lower credibility and allocate fewer investigatory resources when the whistleblowing report is received through an anonymous channel.⁹⁵

It has been suggested that it may be possible to address some of the concerns with respect to anonymous reporting (such as difficulty in assessing credibility and in seeking clarification) through the use of technology such as proxy emails, which allow two-way communication.⁹⁶ TI suggests that the practical difficulties associated with protecting anonymous persons, as well as the issues surrounding seeking further information and informing the whistleblower of the progress of the investigation, may be remedied by anonymous email, online platforms, or the use of an intermediary.⁹⁷

4.3.4 Protection Against Retaliation and Oversight of that Protection

Robust protection against retaliation is a cornerstone of effective whistleblower protection legislation. TI reports that fear of retaliation or unfair treatment is a leading reason influencing people not to make disclosures.⁹⁸ Effective protection from reprisals is required, as is a broad understanding of what reprisals might entail: "The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights."⁹⁹ A key element in ensuring the protection of whistleblowers is educating public employees on their rights and protections under whistleblower legislation, because "[w]histleblowers are not protected by any law if they do not know it exists."¹⁰⁰ Those in positions of power, who may be receiving protected disclosures or working with whistleblowers following disclosures, also need to be educated on their responsibilities under the law. In addition, it is important that protection against retaliation not be limited to a short period of time following the disclosure, as reprisals may occur months or even

⁹⁴ OECD, *supra* note 28 at 63.

⁹⁵ Stephenson & Levi, *supra* note 78 at 32. The authors suggest that anonymous reporting systems may be a first step in the whistleblowing process: "The whistle-blowers' confidence may develop as the exchange progresses: if the intelligence is to be used effectively they will need to identify themselves to the authorities at some stage."

⁹⁶ UN Good Practices, *supra* note 10 at 50.

⁹⁷ Terracol, *supra* note 66 at 20.

⁹⁸ *Ibid* at 21. See also Artello & Albanese, *supra* note 1 at 10-11.

⁹⁹ Devine, *Whistleblower Policies*, *supra* note 66 at 4. The author also notes, at 6, that whistleblowers must be protected from unconventional harassment, considering that "[t]he forms of harassment are limited only by the imagination."

¹⁰⁰ *Ibid* at 7.

years after the initial disclosure.¹⁰¹ The EU Directive 2019/1937 seems to provide the most robust protection against retaliation provisions to date.¹⁰²

Protection within legislation is crucial, but in order to provide whistleblowers with effective shelter from retaliation the legislation must actually be put into practice. The Government Accountability Project, a US-based non-governmental organization, notes that whistleblower laws may actually prove to be counterproductive if they do not have any teeth:

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all.¹⁰³

Adequate oversight is required to ensure that the legislation is doing the work that it was designed for, and this may be accomplished through independent bodies, an ombudsperson, sectoral bodies or courts and tribunals.¹⁰⁴

4.3.5 Remedies and Rewards

When retaliation cannot be prevented and whistleblowers face reprisals, adequate and timely compensation is necessary. Compensation “must be comprehensive to cover all the direct, indirect and future consequences of the reprisal.”¹⁰⁵ This may include reinstatement, compensation for lost wages, awards for suffering, or a range of other reparations. It would be beneficial not to limit the amount of compensation, and “[c]ompensation should be broadly defined to cover all losses and seek to place the person back in an identical position as before the disclosure.”¹⁰⁶ An effective compensation scheme may require interim relief, given the high costs of time delays to whistleblowers seeking the remedies promised in the whistleblowing legislation.¹⁰⁷ In addition, it is important that whistleblower protection laws offer reporting persons a “realistic time frame” within which to assert their rights: Devine

¹⁰¹ OECD, *supra* note 28 at 81.

¹⁰² EC Directive, *supra* note 49. The Directive, *inter alia*, requires member states to ensure that prescribed persons have access to appropriate support measures (Article 20). Further, the Directive establishes the duty for member states to take necessary measures to prohibit any type of whistleblower retaliation against prescribed persons, and provides an enumerated list of examples of prohibited forms of retaliation (Article 19). It also requires member states to provide for “effective, proportionate and dissuasive penalties” to persons that, *inter alia*, hinder or attempt to hinder reporting, or retaliate (Article 23).

¹⁰³ Devine, *Whistleblower Policies*, *supra* note 66 at 1.

¹⁰⁴ Banisar, *supra* note 3 at 38–43.

¹⁰⁵ Devine, *Whistleblower Policies*, *supra* note 66 at 10. See also Terracol, *supra* note 67 at 50.

¹⁰⁶ Banisar, *supra* note 3 at 56.

¹⁰⁷ Devine, *Whistleblower Policies*, *supra* note 66 at 10. See also Terracol, *supra* note 67 at 51.

suggests a one year limitation period, in contrast to the 30-60 days contained in some pieces of legislation.¹⁰⁸

There has been significant debate over the role that rewards should play in model whistleblower legislation. In the US, discussed in more detail in Section 5.2, various pieces of legislation allow whistleblowers to collect cash rewards when the government recovers money as a result of the information disclosed. The value of the information is thought to outweigh any questions regarding the morality of the motivations behind disclosure.¹⁰⁹ And, if rewards are offered to whistleblowers, a further question may be: how much is appropriate?¹¹⁰ However, these moral questions have not been so easily dismissed by everyone in the field. Protect (formerly Public Concern at Work), a UK-based non-governmental organization, did not recommend the introduction of financial incentives into PIDA for reasons related to the underlying philosophy of encouraging reporting in this way, as well as concerns regarding the practical implications of rewarding whistleblowers in this manner. The 2013 Report stated:

The majority of respondents to our consultation (including whistleblowers) were not in favour of rewards. The reasons given were multiple and in summary were as follows:

- a) inconsistent with the culture and philosophy of the UK
- b) undermines the moral stance of a genuine whistleblower
- c) could lead to false or delayed reporting
- d) could undermine credibility of witnesses in future criminal or civil proceedings
- e) could result in the negative portrayal of whistleblowers
- f) would be inconsistent with the current compensatory regime in the UK.

The provision of a reward may well incentivise those who would not normally speak out. However, it may also encourage individuals to raise a concern only when there is concrete proof and monetary reward. This could reduce the opportunity to detect malpractice early and prevent harm. Additionally, it is difficult to use the model in sectors other than the financial sector, such as care or health.

Rewards are not a substitute for strong legal protection. There is no reason why whistleblowers should not be recognised and rewarded in the

¹⁰⁸ Devine, *Whistleblower Policies*, *supra* note 66 at 12.

¹⁰⁹ See discussion in Amanda M Rose, "Calculating SEC Whistleblower Awards: A Theoretical Approach" (2019) 72:6 Vand L Rev 2047 at 2062-2068.

¹¹⁰ For example, see discussion in Yehonatan Givati, "Of Snitches and Riches: Optimal IRS and SEC Whistleblower Rewards" (2018) 55:1 Harv J Legis 105.

workplace via remuneration structures, promotion or other recognition mechanisms including by society at large (e.g., the honours list).¹¹¹

The view that monetary rewards are a valuable tool to encourage reporting misconduct has become widespread. An increasing number of research papers and notes have been published in recent years that tend to support the effectiveness of monetary incentives.¹¹² The National Whistleblower Center argues that monetary rewards are an effective tool to incentivize people to provide high-quality tips which result in successful prosecutions.¹¹³

As a final point, whistleblower protection is untenable if it saddles a victim of retaliation with an unwieldy burden of proof. Thus, the “emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a ‘contributing factor’ in challenged discrimination.”¹¹⁴ It may be possible to go even further and craft legislation that presumes that a detrimental act against a whistleblowing employee is, in and of itself, sufficient to shift the burden of proof to the employer to show that the act was not retaliatory.¹¹⁵ This approach is reflected in the EU Whistleblower Directive. Article 21(5) states:

¹¹¹ The Whistleblowing Commission, *Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK*, (London: Public Concern at Work, 2013) at 14, online (pdf): <<https://s3-eu-west-1.amazonaws.com/public-concern-at-work/wp-content/uploads/images/2018/09/08222935/wbc-report-final.pdf>>.

¹¹² For example, see discussion in Theo Nyreröd & Giancarlo Spagnolo, “Myths and Numbers on Whistleblower Rewards” (2019) 15:1 Regul Gov 82; Jason Zuckerman & Matt Stock, “One Billion Reasons Why The SEC Whistleblower-Reward Program Is Effective”, *Forbes* (18 July 2017), online: <<https://www.forbes.com/sites/realspin/2017/07/18/one-billion-reasons-why-the-sec-whistleblower-reward-program-is-effective/?sh=79f243bb3009>>; Masaki Iwasaki, “Effects of External Whistleblower Rewards on Internal Reporting” (2018) Harvard John M Olin Fellow’s Discussion Paper Series No 76; and Justin Blount & Spencer Markel, “The End of the Internal Compliance World as We Know It, or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act’s Whistleblower Provisions” (2012) 17:4 Fordham J Corp & Fin L 1023.

¹¹³ “The Importance of Rewards” (last visited 1 February 2021), online: *National Whistleblower Centre* <<https://www.whistleblowers.org/the-importance-of-rewards/#:~:text=Data%20shows%20that%20incentivizing%20whistleblowers,increased%20number%20of%20false%20reports>>; Aiyesha Dey, Jonas Heese & Gerardo Perez Cavazos, “Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers” (2021) 59:2 J Accounting Research 1.

¹¹⁴ Devine, *Whistleblower Policies*, *supra* note 66 at 9.

¹¹⁵ OECD, *G20 Anti-Corruption Action Plan Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, (Paris: OECD, 2011) at 25, online (pdf): <<http://www.oecd.org/daf/anti-bribery/48972967.pdf>> states that high burdens of proof have been:

[A]lmost impossible to provide as long as the employer has not explicitly mentioned this as the reason for termination. For that reason, several legislations provide for a flexible approach to the burden of proof, assuming that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified on management grounds unrelated to the fact or consequences of the disclosure.

In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.¹¹⁶

Furthermore, it is important to consider how evidentiary rules may unduly burden whistleblowers seeking remedies for reprisals.¹¹⁷ Finally, if mounting a claim of alleged retaliation is expensive and requires the assistance of a lawyer or other institutional advocate (such as an ombudsperson), then such assistance should be built into the scheme. TI suggests that legal and financial assistance may be required, as “[w]histleblowers should not be at a financial loss for having to bring a claim to enforce their rights or seek compensation for breaches.”¹¹⁸

5. US: A PATCHWORK OF LEGISLATION

The US has a long history of whistleblower protection legislation. Section 5.1 gives an overview of the federal protections available to whistleblowers in the public sector, focusing on those working in the federal public sector, and the sections following after will briefly outline some of the protections available to private sector whistleblowers.

5.1 Whistleblower Protection in the Public Sector

The first whistleblower law in the US arguably appeared as early as 1863, with the introduction of false claims legislation.¹¹⁹ However, the modern approach to whistleblower protection began in 1968 with the landmark case *Pickering v Board of Education*, which recognized the application of the First Amendment to protection of disclosures made in the public interest.¹²⁰ This was followed by the *Civil Service Reform Act of 1978*,¹²¹ which “sought to vindicate these constitutional rights, but it substituted statutory standards for the vague balancing test under First Amendment law.”¹²² Unfortunately, the Office of Special Counsel and Merit Systems Protection Board, implemented by this legislation, did not prove to be very successful.¹²³ Today, the US has a plethora of laws on the local, state, and federal levels

¹¹⁶ EC Directive, *supra* note 49.

¹¹⁷ Fasterling, *supra* note 8 at 336. The author argues, at 336, that “research should take burden of evidence rules into account when evaluating remedies.”

¹¹⁸ Terracol, *supra* note 67 at 54.

¹¹⁹ Vaughn, *supra* note 5 at 4.

¹²⁰ *Pickering v Board of Education*, 391 US 563 (1968).

¹²¹ *Civil Service Reform Act of 1978*, Pub L No 95-454, 92 Stat 1111.

¹²² Vaughn, *supra* note 5 at 5.

¹²³ Terry Morehead Dworkin, “US Whistleblowing: A Decade of Progress?” in David B Lewis, ed, *A Global Approach to Public Interest Disclosure* (Cheltenham: Edward Elgar, 2010) 36 at 46.

that offer protection to whistleblowers. Although these laws purport to offer protection to whistleblowers in both the public and the private sector, there are problems "due to increased implementation difficulties, inefficiencies and regulatory burdens entailed in having multiple laws that have evolved in *ad hoc* ways over time."¹²⁴ A comprehensive, dedicated piece of legislation, such as *PIDA*, that covers both the public and the private sector at the federal level, with similar models at the state level, would be preferable in this sense. It would make it easier for whistleblowers to learn and understand their rights under the legislation, and it would likely decrease implementation and regulatory difficulties.

The legislation that is most relevant to disclosures in the federal public sector is the 1989 *Whistleblower Protection Act* (*WPA*)¹²⁵ (amended in 2012 by the *Whistleblower Protection Enhancement Act* (*WPEA*)).¹²⁶ The *Report of the Committee on Homeland Security and Governmental Affairs United States Senate to Accompany s. 743* underscores the important role of public sector whistleblowers, and explicitly recognizes the need for strong whistleblower protection legislation:

The Whistleblower Protection Enhancement Act of 2012 will strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government. Whistleblowers play a critical role in keeping our government honest and efficient. Moreover, in a post-9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment.

...

S. 743 would address ... problems by restoring the original congressional intent of the WPA to adequately protect whistleblowers, by strengthening the WPA, and by creating new whistleblower protections for intelligence employees and new protections for employees whose security clearance is withdrawn in retaliation for having made legitimate whistleblower disclosures.¹²⁷

Under the *WPA*, the employer bears the burden of showing that the detriment faced by an employee was not connected to their whistleblowing:

The employee only has to establish that he – 1. disclosed conduct that meets a specific category of wrongdoing set forth in the law; 2. made the disclosure to the right type of party; 3. made a report that is either outside of the

¹²⁴ Wolfe et al, *supra* note 1 at 70.

¹²⁵ *Whistleblower Protection Act of 1989*, Pub L No 101-12, 103 Stat 16 [*WPA*]. For further analysis, see Stephenson & Levi, *supra* note 78 at 22, noting that the *WPA* was introduced following the 1986 Challenger space shuttle disaster.

¹²⁶ *Whistleblower Protection Enhancement Act of 2012*, Pub L No 112-199, 126 Stat 1465 [*WPEA*].

¹²⁷ US, Committee on Homeland Security and Government Affairs, 112th Cong, *The Report of the Committee on Homeland Security and Governmental Affairs United States Senate to Accompany s 743* (US Government Printing Office, 2012) at 1, online (pdf): <http://fas.org/irp/congress/2012_rpt/wpea.pdf>.

employee's course of duties or communicated outside the normal channels; 4. made the report to someone other than the wrongdoer; 5. had a reasonable belief of wrongdoing; 6. suffered a personnel action. If the employee establishes these elements, the burden shifts to the employer to establish that it would have taken the same action in absence of the whistleblowing.¹²⁸

In 2011, the Merit Systems Protection Board released a report that compared survey data of federal employees from 1992 with data from 2010. In regard to the rate of disclosures, the report stated:

While observing wrongdoing is the first step in the whistleblowing process, not everyone who sees wrongdoing chooses to tell anyone else what they have observed. To blow the whistle, someone has to make some noise. In 2010, respondents were slightly less likely to report that they did not tell anyone about the wrongdoing that they observed compared with survey data from 1992, but in both years, a strong majority of employees told someone ... [T]he percentage of respondents who told no one what they observed dropped from 40 percent in 1992 to 34 percent in 2010. In 2010, family, friends, and coworkers were less likely to be told about the wrongdoing than they were in 1992. However, this did not correspond to substantially more people reporting wrongdoing to management. Instead, it seems that venting to equally powerless people dropped, but the willingness of respondents to take action that could lead to change was not substantially changed.¹²⁹

The report went on to conclude:

We have seen some progress in the Federal Government with respect to effectively utilizing Federal employees to reduce or prevent fraud, waste, and abuse. Since 1992, the percentage of employees who perceive any wrongdoing has decreased, and for those who perceive wrongdoing, the frequency with which they observe the wrongdoing has also decreased. Additionally, in comparison to 1992, respondents in 2010 were slightly more likely to report the wrongdoing and less likely to think they have been identified as the source of the report.¹³⁰

The WPEA reinforced the WPA by closing loopholes in the legislation, increasing the scope of protected disclosures and shielding "whistleblower rights against contradictory agency non-disclosure rules through an 'anti-gag' provision."¹³¹ The October 2015 G20 Report states

¹²⁸ Stephenson & Levi, *supra* note 78 at 22.

¹²⁹ US Merit Systems Protection Board (MSPB), Report to the President and the Congress of the United States, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* (Washington, DC: MSPB, 2011) at 8, online:

<<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475>>.

¹³⁰ *Ibid* at 27.

¹³¹ Wolfe et al, *supra* note 1 at 70.

that in recent years there has been a positive increase in the favourable resolution of whistleblower retaliation cases: "From 2007 to 2012, the number of new disclosures reported by federal employees increased from 482 to 1,148, and the number of whistleblower retaliation cases that were favorably resolved rose from 50 to 223."¹³² While these numbers indicate positive movement in terms of increased disclosures, it is impossible to determine whether the percentage of favourable resolutions of reprisal claims has increased as well without knowing the total number of reprisal claims. A 2015 study concluded that the WPEA, on paper, shows some potential, but that it is an open question whether it will translate to more robust whistleblower protection in practice:

It remains to be seen if the clarifications in the WPEA regarding disclosures will, in fact, clarify what is and is not a covered disclosure. It is also uncertain whether the courts will broaden their interpretation of the protections for whistleblowers under the WPEA. The expanded jurisdiction written into the Act is really a 2-year experiment to test that notion. The cancelling of the 1999 precedent that translates "reasonable belief" to require irrefutable proof is another issue that may be subject to narrowing by the courts.

There seems to be inherent confusion in the WPEA regarding the dictate that whistleblowers cannot claim protections for disclosing valid policy decision, but can claim protections for disclosing the consequences of a policy decision. Furthermore, the Act creates specific legal protections for scientific freedom, providing WPA rights to employees who challenge censorship, and makes it an abuse of authority to punish disclosures about scientific censorship. This begs the question: when is it censorship and when is it a valid policy decision to maintain the need for information to be classified due to national security or some other compelling reason. The main point here is that the WPEA may not have actually enhanced any protections or clarified the various aspects of whistleblower protections—again, time will tell.¹³³

In addition, in October 2017 Congress enacted the *Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017*,¹³⁴ which, inter alia:

- (1) requires agency heads to propose disciplinary action against supervisors who have engaged in whistleblower retaliation, related to 5 U.S.C. 2302(b)(8), (9), or (14); (2) provides certain whistleblower protections to probationary Federal employees; (3) provides guidelines to enhance Federal employee awareness of Federal whistleblower protections; (4) creates priority transfer rights for whistleblowers who are granted a stay of a

¹³² *Ibid.*

¹³³ Shelley L Peffer et al, "Whistle Where You Work? The Ineffectiveness of the Federal Whistleblower Protection Act of 1989 and the Promise of the Whistleblower Protection Enhancement Act of 2012" (2015) 35:1 Rev Pub Personnel Admin 70 at 78–79. The study concludes, at 78, that the WPA "failed in its basic purpose—protecting employees." The study also highlights weaknesses of the WPEA, such as the lack of protection for national security workers and government contractors.

¹³⁴ Pub L 115-73.

personnel action by the MSPB; and (5) enhances access to information by OSC.¹³⁵

A February 2015 Report from the US Merit Systems Protection Board indicates that the increased protections offered by WPEA have led to a strain on available resources. The report states:

The WPEA provided additional rights to whistleblowers and those who engage in other protected activity in the Federal Government. The law expanded the scope of protected disclosures, broadened MSPB's whistleblower jurisdiction, expanded options for granting corrective action, and permitted review of MSPB decisions by multiple Federal Courts of Appeals. These changes have increased the number of whistleblower cases filed with MSPB and increased the complexity of MSPB's processing of whistleblower cases. The changes also may lead to more and lengthier hearings in whistleblower cases and more addendum appeals (e.g., claims for compensatory and other damages or for attorney's fees) for whistleblower cases. The WPEA also requires MSPB to track and report more detailed information about whistleblower cases in its performance reports. MSPB needs additional permanent resources to enable it to meet the requirements of the WPEA.¹³⁶

The February 2016 *Annual Performance Results and Annual Performance Plan* Report from the US Merit Systems Protection Board provided an update on these concerns, stating:

Many whistleblower cases are being resolved formally or informally at the Office of Special Counsel. The more complex and contentious cases that remain unresolved are often the cases filed with MSPB. Thus, based on what we have seen so far, we still anticipate that the WPEA may lead to more and lengthier hearings in these cases and more addendum appeals.¹³⁷

Further, the February 2020 *Annual Performance Report for FY 2019 and Annual Performance Plan for FY 2020 (Final) and FY 2021 (Proposed)* from the US Merit Systems Protection Board indicates that there have been organizational issues within the Merit Systems Protection Board, in that it had, at the time of the report, "been without a quorum of Board members

¹³⁵ MSPB, *APR-APP for FY 2018-2020: FY 2018 Annual Performance Report (APR) and Annual Performance Plan (APP) for FY 2019 (Revised) and FY 2020 (Proposed)* (Washington, DC: MSPB, 2019) at 46, online:

<<http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1598039&version=1603838&application=ACROBAT>>.

¹³⁶ MSPB, *Annual Performance Report for FY 2014 and Annual Performance Report for FY 2015 (Final) and FY 2016 (Proposed)* (Washington, DC: MSPB, 2015) at 1–2, online:

<<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1133484&version=1137981&application=ACROBAT>>.

¹³⁷ MSPB, *Annual Performance Results for FY 2014 and Annual Performance Plan for FY 2016 (Final) and FY 2017 (Proposed)* (Washington, DC: MSPB, 2016) at 38, online:

<<http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1268947&version=1274024&application=ACROBAT>>.

since January 8, 2017, and without any presidentially-appointed Senate-confirmed Board members since March 1, 2019.”¹³⁸ This has created a backlog of petitions for review and other cases, as well as preventing the Merit Systems Protection Board (MSPB) from releasing “reports of merit systems studies and promulgating substantive regulations.”¹³⁹ The backlog of petitions for review totaled over 2,378 as of the end of September 2019, and was expected to take three years or more to process once the Board achieved a quorum.¹⁴⁰ “The lack of quorum prevented MSPB from setting FY 2018 and FY 2019 performance targets and rating results for several PGs and one strategic objective, including PFR processing timeliness, enforcement case processing, number of reports of merit systems studies published, and quality of initial decisions.”¹⁴¹ In addition, staffing and other challenges have or have the potential to impact the functioning of the Board.¹⁴²

5.2 Encouraging through Rewards: *False Claims Act*

The *False Claims Act* (FCA)¹⁴³ offers a unique understanding of how to encourage whistleblowing, as it allows private citizens to make claims on behalf of the government (*qui tam* actions) in cases of contract fraud. The US Department of Justice reports that in the fiscal year ending September 30, 2020, it obtained more than \$2.2 billion in settlements and judgments, and that recoveries since 1986 total more than \$64 billion.¹⁴⁴ The FCA represents a prioritization of information rather than so-called ethical motives, and offers a different kind of remedy to wronged whistleblowers:

The FCA is much more effective than merely protecting the whistleblower from retaliation or even giving the whistleblower a private cause of action for retaliation.... It is arguably the most protective of whistleblowers because a successful whistleblower recovers enough to withstand losing a job or suffering a stalled career.... The law values information over motive, and blowing the whistle to gain a large recovery is fine as long as the information is novel and leads to successful prosecution.¹⁴⁵

¹³⁸ MSPB, *APR-APP for FY 2019-2021: Annual Performance Report for FY 2019 Annual Performance Plan for FY 2020 (Final) and FY 2021 (Proposed)* (Washington, DC: MSPB, 2020) at 2, online: <<http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1699796&version=1705740&application=ACROBAT>>.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* at 41.

¹⁴¹ *Ibid* at 41.

¹⁴² *Ibid* at 41-42. This report also provides recent data on the whistleblower appeals, from October 1, 2018 to September 30, 2019: *ibid* at 51.

¹⁴³ *False Claims Act*, 31 USC § 3729-3733.

¹⁴⁴ Department of Justice, Office of Public Affairs, Press Release, 21-55, “Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020” (14 January 2021), online: *Justice News* <<https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>>.

¹⁴⁵ Dworkin, *supra* note 123 at 44. For further information on other mechanisms that support whistleblower protection, see Lisa J Banks & Jason C Schwartz, *Whistleblower Law: A Practitioner’s Guide* (Lexis, 2021).

The ethical concern surrounding a whistleblower's motives has diminished in light of the *FCA*'s positive outcomes:

The concern that whistleblowers might be motivated by gain rather than a desire to help is ... no longer a major ethical consideration. The desire by the government to recover money and correct wrongdoing now trumps concerns regarding whistleblower motive. A "pure" motive is seen as secondary to the public good created by whistleblowers, regardless of motive.¹⁴⁶

Some whistleblowers under the *FCA* have received large sums of money: "FCA settlements and judgments have totaled over \$17 billion and virtually all whistleblowers have recovered \$1 million or more—even though the majority of suits are settled."¹⁴⁷ For example, in August 2015, a former sales representative for NuVasive, a medical device producer, was awarded \$2.2 million under the *FCA* in relation to kickbacks paid by the company to doctors. A Wisconsin pharmacist was awarded \$4.3 million in 2015 after they blew the whistle on PharMerica. They were fired after reporting that their employer was dispensing dangerous drugs without a prescription.¹⁴⁸ In an even larger settlement, a former sales representative for Endo Pharmaceuticals Inc. received a \$33.6 million award after blowing the whistle on the company. They served as an undercover informant for the FBI for five years and waited nine years between their first complaint and the 2014 settlement.¹⁴⁹ In addition, it has been argued that US legislation such as the *FCA* "leads the way" when it comes to the protection of whistleblowers that are based in a different jurisdiction.¹⁵⁰

Long time delays between blowing the whistle and receiving recovery amounts can put whistleblowers in disadvantaged financial situations.¹⁵¹ For example, in the Endo Pharmaceuticals case mentioned above, nine years passed between the whistleblower's first complaint and the settlement.¹⁵² Despite this, many states have introduced similar legislation with varying amounts of recovery awarded to the *qui tam* plaintiff.¹⁵³ The state-level legislation has seen similar levels of success as the federal legislation.¹⁵⁴ The debate surrounding the morality of offering rewards was discussed in Section 4.3.5. The US is

¹⁴⁶ Terry Morehead Dworkin & AJ Brown, "The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws" (2013) 11:2 Seattle J Soc Just 653 at 668.

¹⁴⁷ Dworkin, *supra* note 123 at 44.

¹⁴⁸ Richard L Cassin, "PharMerica Whistleblower Collects \$4.3 Million" (21 May 2015), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/5/21/pharmerica-whistleblower-collects-43-million.html>>.

¹⁴⁹ Richard L Cassin, "Jackpot: Pharma Whistleblower Awarded \$33 Million" (17 July 2015), online: *The FCPA Blog* <<http://www.fcpablog.com/blog/2015/7/17/jackpot-pharma-whistleblower-awarded-33-million.html>>. See also Richard L Cassin, "Three SEC Whistleblowers Split \$7 Million Award" (23 January 2017), online (blog): *The FCPA Blog* <<http://www.fcpablog.com/blog/2017/1/23/three-sec-whistleblowers-split-7-million-award.html>>.

¹⁵⁰ Richard Hyde & Ashley Savage, "Whistleblowing Without Borders: The Risks and Rewards of Transnational Whistleblowing Networks" in Lewis & Vandekerckhove, *supra* note 59, 20 at 24.

¹⁵¹ *Ibid.*

¹⁵² Cassin, *supra* note 149.

¹⁵³ Hyde & Savage, *supra* note 150 at 45.

¹⁵⁴ Dworkin & Brown, *supra* note 146 at 668.

mostly alone among the three countries discussed in this chapter in offering rewards. Generally speaking, the ethical or public service motive for whistleblowing in the UK is still favoured over motives related to private gain. The same may be said for Canada, with one exception: whistleblower rewards were created under the Ontario Securities Commission in 2016.

5.3 Federal Whistleblowing Protection in the Private Sector

In addition to the protections for public sector employees discussed above, the US is home to legislation protecting workers in the private sector. The *Sarbanes-Oxley Act of 2002 (SOX)*¹⁵⁵ and the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)*¹⁵⁶ are examples that operate on the federal level. SOX was introduced in response to a number of scandals:

Beginning in 2001, companies such as Enron, WorldCom, Global Crossing and Tyco became familiar names as accounting fraud and other business abuses became public.... Publicized abuses extended beyond accounting fraud, as reflected by Enron's manipulation of the energy markets in California, manipulation that stole millions of dollars from ratepayers and precipitated a crisis in that state.... Employees of these companies were aware of fraud and other abuses, but failed to come forward from fear of retaliation or found their warnings ignored. Some who came forward faced harassment. In response to the public outcry and the disclosed weaknesses in laws regulating corporate conduct, Congress enacted and George W. Bush signed the Sarbanes-Oxley Act of 2002.¹⁵⁷

SOX applies to companies traded publicly, and it "calls for companies to establish a code of ethics and whistleblowing procedures."¹⁵⁸ This has international ramifications, as all countries traded publicly in the US must comply with the requirements of SOX. One of these requirements is that companies should have mechanisms allowing for anonymous disclosures, which many companies have complied with through the use of independent telephone hotlines.¹⁵⁹ This method of reporting has proven problematic in respect to difficulties maintaining anonymity and delays in following up on disclosures.¹⁶⁰

In 2008, the global financial crisis prompted the enactment of the *Dodd-Frank Act*. The *Act* created the Securities and Exchange Commission and the Commodity Futures Trading Commission whistleblower incentive programs. Both programs reward individuals who provide information to the government relating to violations of federal securities or commodities exchange laws by giving whistleblowers a share of the money the government

¹⁵⁵ *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, 116 Stat 745.

¹⁵⁶ *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub L No 111-203, 124 Stat 1376 [*Dodd-Frank Act*].

¹⁵⁷ Vaughn, *supra* note 5 at 150.

¹⁵⁸ Dworkin, *supra* note 123 at 37.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.* For more information on anti-retaliation protections for whistleblowers, see Banks & Schwartz, *supra* note 145.

recovers. Under section 922 of the *Act* (which provides for amendments to the *Securities Exchange Act of 1934*), whistleblowers are entitled to a reward if they provide information for Securities and Exchange Commission (SEC) enforcement actions that lead to sanctions exceeding \$1 million, including enforcement actions for *Foreign Corrupt Practices Act* (*FCPA*) violations. The making of awards is mandatory, but the amount is discretionary, within defined limits: “If one or more whistleblowers meet the eligibility criteria for an award and follow the required procedures for making a claim, the SEC is statutorily required to award them, in the aggregate, at least ten but not more than thirty percent of the monetary sanctions collected in the covered action.”¹⁶¹

Section 922 (section 21F of the *Securities Exchange Act of 1934*) also protects those who provide information to the SEC from retaliation from employers. Retaliation claims under the *Dodd-Frank Act* can be brought within three years after the date when the facts material to the right of action became known or reasonably should have been known to the whistleblower. The *Dodd-Frank Act* allows the applicant to bring a lawsuit directly in the appropriate district court. In 2018, the US Supreme Court concluded that the anti-retaliation provisions in the *Dodd-Frank Act* do not extend to an individual who has not reported a violation of securities laws to the SEC.¹⁶² This decision effectively curtails the protections for internal whistleblowing, including disclosures made to a corporate ethics or compliance program, unless the whistleblower also made the disclosure to the SEC. Disclosures “must rest upon a reasonable belief that the information relates to the violation of any consumer financial protection contained in the *Dodd-Frank Act* or any rule, order, standard, or prohibition prescribed or enforced by the Bureau [of Consumer Financial Protection].”¹⁶³

The SEC reported that fiscal year 2020 broke records with respect to (at that time) the awards paid and claims processed, with over 6,900 whistleblower tips received, 197 final awards issued, 315 preliminary determinations issued, and \$175 million awarded to 39 individuals.¹⁶⁴ Although the majority of awards have been for less than \$2 million,¹⁶⁵ some very large awards have been issued; on October 22, 2020 (after the end of fiscal year 2020), the SEC issued the largest award to date at \$114 million.¹⁶⁶ In 2020, the SEC voted to make certain amendments to the rules governing its whistleblower program, which, among other things, would create a presumption that potential awards of under \$5 million (with certain requirements) would qualify for a presumption of receiving the maximum amount under the statute.¹⁶⁷

¹⁶¹ Rose, *supra* note 109 at 2055.

¹⁶² *Digital Realty Trust, Inc v Somers*, 138 S Ct 767 (2018).

¹⁶³ Vaughn, *supra* note 5 at 156.

¹⁶⁴ US Securities and Exchange Commission (SEC), *2020 Annual Report to Congress Whistleblower Program* (Washington, DC: SEC, 2020) at 2, online (pdf):

<https://www.sec.gov/files/2020%20Annual%20Report_0.pdf>.

¹⁶⁵ Rose, *supra* note 109 at 2057.

¹⁶⁶ *Whistleblower Award Proceeding*, Exchange Act Release No 90247 (SEC File No 2021-2) (22 October 2020), online (pdf): <<https://www.sec.gov/rules/other/2020/34-90247.pdf>>.

¹⁶⁷ US SEC, Press Release, “SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program” (23 September 2020), online: <<https://www.sec.gov/news/press-release/2020-219>>; see also discussion of these amendments in Rose, *supra* note 109.

Although some commentators, such as Tim Martin,¹⁶⁸ predicted that the *Dodd-Frank Act* will increase the number of *FCPA* investigations, Mike Koehler predicts that its impact on *FCPA* enforcement will be negligible.¹⁶⁹ According to the SEC's report for the fiscal year of 2020, out of over 6,900 tips, only 208 related to the *FCPA*.¹⁷⁰

In addition to these pieces of legislation, a number of other laws in the US protect whistleblowers in the private sector.¹⁷¹ Robert Vaughn argues that private sector whistleblower legislation in the US has both positive and negative aspects:

Relief under recent whistleblower laws is extensive, including reinstatement, back pay, compensatory damages, attorney fees and litigation costs, and specifically includes expert witness fees. The similarity between recent laws illustrates the application of a common model for their content. This similarity offers some advantages by tying them together and creating a body of federal private-sector whistleblower laws. For example, this similarity could empower some future reform such as a uniform federal law applying blanket protection to all private-sector whistleblowers. The similarity, however, has some disadvantages. Because the pedigree of these common elements rests on aspects of the Whistleblower Protection Act of 1989, applicable to federal employees, and of the Sarbanes-Oxley Act, these laws may be limited by restrictive interpretations of relevant statutory terms by the Federal Circuit in relation to the Whistleblower Protection Act and by the Department of Labor in relation to the Sarbanes-Oxley Act.¹⁷²

6. UK: PUBLIC INTEREST DISCLOSURE ACT 1998

In the UK, whistleblowers are protected by *PIDA*. The passage of this legislation was preceded by a number of serious disasters that may have been prevented if employees had come forward with information; this "has been confirmed by the findings of the official inquiries ... which found that staff had been aware of dangers but had not mentioned them for fear of retaliation, or had raised concerns and then been dismissed or led to resign."¹⁷³

¹⁶⁸ Tim Martin, *International Bribery Law and Compliance Standards* (Independent Petroleum Association of America, 2013) at 21, online (pdf): <<http://timmartin.ca/wp-content/uploads/2016/02/Int-Bribery-Law-Compliance-Standards-Martin2013.pdf>>.

¹⁶⁹ Mike Koehler, "Potpourri" (24 November 2014), online (blog): *FCPA Professor* <<http://www.fcpaprofessor.com/potpourri-13>>.

¹⁷⁰ US SEC, *supra* note 164 at 27-28.

¹⁷¹ Vaughn, *supra* note 5 at 152, states that "[t]he whistleblower provision of SOX heralded a decade of congressional enactment of private-sector whistleblower laws." In addition, the author at 154-155 calls attention to the *American Recovery and Reinvestment Act* (123 Stat 115), which distributes funds to governments on the local and state level (and, through them, to private contractors) for use on public projects; under this legislation, "[e]mployees may disclose gross management, waste, fraud, and abuse of stimulus funds."

¹⁷² *Ibid* at 159.

¹⁷³ Lucy Vickers, "Whistling in the Wind? The Public Interest Disclosure Act 1998" (2000) 20:3 LS 428 at 429.

For example, in 1987 a ship sank, killing 193 people, because its bow doors had been opened while sailing. Employees had raised concerns on five occasions about the risk that this caused, but the warnings were not heeded by management.¹⁷⁴ Prior to such tragedies and the subsequent introduction of *PIDA*, the cultural attitude in the UK strongly favoured loyalty to an employer and contractual obligations over disclosure of employment-related issues.¹⁷⁵ The common law did not provide much in the way of whistleblower protection, and what protection existed was superseded in many cases by the “implied duties of the employment relationship, which explicitly barred British employees from publicly discussing private employment matters.”¹⁷⁶ Now, many years since the introduction of *PIDA*, whistleblowers in the UK are viewed more positively by individuals and by the media.¹⁷⁷

As already noted, *PIDA* has been lauded as one of the most comprehensive pieces of whistleblower protection legislation in the world, and has often been cited as a “model” law due to its comprehensive coverage and tiered disclosure system. However, as discussed further below, there are now indications that *PIDA* has not been effective in realizing whistleblower protection, and that it may have been overtaken by global developments in whistleblower protection standards.

In Wim Vandekerckhove’s 2010 examination of European whistleblower protection *PIDA* was used as a model against which various European laws were measured.¹⁷⁸ This is because *PIDA*’s “three-tiered model” of disclosure captures a preference for internal disclosure, while still accounting for the necessity of external disclosure in some situations. In doing so, it provides protection for both internal and external whistleblowing against a sliding scale of requirements:

This legislation offers protection for internally raising concerns within and outside of the hierarchical line. It also offers protection for blowing the whistle to a prescribed regulator if the internal route failed. Finally, if that too was unsuccessful, wider disclosures are protected as well.¹⁷⁹

PIDA’s three-tiered model thus offers a balance between the interests of the employer in maintaining confidentiality, and the interests of the public in having employees disclose information related to workplace malpractice or corruption.¹⁸⁰ When a worker makes an internal disclosure, there is a presumption of legislative protection against reprisal as long as the worker has acted in good faith.¹⁸¹ However, there are more requirements in order to receive protection under *PIDA* when disclosure is made to an external regulator or to the media. In order to make a disclosure to an external source, it must be the case that the

¹⁷⁴ The Whistleblowing Commission, *supra* note 111 at 7.

¹⁷⁵ Vickers, *supra* note 173 at 429.

¹⁷⁶ Mendelsohn, *supra* note 84 at 734.

¹⁷⁷ The Whistleblowing Commission, *supra* note 111 at 9.

¹⁷⁸ Wim Vandekerckhove, “European Whistleblower Protection: Tiers or Tears?” in Lewis, *supra* note 123, 15.

¹⁷⁹ *Ibid* at 17.

¹⁸⁰ Mendelsohn, *supra* note 84 at 738.

¹⁸¹ *PIDA*, *supra* note 63, s 43C.

whistleblower “reasonably believes that the information disclosed, and any allegation contained in it, are substantially true.”¹⁸² The whistleblower must not have acted for the purposes of personal gain, and it must have been reasonable to make the disclosure.¹⁸³ *PIDA* thus imposes increasingly onerous requirements (especially in terms of level of knowledge and reasonableness of belief) the further that the whistleblower gets from internal disclosure. The Canadian *Public Servants Disclosure Protection Act (PSDPA)*, discussed in Section 7.2, also has differing requirements depending on the recipient of the disclosure, but they are not as onerous. For example, disclosure to the public under the *PSDPA* is governed by section 16:

- 16.** (1) A disclosure that a public servant may make under sections 12 to 14 may be made to the public if there is not sufficient time to make the disclosure under those sections and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that
- (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or
 - (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.¹⁸⁴

The requirements for similar disclosure under *PIDA* are lengthier, to say the least:

- 43G.** (1) A qualifying disclosure is made in accordance with this section if—
- (a) the worker makes the disclosure in good faith,
 - (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
 - (c) he does not make the disclosure for purposes of personal gain,
 - (d) any of the conditions in subsection (2) is met, and
 - (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
- (2) The conditions referred to in subsection (1)(d) are—
- (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
 - (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the

¹⁸² *Ibid*, s 43G(1)(b).

¹⁸³ *Ibid*, s 43G(1)(c) and (e).

¹⁸⁴ *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 16 [*PSDPA*].

relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

- (c) that the worker has previously made a disclosure of substantially the same information—

- (i) to his employer, or

- (ii) in accordance with section 43F.

- (3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

- (a) the identity of the person to whom the disclosure is made,
 - (b) the seriousness of the relevant failure,
 - (c) whether the relevant failure is continuing or is likely to occur in the future,
 - (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
 - (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
 - (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.
- (4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.¹⁸⁵

Thus, while *PIDA* may benefit from greater clarity in its requirements (as compared to *PSDPA*), it imposes a very heavy burden on a whistleblower who makes a disclosure to a source beyond an employer, legal advisor, Minister of the Crown, or other prescribed person.

PIDA's coverage is expansive: it protects employees in both the public and private sectors, and it is broad enough to capture private contractors.¹⁸⁶ In addition, the legislation covers a wide range of wrongdoing under the purview of a protected disclosure: a disclosure qualifies as protected where the person who makes the disclosure reasonably believes that a criminal offence has been or is likely to be committed, there has been a failure to comply with legal obligations, there has been or is likely to be a miscarriage of justice, there is a risk

¹⁸⁵ *PIDA*, *supra* note 63, s 43G.

¹⁸⁶ Wolfe et al, *supra* note 1 at 67.

to health, safety or the environment, or information relevant to one of these areas faces deliberate concealment.¹⁸⁷ Whether the wrongdoing occurred within or outside the UK or whether non-UK law applies to the wrongdoing, is irrelevant. However, critics have suggested that there are downsides to having an exhaustive list of wrongdoing. Instead, *PIDA*'s reach could be broadened by conferring some discretion on the courts: "PIDA might have provided better protection if it had included a list of matters automatically covered together with a final catch-all provision covering matters that, in the opinion of the court, are in the public interest."¹⁸⁸ The types of reprisals that whistleblowers are protected against are similarly broad, with the legislation stating that "[a] worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by this employer done on the ground that the worker has made a protected disclosure."¹⁸⁹ If a worker experiences reprisal, claims are made directly to the UK Employment Tribunal, rather than to a specialized body. Remedies for reprisal include reinstatement, unlimited compensation, or reengagement.¹⁹⁰ *PIDA*'s track record in its first ten years can be summarized as follows:

In the first ten years of *PIDA*'s operation, the number of claims made under it annually increased from 157 in 1999 to 1761 in 2009. This is still a small proportion (under 1%) of all claims made to Employment Tribunals. Over 70% of these claims were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won. There is only partial information on awards: in the known cases, the average compensation was £113,000 (the largest single award was over £3.8m) and the total known compensation was £9.5m.¹⁹¹

Despite the broad scope of *PIDA*, a review of the legislation by the non-profit Protect identified a number of opportunities for improvement.¹⁹² Among these recommendations were the implementation of a code of practice, and the simplification of the legislative language. A code of practice would help to clarify the rights of whistleblowers and the appropriate procedural steps that whistleblowers should take when disclosing information internally:

Such a code of practice must clearly set out principles enabling workers to raise concerns about a danger, risk, malpractice or wrongdoing that affects others without fear of adverse consequences. Any such arrangements must be proportionate to the size of the organisation and the nature of the risks faced. A code of practice should set out the requirements for arrangements

¹⁸⁷ *PIDA*, *supra* note 63, s 43B.

¹⁸⁸ Vickers, *supra* note 173 at 434. Similarly, a report put forward by The Whistleblowing Commission, *supra* note 111 at 17, suggests that *PIDA* ought to be amended to include a "non-exhaustive list of the categories of wrongdoing, including gross waste or mismanagement of funds and serious misuse or abuse of authority."

¹⁸⁹ *PIDA*, *supra* note 63, s 47B(1).

¹⁹⁰ Vickers, *supra* note 173 at 432.

¹⁹¹ Stephenson & Levi, *supra* note 78 at 20.

¹⁹² The Whistleblowing Commission, *supra* note 111. See also David Lewis, "Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected?" (2008) 82 J Bus Ethics 497 at 504 for a number of recommendations for reform.

covering the raising and handling of whistleblowing concerns and should include a written procedure for the raising of concerns. This procedure should include: clear assurances about protection from reprisal; that confidentiality will be maintained where requested; and should identify appropriate mechanisms for the raising of concerns, as well as, identifying specific individuals with the responsibility for the arrangements.¹⁹³

Protect (formerly Public Concern at Work) called for more research to be done by the government regarding the possibility of creating an ombudsman or similar independent agency. Such an agency may be able to raise public awareness, conduct investigations into alleged reprisals and conduct strategic litigation, among other things.¹⁹⁴

More recently, in July 2018, the All Party Parliamentary Group (APPG) for Whistleblowing was launched. The APPG's objective was to "provide much stronger and more comprehensive protection for whistleblowers ... to work to identify where the law fails to protect whistleblowers and, work with industry experts, whistleblowers, regulators and businesses, to recommend positive, effective and practical proposals for change."¹⁹⁵ Research was conducted into whistleblowing cases between 2015 and 2018 in England and Wales, and in 2020 the APPG concluded that significant reform was required:

The APPG has concluded, using the evidence available that it is time for a root and branch reform of the legislation setting out a 10 point plan including the introduction of a body capable of tackling and challenging wrong-doing. This office will be tasked with the review of PIDA and the development of legislation that addresses the substantive issues to ensure that protecting those who speak up and wrong-doing is addressed at the earliest opportunity. This body will also need to review international best practice and look to make best practice our practice. The APPG calls for new whistleblowing legislation with an Office of the Whistleblower as the bearer of its implementation.¹⁹⁶

Moreover, key findings of the research included that whistleblowing cases had a low success rate, whistleblowers suffered more and longer than before, fewer whistleblowers have legal representation than in the past, whistleblowing has a gender component, and whistleblowing cases often include a discrimination claim but these are the least successful cases.¹⁹⁷

In addition, recent commentators have indicated that *PIDA* may have been overtaken as a "model" law. For example, Richard Hyde and Ashley Savage indicate that "PIDA, which was once considered an exemplar, has now arguably been overtaken by more

¹⁹³ The Whistleblowing Commission, *supra* note 111 at 13.

¹⁹⁴ *Ibid* at 25.

¹⁹⁵ All Party Parliamentary Group for Whistleblowing, *Making Whistleblowing Work for Society*, (July 2020) at 2, online (pdf): <https://a02f9c2f-03a1-4206-859b-06ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf>.

¹⁹⁶ *Ibid* at 2.

¹⁹⁷ *Ibid* at 3.

comprehensive whistleblowing laws,” with particular reference to the EU Whistleblower Directive (then only a provisional agreement).¹⁹⁸

7. CANADA

7.1 Development of the Common Law Defence

Prior to the introduction of dedicated whistleblower legislation, whistleblowers had to rely on protection provided by common law; in the employer-employee context, it was necessary to balance the duty an employee owed to their employer and an employee’s right to freedom of expression. Slowly the balance began to shift, at least in theory, from prioritizing the duty of loyalty to one’s employer, to protecting reasonable, good faith disclosures of alleged wrongdoing in the employer’s organization. In *British Columbia v BCGEU*, arbitrator J.M. Weiler considered a matter wherein employees, who had taken an oath of office, publicly disclosed information that was critical of their public sector employer.¹⁹⁹ The arbitrator considered past decisions in the public sector context, and determined:

These awards do not go so far as to prevent an employee, at the risk of losing his job, from making *any* public statements that are critical of his employer. An absolute “gag rule” would seem to be counter productive to the employer for it would inhibit any dissent within the organization. Employee dissidents can be a valuable resource for the decision-makers in the enterprise.²⁰⁰

However, Weiler went on to note that public criticism of this sort (that is, “going public”) should be something of a last resort after internal processes have been exhausted.²⁰¹ This decision recognized that the disclosure of information may, in fact, benefit the public sector employer: “Neither the public nor the employer’s long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing.”²⁰²

A few years later, in *Fraser v Public Service Staff Relations Board*, the Supreme Court of Canada considered a case wherein the appellant faced disciplinary measures and eventually lost his position at the Department of Revenue Canada after criticizing governmental policy (specifically, metric conversion) in a letter to the editor published in a newspaper. The Court

¹⁹⁸ Richard Hyde & Ashley Savage, “The Halfway House is Only Halfway Built: Reforming the system of prescribed persons and the Public Interest Disclosure Act 1998” (2019) 25:2 Eur J Current Legal Issues.

¹⁹⁹ *British Columbia (Attorney General) v BCGEU*, [1981] BCCAAA No 9, 1981 CarswellBC 1176 (WL) [BCGEU].

²⁰⁰ *Ibid* at para 39.

²⁰¹ *Ibid* at para 42.

²⁰² *Ibid* at para 43.

outlined three contexts in which it would be possible for a public servant to act against their duty of loyalty:

As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances, a public servant may actively and publicly express opposition to the policies of a government. **This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.** But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government. [emphasis added]²⁰³

Following this decision, different factors were identified within the jurisprudence as relevant considerations when determining if a public servant's conduct fit within one of the categories enumerated by the Supreme Court.

After the introduction of the *Canadian Charter of Rights and Freedoms*, and the enshrinement of freedom of expression therein, the Federal Court stated that “[t]he common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the *Charter*, and therefore constitutes a reasonable limit within the meaning of section 1 of the *Charter*.²⁰⁴

7.2 Federal Legislation: *Public Servants Disclosure Protection Act*

7.2.1 Legislation

This section focuses on federal whistleblower legislation. A description of provincial whistleblower laws is beyond the scope of this chapter. It should be noted, however, that a number of provinces have developed legislation to protect provincial public sector employees. In Quebec, for example, in its *Rapport de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction*, the Charbonneau Commission recommended improving the support and protection of whistleblowers by protecting confidentiality regardless of the method of reporting, providing support to whistleblowers,

²⁰³ *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 1985 CarswellNat 145 at para 46 (WL).

²⁰⁴ *Haydon v R*, [2001] 2 FC 82, 2000 CarswellNat 2024 at para 89 (WL).

and offering financial support if necessary.²⁰⁵ The Commission recognized that wrongdoing can be difficult to detect without the assistance of *lanceurs d'alerte*, and that people may not report wrongdoing due to a fear of reprisals.²⁰⁶ The Commission noted the limitations of current whistleblower protections, which are limited in scope and may be difficult to understand, and advocated for a more general system of whistleblower protection.²⁰⁷ Several of these concerns were addressed in *An Act to Facilitate the Disclosure of Wrongdoings related to Public Bodies*, which came into force on May 1, 2017.

Federal public sector employees have been governed by the *Public Servants Disclosure Protection Act (PSDPA)* since it came into force on April 15, 2007.²⁰⁸ The PSDPA reflects the principles that have developed through the case law, but offers a more structured and robust approach to the protection of reporting persons; in other words, the legislation “maintains the integrity of the ‘whistleblower’ defence from the jurisprudence and builds upon it.”²⁰⁹ The Preamble sets out the guiding values underlying the legislation:

Recognizing that

the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy;

it is in the public interest to maintain and enhance public confidence in the integrity of public servants;

confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings, and by establishing a code of conduct for the public sector;

public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* and that this Act strives to achieve an appropriate balance between those two important principles;

the Government of Canada commits to establishing a Charter of Values of Public Service setting out the values that should guide public servants in their work and professional conduct[.]²¹⁰

²⁰⁵ France Charbonneau & Renaud Lachance, “Stratagèmes, causes, conséquences et recommandations” in Quebec, Commission on the Awarding and Management of Public Contracts in the Construction Industry, *Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction* (CEIC, November 2015) at 111, online (pdf): *Gouvernement du Québec* <https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Tome-3_c.pdf>. See Chapter 12, footnote 32, which provides the link to the English translation.

²⁰⁶ *Ibid* at 109.

²⁰⁷ *Ibid* at 110-111.

²⁰⁸ PSDPA, *supra* note 184.

²⁰⁹ *El-Helou v Courts Administration Service*, 2011 PSDPT 1 at para 45 [*El-Helou No 1*].

²¹⁰ PSDPA, *supra* note 184, Preamble.

The *PSDPA* dictates the parameters of what qualifies as a protected disclosure.²¹¹ This means that if a public sector worker “blows the whistle” on issues that are outside of the purview of a protected disclosure, they will not have recourse to the legislation. Section 8 of the legislation enumerates the “wrongdoings” for which disclosure is protected, including contravention of legislation, misuse of public funds, gross mismanagement, acts or omissions creating “substantial and specific” danger to health and safety of people or the environment, breach of codes of conduct established under the *PSDPA* and counseling a person to commit one of these wrongdoings.²¹² This definition signifies a legislative attempt to itemize the kinds of conduct that would be considered corrupt or undesirable within a public sector institution, and the provision makes it clear that not just *any* disclosure will trigger legislative protection. This is problematic, as whistleblowers must: (1) have enough knowledge of the legislative protection to know whether the wrongdoing of which they have knowledge falls within the purview of the legislation and (2) have enough knowledge of the wrongdoing *itself* to know if it falls within one of these categories. Thus, this approach is overly restrictive, and the legislation would be improved by a broader or open-ended understanding of wrongdoing.

The *PSDPA* covers those working in the federal public sector, but it does not extend to protect disclosures by those working in the Canadian Forces, the Communications Security Establishment, or the Canadian Security Intelligence Service.²¹³ However, these excluded groups are required to create internal disclosure mechanisms under section 52 of the *PSDPA*, which states:

As soon as possible after the coming into force of this section, the person responsible for each organization that is excluded from the definition of “public sector” in section 2 must establish procedures, applicable to that organization, for the disclosure of wrongdoings, including the protection of persons who disclose the wrongdoings. Those procedures must, in the opinion of the Treasury Board, be similar to those set out in this Act.²¹⁴

Again, only those disclosures that qualify will warrant the protection of the legislation.

The *PSDPA* also outlines the appropriate methods of disclosure. Section 12 provides for internal disclosure, section 13 allows for external disclosure to the Public Sector Integrity Commissioner (Commissioner or PSIC), and section 16(1) provides for limited circumstances under which the disclosure may be made to the public. This system was

²¹¹ Legislation often uses terms such as “protected disclosure” rather than the colloquial “whistleblowing.” One reason for this may be, as suggested in David Lewis, AJ Brown & Richard Moberly, “Whistleblowing, Its Importance and the State of the Research” in Brown et al, *supra* note 8, 11 at 3, that the term whistleblower has “negative historical connotations, in many settings, alongside or overwhelming any positive ones, particularly in countries where oppressive governments have encouraged citizens to denounce the activities of political opponents.”

²¹² *PSDPA*, *supra* note 184, s 8.

²¹³ *Ibid*, s 2(1).

²¹⁴ *Ibid*, s 52. Section 53 also provides some limited and discretionary protection to these groups: “The Governor in Council may, by order, direct that any provision of this Act applies, with any modifications that may be specified in the order, in respect of any organization that is excluded from the definition of ‘public sector’ in section 2.”

summarized by the Public Servants Disclosure Protection Tribunal in their first interlocutory decision, *El-Helou v Courts Administration Service* (*El-Helou No. 1*), as follows:

The Act creates a much broader system for disclosure protection within the public service at several junctures and at different levels: internally to a supervisor or the departmental Senior Officer (section 12) of a department or agency; externally to the Commissioner (section 13); or where there is not sufficient time to disclosure a serious offence under Canadian legislation or an imminent risk of a substantial and specific danger, the disclosure may be made to the public (subsection 16(1)).²¹⁵

This tiered system of disclosure attempts to operationalize the best practices principles discussed in Section 4.3.2. Internal disclosure is prioritized, but procedures and requirements are in place for disclosures externally and to the media.

Section 19 prohibits reprisals against public servants, and section 19.1 lays out the process through which a public service employee can complain about an alleged reprisal. “Reprisal” is a defined term within section 2 of the *PSDPA* to include actions such as disciplinary measures, demotion, employment termination, or “any measure that adversely affects the employment or working conditions of the public servant.”²¹⁶ The *PSDPA* relies on a central agency, the Office of the Public Sector Integrity Commissioner appointed under section 39, to “receive reports from public servants of wrongdoing, to investigate them and to make recommendations to correct them.”²¹⁷ The *PSDPA* also mandated the creation of the Public Servants Disclosure Protection Tribunal to adjudicate claims of reprisals that the Commissioner deems appropriate; arguably, “[t]he existence of an independent tribunal with quasi-judicial powers to adjudicate reprisals is reflective of Parliament’s intention of emphasizing and addressing the gravity of retaliation against individuals who come forward to report suspected wrongdoing.”²¹⁸ Broadly speaking, the complaint procedure is as follows. If a public servant or former public servant who made a protected disclosure has reasonable grounds for believing that a reprisal (as defined in section 2(1)) has been taken against them, they may file a complaint with the Commissioner (section 19.1(1)). The complaint must be filed within 60 days of when the complainant knew or ought to have known that the reprisal was taken (section 19.1(2)). The Commissioner may refuse to deal with a complaint (s. 19.3(1)) or designate a person as an investigator to investigate a complaint (section 19.7(1)); in any event, the Commissioner must decide whether or not to deal with a complaint within 15 days after it is filed and must provide written notice or reasons of that decision (section 19.4). If an investigation is initiated, the Commissioner might appoint a conciliator to try to settle the case (section 20(2)), and/or make an application to the Tribunal (section 20.4(1)). The Tribunal, consisting of judges of the Federal Court or a superior court of a province (section 20.7(1)), can grant remedies in favour of complainants (section 21.7(1)) and order disciplinary action against persons who take reprisals (section 21.8(1)).

²¹⁵ *El-Helou No 1*, *supra* note 209 at para 47.

²¹⁶ *PSDPA*, *supra* note 184, s 2.

²¹⁷ Latimer & Brown, *supra* note 51 at 779.

²¹⁸ OECD, *supra* note 28 at 152.

Section 21.7 lays out the potential remedies that the Tribunal is able to order. Remedies include reinstating the whistleblower's employment, rescinding measures taken by the employer, and paying compensation to the complainant.²¹⁹ However, it is problematic that these remedies represent a closed list; in other words, the Tribunal has limited power to respond to the specific circumstances of the case, and must find an appropriate remedy from within the list. Furthermore, the remedies listed focus on rescinding detrimental actions, reinstating an employee, or paying compensation. If the reprisal faced by the complainant cannot be easily reduced to a dollar value (if, for example, the employee has been harassed or has missed opportunities for promotion), then it is unclear how the Tribunal could fashion an appropriate remedy.

7.2.2 Decisions of the Tribunal and the Federal Courts

As of February 2021, the Tribunal website lists eight cases.²²⁰ Of these, five were settled between the parties in some manner. The other three files have seen a multitude of interlocutory decisions, judicial reviews to the Federal Court, appeals to the Federal Court of Appeal, and, finally, decisions on the merits. In no case has the Tribunal found that the complainant has made out their claim.

Early decisions by the Tribunal were all interlocutory in nature—indeed, the Tribunal did not render a final decision on the merits in any case until 2017. In *El-Helou No. 1*, the Tribunal affirmed the potential strength of this legislation: “The Tribunal recognizes that it must play its role to ensure that this new legislative scheme not be ‘enfeebled’.”²²¹ This approach was developed in *El-Helou v Courts Administration Service (El-Helou No. 3)*, where the Tribunal noted that the goal of the legislation and of the adjudicative function of the Tribunal ought to be on the substantive content of the disclosure and the alleged reprisal, and not on the possible procedural defects of an Application. The Tribunal highlighted the principles of natural justice:

It is in this context that an examination of the Act must be conducted. In considering the Act as a whole and the part of the Act pertaining to complaints of reprisal, it becomes clear that **Parliament focussed on the substance of the complaint**, and not on who may or may not have been identified as potential respondents in the original complaint. In addition, as discussed below, the processes for reprisal complaints demonstrate Parliament’s intention to ensure that notice be provided to potential respondents, whether or not they were named in a complaint. This requirement of notice ought not to be considered as merely a procedural formality, but rather, as an important step in ensuring fairness to all of those affected by an investigation and, possibly, an Application before the Tribunal. In the course of an investigation, other parties might be identified

²¹⁹ PSDPA, *supra* note 184, s 21.7.

²²⁰ “All Cases” (last visited 1 February 2021), online: Government of Canada - Public Servants Disclosure Protection Tribunal <<https://www.psdpt-tpfd.gc.ca/Cases/AllCases-en.html>>.

²²¹ *El-Helou No 1*, *supra* note 209 at para 49.

and Parliament wanted to ensure that the principles of natural justice could be addressed as a complaint progressed. [emphasis added]²²²

In line with this approach, the Tribunal in *El-Helou v Courts Administration Service (El-Helou No. 4)* recognized that it may be appropriate to adopt more relaxed standards regarding the admission of evidence. This represents the Tribunal's desire to deal with the substance of the reprisal, rather than evidentiary or procedural issues that may prevent a complainant from accessing justice. The Tribunal stated:

In addition, there is flexibility in the Act as to how the Tribunal admits evidence, which strongly suggests that opinion evidence and hearsay could be subject to more relaxed standards. Nonetheless, **the Tribunal would need to ensure fairness in its proceedings for all the parties, and adopt a focused approach to its proceedings and the tendering of evidence.** In this manner, it can assure that its time and resources are utilized judiciously.

The Tribunal recognizes that it must weigh evidence carefully, given the serious consequences of the proceedings. Nevertheless, the provisions of the Act pertaining to a more flexible approach to the admissibility of evidence guide the Tribunal, and suggest that **a formalistic approach ought not to be adopted.** This general stance is also supported by Supreme Court of Canada jurisprudence. Given the requirements of a hearing and the mandate of the Tribunal, it must be cautious in any request that asks that it rule in an anticipatory fashion on the admissibility of evidence. [emphasis added]²²³

In this decision, the Tribunal also commented on the differing burden as between the Commissioner's threshold for referring an application to the Tribunal, and the Tribunal's determination of whether a reprisal has been made out:

The "balance of probabilities" is generally the standard of proof used in civil proceedings and before administrative tribunals, unless otherwise expressed in the statute. This is the burden of proof upon which the Tribunal decides whether or not reprisal has been taken against the complainant, in relation to the disclosure of wrongdoing within the meaning of the Act. If Parliament had intended that the burden of proof not be the civil standard of proof, this would have been clearly articulated in the legislation. To meet the standard of proof of the balance of probabilities, the evidence presented will outweigh the evidence that disputes the allegations. It is sometimes stated that for the "balance of probabilities" to be satisfied, the evidence presented must show that the facts as alleged are more probable than they are not.

²²² *El-Helou v Courts Administration Service*, 2011 PSDPT 3 at para 29 [*El-Helou No 3*].

²²³ *El-Helou v Courts Administration Service*, 2011 PSDPT 4 at paras 73-74 [*El-Helou No 4*].

The Commissioner's threshold for the referral of an Application and the Tribunal's burden of proof is different. This can be understood by examining the wording as well as the structure of the Act.²²⁴

The Federal Court and the Federal Court of Appeal have grappled with certain sections of the *PSDPA* through judicial reviews of decisions made pursuant to the legislation. For example, judicial reviews have been conducted of decisions by the Commissioner, such as decisions that were not in the public interest to commence investigations into alleged wrongdoings,²²⁵ or to dismiss complaints of reprisals and therefore not make applications to the Tribunal in respect of those complaints;²²⁶ what follows is not an exhaustive review of the jurisprudence.

In *El-Helou v Canada (Courts Administration Service)*,²²⁷ the Federal Court of Appeal considered an appeal and a cross-appeal of a Federal Court decision which allowed in part the application for judicial review against a decision of the Commissioner dismissing the appellant's reprisal complaints under the *PSDPA*. The facts of this case are unusual (and the path rather circuitous): the Commissioner, after an investigation, referred a complaint of reprisal to the Tribunal. Mr. El-Helou sought judicial review of the decision not to refer the other complaints to the Tribunal; this was allowed, and a second investigation was conducted into all of the complaints. Following that investigation, the Commissioner did not refer any other complaints to the Tribunal, and also concluded that the complaint that had previously been referred to the Tribunal was not founded. Mr. El-Helou sought judicial review of the decisions made following the second investigation; the Federal Court allowed the application in part, and this was then both appealed and cross-appealed to the Federal Court of Appeal.

The Court of Appeal found that the disclosure of the investigator's preliminary report into the reprisal complaints adequately informed the appellant of the case to be met in order to allow him to provide a full response.²²⁸ Further, the Court of Appeal considered whether, as a result of the previous decision made by the Federal Court and the subsequent investigation, the Commissioner was *functus officio* with respect to a complaint that had already been referred to the Tribunal. The Court determined that he was, but also that the Commissioner could now adopt a position adverse to the application, stating:

[E]ven though the Commissioner no longer believes that the appellant is entitled to the remedy claimed, he does not have the power to dismiss the complaint. Only the Tribunal retains the authority to deal with it, after hearing all the parties concerned. In this respect, the Commissioner's revised position is no more determinative of the outcome before the

²²⁴ *Ibid* at paras 34-35.

²²⁵ See, for example, *Gordillo v Canada (Attorney General)*, 2019 FC 950.

²²⁶ See, for example, *Biles v Canada (Attorney General)*, 2017 FC 1159.

²²⁷ *El-Helou v Courts Administration Service*, 2016 FCA 273, leave to appeal ref'd.

²²⁸ *Ibid* at paras 47-48. See also the earlier decision in *El-Helou v Canada (Courts Administration Service)*, 2012 FC 1111, in which Mactavish J found there to be a breach of procedural fairness in an earlier investigation, where Mr. El-Helou was not provided with a copy of the investigator's report.

Tribunal than was his support for the application at the time he filed it before the Tribunal.

Turning to section 21.6, the Commissioner proceeded on proper principle when he asked whether this provision authorized him to change his stance and adopt a position against the application that he filed. In holding that it did, the Commissioner was construing his home statute. In my view, reasonableness is the standard against which this aspect of the Commissioner's decision is to be reviewed (*Dunsmuir*, para. 54; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), para. 34).

Subsection 21.6(2) requires the Commissioner to "adopt the position that, in his or her opinion, is in the public interest". **In my view, it was reasonable for the Commissioner to hold that he could adopt a position adverse to the application that he had filed if, in his opinion, the circumstances no longer supported the granting of a remedy in the public interest.** Looking at the matter the other way, the Commissioner would be acting against the public interest if he were to support a complaint of reprisal even though he was of the view that no reprisal had taken place. It was therefore open to the Commissioner to reconsider his initial position and to adopt one before the Tribunal that is consistent with the facts revealed by the second investigation.

...

I accept that, as a general rule, the Commissioner should not allow a complaint that has been referred to the Tribunal to be investigated further. However, I do not believe that this renders the Commissioner's decision unreasonable on the facts of this case.

While as noted earlier, the appellant did object to complaint #3 being further investigated, he could not object to the investigation of the other complaints as they emanated from him. Given the extent to which they are intertwined, I do not see how these complaints could be investigated without eliciting information relevant to complaint #3. This is what Mactavish J. had in mind in *El-Helou #1* when she suggested that the further investigation that she ordered — specifically the interview of the former Chief Administrator of CAS — could impact the outcome of complaint #3 even if it was no longer in the hands of the Commissioner (*El-Helou #1*, para. 90).

Given the ongoing investigation into the other complaints, there is no principled reason by which the Commissioner should have turned a blind eye to the new information gathered in the course of the second investigation.

It was therefore reasonable for the Commissioner to rely on this new information when deciding under section 21.6 to adopt a position before the Tribunal that is adverse to the application that he had filed and to amend

the statement of particulars to reflect his current position. [emphasis added]²²⁹

Leave to appeal this decision to the Supreme Court of Canada was refused.

In *Therrien v Canada*, the Federal Court dismissed an application for judicial review of the Commissioner's decision not to investigate allegations of wrongdoing.²³⁰ In this case, the whistleblower made disclosures both internally and publically regarding alleged pressures by Service Canada to deny or limit claims for Employment Insurance; their employment was ultimately terminated, and their reliability status was revoked.²³¹ The Court upheld the Commissioner's decision not to investigate the complaints because they were already the subject of a grievance process, and under section 19.3(2) the Commissioner was directed not to deal with such complaints.²³² This decision was subsequently reversed on appeal,²³³ with Gleason J.A. concluding that the Commissioner violated the appellant's procedural fairness rights, as the appellant's counsel was told that the Commissioner would be assessing whether he would inquire into the reprisal complaint according to the factors enumerated in section 19.3(1)(a), but the Commissioner instead dismissed the complaint under section 19.3(2). The Court considered the difference between these as follows:

There is a meaningful difference between the two statutory provisions. Paragraph 19.3(1)(a) of the *PSDPA* affords the Commissioner discretion to decline to deal with a complaint where the Commissioner is of the opinion that the subject matter of the complaint either has been or ought more appropriately be dealt with under a procedure provided under another Act of Parliament or a collective agreement. Subsection 19.3(2), on the other hand, is cast in mandatory terms and requires the Commissioner to dismiss a complaint where its subject matter is being dealt with by a body (other than a law enforcement agency) acting under another Act of Parliament or a collective agreement. Given these differences, a complainant may well make different submissions under the two provisions.²³⁴

The Court went on to examine the Commissioner's interpretation of section 19.3(2), finding the decision to be unreasonable: "in the context of a grievance, it is only where the Commissioner is satisfied that the substance of a reprisal complaint is being dealt with on its merits by the PSLREB that subsection 19.3(2) of the *PSDPA* might reasonably be found to apply. To ascertain whether this is so, it may often be necessary for the Commissioner to await the outcome of proceedings before the PSLREB prior to determining whether subsection 19.3(2) of the *PSDPA* is applicable."²³⁵

²²⁹ *Ibid* at paras 71-73, 75-78.

²³⁰ *Therrien v Canada (Attorney General)*, 2015 FC 1351, rev'd 2017 FCA 14.

²³¹ *Ibid* at paras 3-5.

²³² *Ibid* at para 18.

²³³ *Therrien v Canada (Attorney General)*, 2017 FCA 14.

²³⁴ *Ibid* at para 5.

²³⁵ *Ibid* at para 9.

In *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, the Federal Court considered section 23(1) for the first time.²³⁶ This section indicates that the Commissioner cannot deal with a disclosure if the subject-matter of that disclosure is already being dealt with by “a person or body acting under another Act of Parliament.”²³⁷ In reaching its conclusion, the Court emphasized the need to consider the entirety of the *Act* and the context of the legislation, stating:

The parties have focused on the phrases in subsection 23(1) but not necessarily in the context of the *PSDPA*. Given the importance of whistleblower legislation to “denounce and punish wrongdoings in the public sector” the phrase “dealing with” must take its meaning from this context. The phrase cannot be interpreted so broadly as to frustrate the scheme and purpose of the legislation. Simply bringing the wrongdoing to the attention of the CEO is but one aspect of the purpose of an investigation. Public exposure is mandatory whenever an investigation leads to a finding of wrongdoing.

The legislation addresses wrongdoings of an order of magnitude that could shake public confidence if not reported and corrected. When the Commissioner is “dealing with” an allegation of wrongdoing, it is something that, if proven, involves a serious threat to the integrity of the public service. That is why, before an investigation is commenced, there is a period of analysis to determine there is some merit to the disclosure. That is also why the investigators are separate from the analysts.

The focus of the disclosure provision of the *PSDPA* is to uncover past wrongs, bring them to light in public and put in place corrections to prevent recurrence.

...

The *PSDPA* is remedial legislation. As such, section 12 of the Interpretation Act, RSC 1985, c.I-21 requires it to be given “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”. Parliament cannot have intended that subsection 23(1) be read so broadly that a procedure undertaken months after the Commissioner begins to deal with a disclosure, led by another body for a different purpose, headed toward the qualitatively different outcome of a private report, regardless of the finding, and examining only recent, very different, evidence should be sufficient to prevent the Commissioner from determining whether a serious past allegation of wrongdoing occurred and, if so, exposing it.²³⁸

The Court ultimately found that the Commissioner made a reasonable decision in not ending the investigation into the alleged wrongdoing when informed that Transport Canada was

²³⁶ *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886.

²³⁷ *PSDPA*, *supra* note 184, s 23(1).

²³⁸ *Canada (Attorney General) v Canada (Public Sector Integrity Commissioner)*, 2016 FC 886 at paras 105-107, 113.

dealing with the same incidents (that is, the actions of the Ottawa Air Section of the RCMP Air Services Branch in making false log entries).

In *Gupta v Canada*, the Federal Court of Appeal considered a judicial review of the Commissioner's decision not to investigate a whistleblower's allegations that he faced reprisals and the threat of reprisals following a disclosure of wrongdoing.²³⁹ The Court dismissed the whistleblower's appeal, finding that the Commissioner was reasonable in deciding that some of the appellant's allegations of reprisals were out of time according to section 19.1(2) of the *PSDPA* and in deciding not to grant an extension of time; in addition, the Court found it was reasonable to conclude that some of the allegations did not meet the definition of reprisals under the legislation.²⁴⁰ When considering the limitation period in the *PSDPA*, the Court stated:

The language of this subsection is clear – the sole criterion to determine whether a complaint is filed on time is one of knowledge or imputed knowledge of specific incidents of reprisal. The allegation that the most recent act of reprisal is part of an ongoing chain of reprisals does not bring the earlier events into the 60-day time limit.²⁴¹

However, the Court did acknowledge that a victim of reprisal who is "reasonably confused or unaware of the nature of the conduct against her or him"²⁴² would not be captured by the limitations period, as the 60-day period begins when the victim "ought to have known" about a reprisal. In addition, a victim may be able to make a compelling case for the extension of time to file a complaint if the reprisals were a sequence of connected events; in this case, those were not the facts.²⁴³

Subsequently, in *Gupta v Canada*, the Federal Court of Appeal considered an appeal from the decision of the Federal Court dismissing the application for judicial review of the Commissioner's decision not to conduct an investigation into a disclosure by the appellant under the *PSDPA*, in which the appellant alleged that he had been harassed by senior managers and other employees.²⁴⁴ The Commissioner had relied on section 24(1)(f) in declining to commence an investigation "if the Commissioner is of the opinion that there is a valid reason for not dealing with the subject-matter of the disclosure."²⁴⁵ The Court found that there was no denial of procedural fairness in the circumstances, as

[e]ven assuming that, as Dr. Gupta submits, persons making disclosures are entitled to notice of the grounds on which the Commissioner may rely in deciding not to investigate, the information made available to Dr. Gupta and his counsel provided adequate notice that the Commissioner might rely

²³⁹ *Gupta v Canada (Attorney General)*, 2016 FCA 50.

²⁴⁰ *Ibid* at para 2.

²⁴¹ *Ibid* at para 5.

²⁴² *Ibid* at para 7.

²⁴³ *Ibid* at para 8.

²⁴⁴ *Gupta v Canada (Attorney General)*, 2017 FCA 211.

²⁴⁵ *Ibid* at para 2.

on the availability of another recourse as a reason for deciding not to investigate the alleged harassment.²⁴⁶

The Court of Appeal stated:

The Act does not prescribe the process for the Commissioner to follow before deciding whether to exercise what has been described as the "wide" discretion not to commence an investigation (*Detorakis v. Canada (Attorney General)*, 2010 FC 39, 358 F.T.R. 266 (Eng.) (F.C.) at para. 43). In particular, the Act does not specify that the Commissioner will communicate to persons who have made disclosures the basis on which the Commissioner is considering exercising this discretion. However, it includes among the Commissioner's duties (in paragraph 22(d)) the duty to "ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures."

...

Dr. Gupta submits that even if the content of procedural fairness at the stage of a decision whether to investigate is relatively limited, the person making the disclosure must still be given notice of the "threshold issues" or "factors" that the Commissioner may consider in deciding whether to refuse to investigate. Dr. Gupta submits that he was not given notice that the availability of alternate recourse was a potential "threshold issue." In reliance on this Court's decision in *Gladman v. Canada (Attorney General)*, 2017 FCA 109 (F.C.A.) at para. 40, he also submits that at a minimum procedural fairness must include "the right to be informed of undisclosed adverse material facts being considered by a decision-maker and to make submissions about them (in some form)."

In my view, it is not necessary to decide in this appeal whether fairness in this context requires notice of this nature, or whether recognizing a requirement to this effect would risk complicating and over-judicializing a process that was intended to be informal and expeditious. In my view, even if procedural fairness requires this sort of notice in this context, in the circumstances here Dr. Gupta had adequate notice that the Commissioner might decide not to investigate his disclosure of alleged harassment based on the assessment that the subject-matter could more appropriately be dealt with through another process.²⁴⁷

The Tribunal issued its first final decision on the merits in 2017 in *Dunn v Indigenous and Northern Affairs Canada and Lecompte*.²⁴⁸ This was an application pursuant to section 20.4(1)(b) of the PSDPA for a determination of whether a reprisal was taken against the complainant, and if such a reprisal was taken for an order issuing a remedy and disciplinary action.²⁴⁹ In

²⁴⁶ *Ibid* at para 4.

²⁴⁷ *Ibid* at paras 9, 33-34.

²⁴⁸ 2017 PSDPT 3.

²⁴⁹ *Ibid* at para 1.

a 423-paragraph decision, the Tribunal dismissed the application and found that no measures had been taken against the complainant that would constitute a reprisal under the PSDPA, and that further there was no nexus between the alleged reprisals and any protected disclosure.

The complainant in this case, Ms. Dunn, made disclosures with respect to unjust hiring practices and a perceived conflict of interest.²⁵⁰ The complainant submitted a first reprisal complaint in respect of a staffing process, which was dismissed as unfounded.²⁵¹ The second complaint, which was the subject of the instant decision, listed six allegations of reprisal; the two that were referred to the Tribunal involved claims that the complaint was singled out by monitoring of her work absences and segregation from her coworkers.²⁵²

The Tribunal identified the issues to be decided as follows:

The Tribunal must decide on the following issues in respect of an application by the Commissioner pursuant to section 20.4(1)(b) for a determination pursuant to section 21.5 (1):

1. Did the Complainant make a “protected disclosure” under the Act?
2. Did the Complainant suffer a “reprisal” under the Act?
 - a. Did the Respondent inappropriately monitor the Complainant’s attendance?
 - b. Did the Respondent attempt to segregate the Complainant?
 - c. Should the Tribunal consider allegations of reprisal not submitted by the Commissioner?
3. Is there a nexus between the Complainant’s protected disclosure of wrongdoing and the alleged reprisal measures such that it is determined that the Complainant has been subject to a reprisal?
 - a. What is the applicable test?
 - b. What is the appropriate mental element required to establish a reprisal taken by Ms. Lecompte that results in an order against her for disciplinary action?
 - c. Does the evidence establish a nexus in this case?
4. If a reprisal was taken against the Complainant, whether Ms. Lecompte actually took it against the Complainant?
5. If it is determined that Ms. Lecompte took a reprisal against the Complainant, whether to direct a further proceeding to determine

²⁵⁰ *Ibid* at paras 13-14.

²⁵¹ *Ibid* at para 20.

²⁵² *Ibid* at para 46.

whether to order the Employer to take appropriate disciplinary measures against Ms. Lecompte?

6. Whether or not it is determined that Ms. Lecompte did not actually take the reprisal found to have been taken against the Complainant, what is the appropriate remedy pursuant to section 21.7 (1) of the Act of all necessary measures that the Employer should be ordered to provide the Complainant?²⁵³

The Tribunal, in its lengthy reasons, made numerous comments on the law, including, *inter alia*, on the process for determination of an application under section 20.4(1)(b),²⁵⁴ the elements required to succeed on the application,²⁵⁵ what constitutes a protected disclosure²⁵⁶ (e.g., “I am of the view that such a disclosure must have some aspect of “whistleblowing” to be protected”²⁵⁷), what constitutes a reprisal²⁵⁸ (e.g., “I find the meaning of reprisal and retaliation to be well understood by the general population as capturing the sense of the biblical adage of ‘an eye for an eye,’ or more colloquially ‘a tit for a tat.’ It is all about revenge, which is most certainly an intentional act”²⁵⁹), what constitutes a nexus between the disclosure and the reprisal and the sufficiency of the causal link (the nexus may be direct or indirect),²⁶⁰ and the requisite intention for establishing the grounds for an order of a disciplinary measure²⁶¹ (e.g., “I do not conclude that the Commissioner must establish that the reprisal measures were taken in bad faith, only that they were intended as revenge for the protected disclosures”²⁶²).

As noted, in the result, the Tribunal found that no measure had been taken against the complainant that would constitute a reprisal under the *PSDPA*, and that even if such a measure had been proven there was no nexus with any protected disclosure. The application was dismissed.²⁶³

The complainant applied to the Court of Appeal for judicial review of the decision.²⁶⁴ While the Court dismissed the application due to the factual and credibility findings made by the Tribunal, the panel (Stratas, Rennie, and Laskin J.J.A., *per curiam*) did offer a somewhat scathing commentary on the Tribunal’s approach in this case:

We wish to raise a larger concern with how the Tribunal proceeded in this case. In hundreds of paragraphs, it delved deeply into several legal issues and ventured opinions on them. This was not necessary to decide the case

²⁵³ *Ibid* at para 60.

²⁵⁴ *Ibid* at paras 61-65.

²⁵⁵ *Ibid* at paras 66-67.

²⁵⁶ *Ibid* at paras 69-72, 78-80.

²⁵⁷ *Ibid* at para 79.

²⁵⁸ *Ibid* at paras 107-121.

²⁵⁹ *Ibid* at para 120.

²⁶⁰ *Ibid* at paras 88-89, 96, 134.

²⁶¹ *Ibid* at paras 100-103, 122-130.

²⁶² *Ibid* at para 103.

²⁶³ *Ibid* at paras 421-423.

²⁶⁴ *Dunn v Canada (Attorney General)*, 2018 FCA 210, leave to appeal ref’d.

before it. By acting in this way, the Tribunal ran counter to the imperative of expedition in subsection 21(1) of the Act, caused much waste and needless expense for the parties in this application, and greatly complicated our task of review.

...

Therefore, we decline to deal with these legal issues in this case. But we wish to add that many of the legal conclusions reached by the Tribunal in this case warrant critical scrutiny. As a matter of administrative law, other members of the Tribunal are not bound by the legal conclusions reached here: see, e.g., *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257, [2017] 3 F.C.R. 123 (F.C.A.) at para. 40 and authorities cited therein. If the particular case requires it, and until this Court settles the matter, a member of the Tribunal is free to conduct her or his own analysis and reach different legal conclusions.²⁶⁵

A final example is the case of Me Agnaou, which has involved interlocutory decisions by the Tribunal (which will not be canvassed here), judicial reviews by the Federal Court and the Federal Court of Appeal, and finally in 2019 a final decision on the merits by the Tribunal. In *Agnaou v Canada (Agnaou FCA)*, the Federal Court of Appeal allowed the appeal of a whistleblower against a decision of the Deputy Public Sector Integrity Commissioner and declared his complaint of reprisal to be admissible.²⁶⁶ In reaching its decision, the Court commented on the purpose of the PSDPA and the role of the Commissioner within the scheme set out in the legislation, stating:

I think it is beyond doubt that Parliament chose to adopt a different approach to reprisal complaints and that, as is the case under section 41 of the CHRA, only plain and obvious cases must be rejected summarily because they cannot be dealt with. Allow me to explain.

...

The Commissioner clearly has very broad discretion to decide not to deal with a disclosure or not to investigate under section 24 of the Act. This stems not only from the grammatical and ordinary sense of the terms used, but also from the context, such as the type of reasons that the Commissioner may rely on to justify his decision. For example, under paragraph 24(1)(b), the Commissioner may decide not to commence an investigation because the subject-matter of the disclosure or the investigation is not sufficiently important, and under paragraph 24(1)(f), he or she may decide that there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation. This suggests a considered analysis rather than a summary review. The Act sets no time limit for deciding this question, or for filing a disclosure after a wrongdoing has been committed.

²⁶⁵ *Ibid* at paras 5, 7.

²⁶⁶ *Agnaou v Canada (Attorney General)*, 2015 FCA 29; see also *Agnaou v Canada (Attorney General)*, 2015 FCA 30, released the same day.

It is also clear that although the person making a disclosure has a certain interest in the case, the purpose of the Act is to denounce and punish wrongdoings in the public sector and, ultimately, build public confidence in the integrity of federal public servants. The public interest comes first, and it is the Commissioner's responsibility to protect it. This explains why, for example, the Commissioner may decide that the subject-matter of the disclosure is not sufficiently important; conversely, he or she may expand an investigation and consider wrongdoings uncovered in the course of that investigation without the need for any disclosure to have been made (section 33 of the Act).

The role of the Commissioner is crucial. The Commissioner is the sole decision-maker throughout the process. He or she has the power not only to refuse to investigate, but also to recommend disciplinary action against public servants who engage in wrongdoings. Among other things, the Commissioner may also report on "any matter that arises out of an investigation to the Minister responsible for the portion of the public sector concerned or, if the matter relates to a Crown corporation, to its board or governing council" (section 37 of the Act).²⁶⁷

The Court of Appeal also highlighted the differences between the Commissioner's discretion in deciding whether to deal with the subject matter of disclosures, as discussed above, and the Commissioner's discretion with respect to complaints of reprisals. The Court stated:

Parliament has established a very different process for reprisal complaints. In fact, this process is similar to the one provided for in the CHRA. There too, the public interest is a major concern. The disclosure of wrongdoings must be promoted while protecting the persons making disclosures and other persons taking part in an investigation into wrongdoings. However, as is often the case for complaints filed under the CHRA, reprisals complained of have a direct impact on the careers and working conditions of the public servants involved. The Act provides that a specific tribunal shall be established to deal with such matters, and that the Tribunal will be able to grant remedies to complainants, as well as impose disciplinary action against public servants who commit wrongdoings, where the Commissioner recommends it.

In the process applicable to these complaints, the role of the Commissioner is similar to that of the Commission. Like the Commission, he or she handles complaints and ensures that they are dealt with appropriately. To do so, the Commission reviews complaints at two stages in the process before deciding whether an application to the Tribunal is warranted to protect the public servants making disclosures.

...

Like Justice Rothstein (then of the Federal Court) in *Canada Post Corporation*, who had before him a decision dismissing a complaint under section 41 of

²⁶⁷ *Ibid* at paras 57, 59-61.

the CHRA, I find that at the admissibility stage, the Commissioner must not summarily dismiss a reprisal complaint unless it is plain and obvious that it cannot be dealt with for one of the reasons described in subsection 19.1(3) of the Act. This interpretation respects Parliament's intention that complaints be dealt with in a particularly expeditious manner (within 15 days) at this first stage in the process. It is also consistent with the principle generally applied when a proceeding is summarily dismissed, thereby depriving the complainant of his or her right to a remedy. Finally, a cursory review of the complaint at this preliminary stage also avoids duplicating the investigation and repeating the exercise set out in subsection 20.4(3) of the Act.²⁶⁸

Subsequently, in *Agnaou c Canada (Procureur général)* (*Agnaou FC*), the Federal Court considered that same whistleblower's application for judicial review of the decision of the Commissioner to dismiss the reprisal complaint filed at the Office of the Public Sector Integrity Commissioner.²⁶⁹ Martineau J. provided the following summary of the process by which the commissioner may refer a reprisal complaint to the Tribunal if, after receipt of an investigation report, the Commissioner is of the opinion that the referral is warranted:

In fact, disclosures can be made at various times and at various levels: internally, to a supervisor or senior officer in a department or organization (section 12); externally, to the Commissioner (section 13), or, if there is not sufficient time to make the disclosure of a serious offence under an Act of Parliament or an imminent risk of substantial and specific danger, the disclosure may be made to the public (subsection 16(1)). In this section, as an independent agent of Parliament, the Commissioner plays an essential watchdog role, investigating not only disclosures of wrongdoing that he or she has received from public servants (section 13), but also any other instance of wrongdoing of which he or she may have learned during the course of an investigation or as a result of information provided by a person who is not a public servant (section 33). However, the disclosure system would go ignored if the *Act* did not at the same time ensure the protection of the public servants who made the disclosures.

Here is why, in a distinct manner, the *Act* allows the Commissioner to conduct investigations (sections 19.7 to 19.9), to conduct conciliation (sections 20 to 20.2), and to refer to the Public Servants Disclosure Protection Tribunal Canada [the Tribunal] a reprisal complaint made by a public servant pursuant to section 19.1 of the *Act* if, after receipt of the investigation report pursuant to section 20.3 of the *Act*, the Commissioner is of the opinion that it is warranted (section 20.4). In such cases, the Commissioner can apply to the Tribunal to determine whether a reprisal was taken, for: (a) an order respecting a remedy in favour of the complainant (paragraph 20.4(1)(a) of the *Act*); or (b) an order respecting a remedy in favour of the complainant and an order respecting disciplinary

²⁶⁸ *Ibid* at paras 62-63, 66.

²⁶⁹ 2017 FC 338.

action against any person or persons identified by the Commissioner in the application as being the person or persons who took the reprisal (paragraph 20.4(1)(a) of the *Act*). Clearly, the success of the protection system depends on the expeditiousness of the Commissioner's investigations and the confidence of stakeholders in the remedy mechanisms.

Furthermore, the creation of the Tribunal — a specialized and independent tribunal tasked with determining whether reprisals took place and providing the appropriate remedy, which may include taking disciplinary action against any person who carried out reprisals — is a very different approach from traditional labour relations models (in particular, see *El-Helou and Courts Administration Service, Power and Delage*, 2011 CanLII 93945 (CA PSDPT), 2011-TP-01 at para 48 [*El-Helou 1*]). The importance taken on by the Commissioner's application, once sent to the Tribunal, does not come from the fact that it proves the veracity of its contents, since that is not the case. Nevertheless, the Commissioner's application pursuant to section 20.4 of the *Act* is essential because it allows the Tribunal to carry out its decision-making function and, as required, provide an appropriate remedy (sections 21.7 and 21.8). With respect to reprisals, unlike the Commissioner, the Tribunal has the authority, in the same manner and to the same extent as a superior court of record, to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the application (paragraph 21.2(1)(a) of the *Act*). In addition, it is the judges of the Federal Court or other superior courts who sit on the Tribunal. These judges are therefore particularly well placed to decide on any issue of evidence or law that may arise as part of the Commissioner's application.

It must be remembered that the Commissioner's role is not to determine the credibility of the persons involved or to decide on delicate issues of law, but to decide whether there is an objective basis for justifying that the reprisal complaint be investigated on its merits by the Tribunal. Thus, by holding an investigation into a reprisal complaint (sections 19.3 to 19.7), the investigator, who submits a report and its recommendations to the Commissioner, must not undermine the Tribunal's adjudicative function (*El-Helou v. Courts Administration Service*, 2011 CanLII 93947 (CA PSDPT), 2011-TP-04 at para 43 [*El-Helou 4*]). At the risk of repeating myself, the Commissioner acts as a filter and not as a shield against otherwise allowable reprisal complaints. In fact, paragraph 20.4(3)(a) should be read in correlation with subsection 19.1(1), which states that a public servant or former public servant who has "reasonable grounds" for believing that a reprisal has been taken against him or her may file a complaint. It is in this context that the Commissioner must look at whether "there are reasonable grounds for believing that a reprisal was taken against the complainant" (paragraph 20.4(3)(a)). That being said, the expression "reasonable grounds to believe" refers to a threshold of proof that is less demanding than the "balance of probabilities" standard of proof, which typically applies to civil

trials and before many administrative tribunals, including the Tribunal (*El-Helou* 4 at paras 34-46).

...

On the other hand, the existence of "reasonable grounds" is not the only factor that affects the exercise of the Commissioner's discretion. Among the other relevant factors mentioned by lawmakers in subsection 20.4(3) of the *Act*, the Commissioner is asked to take into account whether the investigation into the complaint could not be completed due to a lack of cooperation on the part of one or more chief executives or public servants (paragraph 20.4(3)(b)); the complaint should be dismissed on any ground mentioned in paragraphs 19.3(1)(a) to (d) (section 19.3 and paragraph 20.4(3)(c)); and, having regard to all the circumstances relating to the complaint, it is in the public interest to make an application to the Tribunal.

In the case at bar, the disputed decision was made under the authority of section 20.5 of the *Act*, which allows the Commissioner, after receipt of the investigation report prepared by an investigator under section 20.3 of the *Act*, to dismiss a reprisal complaint if the Commissioner "is of the opinion that an application to the Tribunal is not warranted in the circumstances, he or she must dismiss the complaint", hence the present application for judicial review.²⁷⁰

In this case, Martineau J. ultimately allowed the application for judicial review and set aside the Commissioner's decision (although it should be noted that the Commissioner had also decided that it was in the public interest to revoke that decision).²⁷¹ The Court ordered that the Commissioner apply under section 20.4(1) to the Tribunal to deal with the reprisal complaint.

The Tribunal issued a final decision on the merits in Me Agnaou's case in 2019, concluding that Me Agnaou had failed to prove, on a balance of probabilities, that they had made a protected disclosure within the meaning of section 12 of the *PSDPA* or that the alleged reprisal was taken against them because they had made a protected disclosure.²⁷² With respect to the complainant's burden, the Tribunal stated:

The Federal Court and the Tribunal have already established that, in a reprisals complaint, it is for the complainant to demonstrate, on a balance of probabilities, that (1) he or she made a protected disclosure within the meaning of the Act; (2) he or she was the subject of one of the measures listed in the definition of "reprisal" in section 2 of the Act; and (3) the measure was taken against him or her because he or she has made a disclosure, which constitutes reprisals (*Agnaou* 2017 FC 338 at para 7; *Dunn v Indigenous and Northern Affairs Canada and Lecompte*, 2017 PSDPT 3 at

²⁷⁰ *Ibid* at paras 4-7, 9-10.

²⁷¹ *Ibid* at paras 45, 47.

²⁷² *Agnaou v Public Prosecution Service of Canada et al*, 2019 PSDPT 3 at para 5.

para 66 [*Dunn*]; *El-Helou* 4 at para 34, 47-49). These elements flow directly from the definition of reprisals provided for in section 2 of the Act. [...]²⁷³

The Tribunal went on to consider the meaning of “disclosure” in the PSDPA, stating:

The word “disclosure” is not defined in the Act. However, Le Petit Robert defines it as the act of disclosure which is to [translation] “bring to the attention of the public (that which was known to a few). – to unveil, to disclose, to proclaim, to publish, to spread, to reveal (cf. to bring to light; to shout from the rooftops)”. As for the Larousse Dictionary, it defines this term as the [translation] “act of disclosing, of making information public: Disclosure of a secret code”. And it defines *divulguer* (to disclose) as [translation] “to disseminate to the public information that was originally considered secret, confidential; to spread a rumour; to unveil, to uncover: Disclose the name of a suspect”. What is more, in accordance with the context in which the Act was passed and the purpose stated in its preamble, it seems fair to point out that the objective of a disclosure is, for the public servant, to denounce an act that undermines the integrity of the public service, to reveal, to sound the alarm. A person who makes a disclosure is known in popular parlance as a “whistle-blower.”

The very text of section 12 of the Act provides for certain elements. Thus, a disclosure must be made to a supervisor or the designated senior officer. In this case, it is common ground that Me Boileau and Me Morin were indeed supervisors of Me Agnaou on April 1 and 2, 2009.

Second, in my view, a disclosure should communicate any information that could objectively demonstrate that a wrongdoing has been or is about to be committed. To this end, section 8 sets out the categories of wrongdoings covered, including (c) a gross mismanagement in the public sector. Me Agnaou indicated in these emails that the PPSC’s position not to prosecute is contrary to its own policies and to the public interest, and the Federal Court of Appeal determined in *Agnaou* 2015 FCA 29 at paras 78, 83–88, that Me Agnaou’s references may refer to a case of gross mismanagement. I therefore accept that the objective criterion to which the respondents have referred has been met.

...

Even if I accepted Me Agnaou’s argument that only his view counts in deciding whether he had made a disclosure under the Act by sending his

²⁷³ *Ibid* at para 73. In the House of Commons, Standing Committee on Government Operations and Estimates, “Strengthening the Protection of the Public Interest within the Public Servants Disclosure Protection Act” (June 2017) [2017 Review] at 57, online (pdf):

<<https://www.ourcommons.ca/Content/Committee/421/OGGO/Reports/RP9055222/oggorp09/oggorp09-e.pdf>>, the Committee noted that “Under the Act, the whistleblower must demonstrate in court that he or she was effectively the victim of reprisals. All witnesses that spoke about the burden of proof expressed this to be a daunting and quasi-impossible task or, at least, that a reverse onus would level the field for whistleblowers before the Tribunal.”

emails on April 1 and 2, he unfortunately did not prove that it was more likely than not that he himself wanted to make a disclosure under the Act.

According to the evidence, **the element of denunciation, of revelation or of sounding the alarm to which I referred above is absent**. In this regard, I agree with Me Morin when he concludes that if Me Agnaou had wanted to sound the alarm, he would have sent his message to the disclosure protection coordinator at the PPSC, a third party, and not exclusively to the same persons that he alleged having wanted to denounce. It is difficult to conclude that Me Agnaou wanted to disclose, to sound the alarm, to reveal information or to denounce acts, by sending two messages to the exact same people he was accusing. [emphasis added]²⁷⁴

The Tribunal has thus incorporated an element of “denunciation” or “sounding the alarm” into the determination of whether a disclosure has been made. This is not found in the text of the legislation, and may impose a heavy burden on complainants.

The Tribunal went on to consider whether, in the event it was wrong on the matter of whether there was a disclosure, the complainant had established that there was a link between the emails (i.e., the alleged disclosure) and the measure—that his staffing priority had not be respected, and he was “robbed”²⁷⁵ of a job through the reclassification of two positions (i.e., the alleged reprisal). The Tribunal found that there was no evidence of a connection between these:

It should first be noted that I do not agree with the proposition that Me Agnaou raised at the hearing, according to which it would suffice for the complainant to prove that the disclosure was only one of the reasons for taking the measure, and not the only reason, in order to conclude that there were reprisals (transcripts, volume 18, p. 5054).

I also disagree with the other proposition that Me Agnaou set out in his reply, namely, that if we take the position that there must be a causal link between the disclosure and the measure, the protection regime against reprisals will not work (transcripts, volume 19, p. 5325). Me Agnaou did not file any authorities or arguments to support his propositions, while the text of the Act clearly requires that, in order to find reprisals, the measure had to have been taken against the public servant “because the public servant has made a protected disclosure.”

...

Furthermore, even assuming that the Memorandum of Understanding could not have been opposed, or even that the reclassification was not valid, nothing in the evidence shows that it is more likely than not that the measure was taken, in September 2012, because Me Agnaou made a disclosure, in April 2009.

²⁷⁴ *Ibid* at paras 104-106, 109-110.

²⁷⁵ *Ibid* at para 114.

...

Furthermore, proof of the link between the measure and the disclosure also requires, first of all, proof of knowledge, by those who took the measure, of the existence of the disclosure. However, this proof has not been made.²⁷⁶

With respect to the external disclosure, the Tribunal found that Me Agnaou did not demonstrate the existence of a link between the disclosure to the Office of the Commissioner and the reclassification of the positions, and he therefore did not prove that a measure had been taken against him because he made a disclosure.²⁷⁷

7.2.3 Is the PSDPA Effective? Commentary and Review

A 2011 Report that examined the legislation's effectiveness in its first three years by the Federal Accountability Initiative for Reform (FAIR),²⁷⁸ a Canadian non-governmental organization, was scathing in its review of the federal legislation:

When FAIR testified to Parliament we predicted that the legislation would fail, but we could not have imagined how badly. A combination of flawed legislation and improper administration created a system that in three years uncovered not a single finding of wrongdoing and protected not a single whistleblower from reprisals. The Commissioner appointed to protect government whistleblowers resigned in disgrace following a report by the Auditor General condemning her behaviour. The credibility of the entire system is currently in tatters: it needs a complete overhaul.

...

The basic approach of the Act – creating a complete new quasi-judicial process just for whistleblowers – is misguided and suspect, creating a secretive, unaccountable regime, hermetically sealed off from our courts and from the media. Experience has shown that watchdog agencies constituted like this are invariably protective of the establishment and indifferent or even hostile to whistleblowers.

...

The text of the law is a bloated, unwieldy mess. It creates a labyrinth of complex provisions, full of ambiguities, exceptions and repetition, which almost no-one can claim to understand fully. It stands in stark contrast to

²⁷⁶ *Ibid* at paras 125-126, 136, 139.

²⁷⁷ *Ibid* at para 152.

²⁷⁸ The website for the Federal Accountability Initiative for Reform has been inactive since Executive Director David Hutton stepped down. The website included “3,000 pages of valuable whistleblower resource material … [including] original reference works such as ‘The Whistleblower Ordeal’ and ‘How Wrongdoers Operate.’” See Allan Cutler, Sean Bruyea & Ian Bron, Editorial, “Adieu to a Friend, Ally in Accountability Wars” (22 July 2014), online (blog): *Anti Corruption & Accountability Canada* <<http://canadians4accountability.org/2014/07/22/adieu-to-a-friend-ally-in-accountability-wars/>>.

the brevity, simplicity and clarity that we find in whistleblower legislation that has proven to be effective.²⁷⁹

FAIR identified the narrow scope of the law (applying only to workers in the federal public sector), restriction of reporting avenues and exclusion from the courts, restrictions contained in the definition of wrongdoing, weak provisions for the investigation and correction of wrongdoing, and likelihood of complaint rejection as among the failures of the PSDPA.²⁸⁰ In addition, it is possible to interpret the lack of any finding of wrongdoing differently; that is, it could be interpreted as a sign that little wrongdoing has actually occurred. In a 2010 article, for example, Kelly Saunders and Joanne Thibault state:

There are so few real cases of wrongdoing that the public sector as a whole remains woefully unpracticed in working through an actual disclosure. Indeed, in the first two years after Canada's latest whistleblower legislation came into effect, not a single case of wrongdoing was uncovered. In the absence of practice, there are no lessons learned, no "sharpening of the saw" that normalizes the act of disclosure.

...

The limited volume of disclosures since the introduction of stronger mechanisms could mean one of two things. It could mean that the legislation has deterred wrongdoers who are convinced that the code of silence, which still lingers within the public service, will not hold in the face of disclosure protection. Alternatively, it could mean that there really are not many instances of wrongdoing to expose.²⁸¹

The October 2015 G20 Report echoes many of FAIR's negative findings, albeit in less colourful language. The report notes that:

As of September 2015 there are no active cases before the Public Servants Disclosure Protection Tribunal, where retaliation victims can seek remedies and compensation. All six cases recorded have either settled or have been withdrawn. Three of the cases involved long-term employees of Blue Water Bridge Canada who were all fired on 19 March 2013, including the vice president for operations. The PSIC says the former CEO misused public money and violated the code of ethics when he gave two managers severance payments worth \$650,000.

In five of six cases that the Integrity Commissioner has referred to the Tribunal, he has declined to ask the Tribunal to sanction those responsible for the reprisals. **In the one case in which the Commissioner called for**

²⁷⁹ FAIR, *What's Wrong with Canada's Federal Whistleblower Legislation: An Analysis of the Public Servants Disclosure Protection Act (PSDPA)*, (Ottawa: FAIR, 24 February 2011) at 2, online (pdf): <https://web.archive.org/web/20150306013638/http://fairwhistleblower.ca/files/fair/docs/psdpa/whats_wrong_with_the_psdfa.pdf>.

²⁸⁰ *Ibid* at 5–13.

²⁸¹ Kelly L Saunders & Joanne Thibault, "The Road to Disclosure Legislation in Canada: Protecting Federal Whistleblowers?" (2010) 12:2 Pub Integrity 143 at 156.

sanctions, he has since reversed himself and now says there were no reprisals. The whistleblower's lawyer has initiated a judicial review to contest this reversal.

In April 2014 Canada's Auditor General found "gross mismanagement" in the handling of two PSIC cases. The audit criticized 'buck-passing' by top managers, slow handling of cases, the loss of a confidential file, poor handling of conflicts of interest, and the inadvertent identification of a whistleblower to the alleged wrongdoer. [emphasis added] [footnotes omitted]²⁸²

A review of UNCAC implementation by TI, conducted in October 2013, emphasizes the critical need for a review of the Canadian legislation.²⁸³ The review notes that the *PSDPA* does not make public interest the foremost concern in the protection of whistleblowers, and instead emphasizes the balance of rights between duty to one's employer and an employee's freedom of expression.²⁸⁴ Furthermore, the TI review notes that access to justice issues are implicated in Canada's statutory regime:

Whistleblowers often have to bear their own legal costs, while accused wrongdoers will typically have access to the financial and legal resources of the organization. The review also raises questions about the implementation of the *PSDPA*, raising concerns regarding the Commissioner's power to adequately investigate claims of reprisal, the first Commissioner's failure to investigate allegations of reprisals against her own staff, and statistics that show few inquiries by whistleblowers receive full investigations.²⁸⁵

²⁸² Wolfe et al, *supra* note 1 at 29.

²⁸³ Transparency International Canada Inc, *UNCAC Implementation Review Civil Society Organization Report*, (October 2013) at 15, online (pdf):

<https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/t/5e3b09ebfb8df43f9b31c4fb/1580927469051/20131219-UNCAC_Review_TI-Canada.pdf>.

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid* at 16–18. Regarding investigatory powers, the review states at 16 that "[u]nder the PSDPA, the Integrity Commissioner has full powers under Part II of the *Inquiries Act* to investigate disclosures of wrongdoing [s 29]. However, when investigating complaints of reprisals against a whistleblower, the Commissioner is not given comparable powers [ss 19.7-19.9]." In regard to the first Commissioner's tenure, the report states at 17–18:

In 2010, the Auditor General reported that the first Public Sector Integrity Commissioner, Christiane Ouimet, failed to finalize or implement operational guidance to enable investigations to be conducted. The Commissioner's Office failed to robustly investigate complaints: from 2007 to 2010, the Commissioner's Office received 228 disclosures of wrongdoings or complaints; out of these only seven received a formal investigation of the 86 closed operational files, in "many cases" the decision to not formally investigate or otherwise dismiss disclosures of wrongdoing and complaints was not supported by the material in the Commissioner's file. In addition, the Auditor General's investigation found that the Commissioner had engaged in retaliatory action against employees whom the

In 2015, research into the whistleblowing culture in the federal public sector in Canada found that when focus group participants were shown a short informative video about information disclosure, the “most frequently identified aspect of the video to which participants reacted negatively or which created some degree of concern was the prospect of appearing before a tribunal of judges in the case of reprisals.”²⁸⁶

Section 54 of the *PSDPA* mandates a five year review of the legislation. Although long overdue, the first statutory review of the legislation was recently undertaken and in June 2017 the report of the Standing Committee on Government Operations and Estimates was released, titled *Strengthening the Protection of the Public Interest within the Public Servants Disclosure Protection Act.*²⁸⁷ In the course of its review, the Committee held 12 meetings, heard from 52 witnesses, and received 12 briefs. The Committee identified six “main challenges,” as follows:

1. The lack of clarity around the public interest purposes of the Act;
2. The disclosure mechanisms under the Act do not necessarily ensure the protection of the public interest;
3. The Act does not sufficiently protect whistleblowers from reprisals as most of them face significant financial, professional and health-related consequences;
4. The commonly held perception that the federal organizational culture towards the disclosure of wrongdoing seems to discourage it;
5. The mandatory annual reporting as prescribed under the Act is inadequate to provide a meaningful evaluation of the effectiveness of the disclosure mechanisms; and
6. Public servants and external experts lack confidence in the adequate protection of whistleblowers under the Act, notably due to the potential conflicts of interest of those administering the internal disclosure process.²⁸⁸

And made fifteen recommendations.²⁸⁹ In sum, the Committee recommended:

Commissioner believed had complained about her. A new Commissioner was appointed in December 2011.

The review notes, at 18, that between 2007-2013 the Commissioner “[r]eceived 1365 inquiries and 434 disclosures; Began 55 investigations; Completed 34 investigations; Found 5 instances of wrongdoing; and Sanctioned 0 wrongdoers.” [emphasis removed]

²⁸⁶ Phoenix Strategic Perspectives Inc (SPI), *Exploring the Culture of Whistleblowing in the Federal Public Sector*, Prepared for The Office of the Public Sector Integrity Commissioner of Canada (Ottawa: December 2015) at 21, online (pdf): <http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/office_public_sector_integrity_commissioner/2016/2015-12-e/report.pdf>.

²⁸⁷ 2017 Review, *supra* note 273.

²⁸⁸ *Ibid* at 1.

²⁸⁹ *Ibid* at 95-99.

1. Expanding the definitions of the terms “wrongdoing” and “reprisal,” and modifying the definition of the term “protected disclosure” under the Act;
2. Amending the legislation to protect and support the whistleblowers and to prevent retaliation against them;
3. Reversing the burden of proof from the whistleblower onto the employer in cases of reprisals;
4. Providing legal and procedural advice, as necessary, to public servants seeking to make a protected disclosure of wrongdoing or file a reprisal complaint;
5. Embedding in the legislation confidentiality provisions of witnesses’ identities;
6. Making the Office of the Public Sector Integrity Commissioner responsible for training, education and oversight responsibilities to standardize the internal disclosure process; and
7. Implementing mandatory and timely reporting of disclosure activities.²⁹⁰

The government response to the report (dated October 16, 2017) stated, in part:

I agree with the opinion of the Committee and its witnesses that improvements are required to the disclosure and protection regime under the *Public Servants Disclosure Protection Act*. We will move forward to implement improvements to the administration and operation of the internal disclosure process and the protection from acts of reprisal against public servants, which will include greater guidance for the internal disclosure process, increased awareness activities and training for public servants, supervisors and managers, and enhanced reporting related to the internal disclosure process and acts of founded wrongdoing. Additionally, within the Open Government Portal, we are implementing a central website where Canadians will be able to access information about acts of founded wrongdoing within federal institutions.

The Government remains committed to providing public servants and the public with a secure and confidential process for disclosing serious wrongdoing in the federal public sector and enhancing protection from acts of reprisal. We remain committed to promoting and sustaining an ethical workplace culture, and to supporting and strengthening Canadians’ confidence in the integrity of the federal public sector. The Government recognizes the importance of making continuous and meaningful

²⁹⁰ *Ibid* at 2.

improvements to the disclosure regime and to the protection from acts of reprisal.²⁹¹

The 2019-2020 *Annual Report* produced by the Treasury Board of Canada, in compliance with section 38.1 of the *PSDPA*, “contains information on disclosure activities in the federal public sector, which includes departments, agencies and Crown corporations as defined in section 2 of the Act,”²⁹² but does not include information on anonymous disclosures or disclosures or complaints made to the Public Sector Integrity Commissioner of Canada. 2019-2020 saw the second lowest number of disclosures in a five year period, with 220 new disclosures received by federal public service organizations.²⁹³ In 2019-2020, there were 216 disclosures received under the *PSDPA* (and four referrals resulting from a disclosure made in another public sector organization), as compared to 269 in 2018-2019 and 291 in 2017-2018.²⁹⁴ Of the 133 active organizations reporting in this year, 24 reported disclosures and 33 reported enquiries.²⁹⁵ And, of the 458 active disclosures in 2019-2020 (many of which being carried over from previous years), 280 (61%) were assessed this year; 116 (41%) of those met the definition of wrongdoing, and 58 (35%) were directed to other recourse processes.²⁹⁶ Only 38 investigations were commenced in 2019-2020 as a result of disclosures received; 3 disclosures led to a finding of wrongdoing, and 11 led to corrective measures.²⁹⁷ Organizations have reported that the increase in disclosures carried over from one year to the next “stems from of a lack of internal investigative capacity or available investigative services.”²⁹⁸ Since 2018, there has been a National Master Standing Order for investigative services made available to organizations in an attempt to mitigate this issue.²⁹⁹

It is difficult to determine what these numbers tell us about the success or failure of the *PSDPA*, beyond the fact that individuals are making internal disclosures of wrongdoing. Without data as to the number of individuals who *perceive* wrongdoing in the workplace, it is impossible to determine whether a high percentage of public sector workers actually blow the whistle on wrongdoing. In the past five years, the number of disclosures received under the *PSDPA* has ranged from a high of 291 in 2017-2018 to a low of 209 in 2016-2017.³⁰⁰ These numbers may indicate that fewer public sector workers disclose wrongdoing in some years, or the numbers may demonstrate that less wrongdoing has occurred in those years. Data

²⁹¹ Letter from the Honourable Scott Brison, PC, MP, to Tom Lukiwski, MP (16 October 2017), “Government Response to the Ninth Report of the Standing Committee on Government Operations and Estimates”, online (pdf): *Parliament of Canada - House of Commons* <https://www.ourcommons.ca/content/Committee/421/OGGO/GovResponse/RP9156489/421_OGGO_Rpt09_GR/421_OGGO_Rpt09_GR-e.pdf>.

²⁹² Treasury Board of Canada Secretariat, *Annual Report on the Public Servants Disclosure Protection Act 2019-2020*, Catalogue No BT1-18E-PDF (Ottawa: Treasury Board of Canada, 2020) [Annual Report] at 1, online (pdf): <<https://www.canada.ca/content/dam/tbs-sct/documents/psm-fpfm/ve/psdpa-psdar/psdpa-psdar-1920-eng.pdf>>.

²⁹³ *Ibid* at 2.

²⁹⁴ *Ibid* at 21.

²⁹⁵ *Ibid* at 22.

²⁹⁶ *Ibid* at 3-4.

²⁹⁷ *Ibid* at 21-22.

²⁹⁸ *Ibid* at 2.

²⁹⁹ *Ibid* at 2.

³⁰⁰ *Ibid* at 21.

gathered from the Public Service Employee Survey includes information related to the perception of an "ethical environment" in the workplace.³⁰¹ The results of the 2019 survey indicate that 50% of public servants felt that they could initiate a formal recourse process without fear of reprisal; generally, the *Annual Report* indicates that "while upward trends in the perception of ethical leadership are important, the downward trend in the rate of awareness about where to go for help in resolving ethical dilemmas or conflicts is a concern."³⁰²

7.3 Ontario Securities Commission Whistleblower Program

On July 14, 2016, the Ontario Securities Commission (OSC) launched a new enforcement initiative called the Office of the Whistleblower. This program is the first paid whistleblower program by a securities regulator in Canada, and largely resembles the Whistleblower Program of the US SEC.³⁰³ The OSC Whistleblower Program allows eligible whistleblowers to report information regarding possible violations of Ontario securities law anonymously and, if the information results in an enforcement action, receive an award of up to \$5 million.³⁰⁴ Since its launch, the OSC Whistleblower Program has awarded more than \$8.6 million to whistleblowers; recently, in November of 2020, it announced that it had awarded \$585,000 to three whistleblowers, who included company outsiders.³⁰⁵

The next section describes in detail the features of the OSC Whistleblower Program, drawing attention to those features that elicited commentary prior to and following the launch of the initiative. This section will also compare features of the OSC and SEC whistleblower programs, drawing attention to significant differences between their eligibility criteria and award determination structures.

7.3.1 Confidentiality

The OSC Whistleblower Program allows individuals to submit information related to potential violations of Ontario securities law to the OSC online or by mail. Anonymous submissions may be made through the program by retaining a lawyer who submits

³⁰¹ *Ibid* at 11.

³⁰² *Ibid* at 12, 14.

³⁰³ Briefly described in Section 5.3. See, generally, "Frequently Asked Questions" (last modified 10 December 2020), online: *US SEC – Office of the Whistleblower* <<https://www.sec.gov/about/offices/owb/owb-faq.shtml>>. The SEC Whistleblower Program was launched following the passage of the *Dodd-Frank Act*, *supra* note 156, in July 2010. See also Steve Szentesi, "The Time Has Come to Reward Competition Act Whistleblowers", Opinion, *Canadian Lawyer* (23 January 2017), online: <<https://www.canadianlawyermag.com/news/opinion/the-time-has-come-to-reward-competition-act-whistleblowers/270375>>.

³⁰⁴ Ontario Securities Commission, News Release, "OSC Launches Office of the Whistleblower" (14 July 2016), online: <http://www.osc.gov.on.ca/en/NewsEvents_nr_20160714_osc-launches-whistleblower.htm>.

³⁰⁵ Ontario Securities Commission, News Release, "OSC awards over half a million to three whistleblowers" (17 November 2020), online:

<https://www.osc.gov.on.ca/en/NewsEvents_nr_20201117_osc-awards-over-half-a-million-to-three-whistleblowers.htm>.

information on a whistleblower's behalf.³⁰⁶ Before the OSC can submit an award to an anonymous whistleblower, the whistleblower will generally be required to provide their identity to the OSC to confirm that they are eligible to receive an award.³⁰⁷ While the OSC policy includes a general commitment to make all reasonable efforts to keep a whistleblower's identity (and any potentially identifying information) confidential, there are specific exceptions. For example, during certain administrative proceedings under section 127 of the *Securities Act* (e.g., an order to terminate registration), disclosure of the whistleblower's identity may be required to allow the respondent an opportunity to make full answer and defence.³⁰⁸

The OSC Whistleblower Program also outlines the OSC's general policy of responding to requests for information relating to a whistleblower's identity (or other possibly identifying information) under the *Freedom of Information and Protection of Privacy Act (FIPPA)*.³⁰⁹ While the OSC takes the position that information requests with respect to identifying information should be denied because specific *FIPPA* provisions protect such information, the ultimate decision to disclose in this context is made by the Information and Privacy Commissioner of Ontario or a court of competent jurisdiction.³¹⁰

Taken together, the OSC's policies regarding the confidentiality of whistleblowers speak to the limits of whistleblower initiatives generally. Dedication to reasonable efforts to maintain confidentiality is important, but due to the nature of administrative law and freedom of information legislation, confidentiality is far from guaranteed in all circumstances. In other words, despite the protections afforded by the OSC Whistleblower Program, whistleblowers are taking some risk of having their identities ultimately disclosed as a result of the information they submit to the Commission.

7.3.2 Eligibility Criteria for Awards

The OSC Whistleblower Program sets out criteria that must be fulfilled before the OSC will consider issuing an award, covering both the information provided by the whistleblower and the characteristics of the whistleblower themselves.

The eligibility criteria that information received from whistleblowers must meet are designed to ensure that awards are only given for novel information that leads to an enforcement action. The information must relate to a serious violation of Ontario securities law, be original information, be voluntarily submitted, be "of high quality and contain sufficient timely, specific and credible facts" relating to an alleged violation of securities law,

³⁰⁶ Ontario Securities Commission, "OSC Policy 15-601: Whistleblower Program" (4 October 2018) [unofficial consolidated version] [Policy Document], s 3, online (pdf): <https://www.osc.ca/sites/default/files/2021-02/pol_20181004_15-601_unofficial-consolidation.pdf>.

³⁰⁷ *Ibid*, s 4.

³⁰⁸ *Ibid*, s 11(a).

³⁰⁹ *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31 [*FIPPA*].

³¹⁰ Policy Document, *supra* note 306, s 12. The OSC cites two specific *FIPPA* provisions in support of its position that identifying information with respect to whistleblowers should be protected from disclosure under the *FIPPA*, *ibid*: s 14(1)(d) (protection of confidential sources of information in a law enforcement context) and s 21(3)(b) (protection of personal information compiled as part of an investigation into possible violations of the law).

and be “of meaningful assistance to Commission Staff in investigating the matter and obtaining an award-eligible outcome.”³¹¹ To be eligible for a whistleblower award, all of these criteria must be met.³¹² Consequently, if, for example, a whistleblower voluntarily provides original information related to a violation that is not of meaningful assistance to the OSC in its investigation, the information will not be eligible for a reward. Simply put, these conditions restrict the availability of whistleblower awards to information that has a direct and tangible impact on an investigation or proceedings.

Section 14(3) of the Policy Document lists disqualifying criteria that will render a piece of information ineligible for a whistleblower award. These criteria reflect several policy goals underlying the OSC Whistleblower Program. If information is misleading, untrue, speculative, insufficiently specific, public or not related to a violation of Ontario securities law, it is ineligible for a whistleblower award. These requirements reflect the purpose of the program, which is to obtain high-quality information regarding potential violations of securities law. Further, information subject to solicitor client privilege is ineligible for a whistleblower award, given the broad systemic interest in maintaining solicitor client privilege.³¹³ Lastly, information obtained by a means that constitutes a criminal offence will

³¹¹ *Ibid*, s 14(1).

³¹² *Ibid*, s 14(2).

³¹³ *Ibid*, s (1), defines “original information” to exclude information obtained by a whistleblower “through a communication that was subject to solicitor-client privilege,” and s 15(1)(d) indicates that the following category is generally ineligible for an award:

[T]hose who obtained information in connection with providing legal services to, or conducting the legal representation of, an employer that is, or that employs, the subject of the whistleblower submission, unless disclosure of that information would otherwise be permitted by a lawyer under applicable provincial or territorial bar or law society rules, or the equivalent rules applicable in another jurisdiction.

Paragraph 15(1)(d) was originally subject to the exceptions listed in s 15(2). However, changes were proposed in 2018: see “OSC Notice and Request for Comment Proposed Change to OSC Policy 15-601 *Whistleblower Program*” (18 January 2018), online: *Ontario Securities Commission* <https://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20180118_15-601_rfc-whistleblower-program.htm>, wherein the OSC described the proposed change as follows:

The proposed change would mean that the exceptions from ineligibility set out in subsection 15(2) of the Policy would not apply to in-house counsel in respect of matters that arise while the in-house counsel is acting in a legal capacity. The change is also intended to further clarify that the Commission does not wish to receive information that is subject to solicitor-client privilege or the provision of which would otherwise be in breach of applicable provincial or territorial bar or law society rules or equivalent rules applicable in another jurisdiction. Specifically, the proposed change clarifies that in Ontario, in-house counsel acting in a legal capacity are ineligible for a whistleblower award because their duty to protect the confidentiality of their clients’ information would preclude them from making a whistleblower submission under the rules governing the legal profession in the province.

These changes were implemented in 2018. For an in-depth discussion of the Policy Document as it stood prior to this change, see Connor Bildfell, “In-House Counsels’ Eligibility for Whistleblower Awards: A Critical and Comparative Analysis” (2017) 49:2 Ottawa L Rev 373.

be ineligible for an award, as the OSC does not want to encourage or be complicit in theft, fraud or other illegal means of acquiring information. These common sense disqualifying criteria ensure that whistleblowers are encouraged to submit only information that is legally obtained and can be sufficiently relied upon to advance an investigation or proceedings.

Section 15 of the Policy Document describes categories of individuals who would “generally be considered ineligible for a whistleblower award.”³¹⁴ Many of these categories refer to roles that render a person ineligible for an award, such as counsel for the subject of the whistleblowing submission or an employee of the Commission or a self-regulatory body. Other provisions disqualify a whistleblower from award eligibility on the basis of their conduct as a whistleblower. For example, section 15(1)(a) excludes individuals from eligibility if they “without good reason refused a request for additional information from Commission Staff.”³¹⁵

It should be noted that awards would generally not be given to “those who obtained or provided the information in circumstances which would bring the administration of the [Whistleblower Program] into disrepute.”³¹⁶ This general language removes the incentive for individuals to engage in disputable activities in pursuit of a financial award, and limits eligibility of awards to those who voluntarily submit original, high-quality information without resorting to illegal means to acquire that information.

While individuals who fall into the categories listed under section 15(1) of the policy will generally be ineligible to receive a whistleblower award, section 15(2) recognizes limited exceptions regarding certain categories. Per section 15(2), a whistleblower who would generally be ineligible under sections 15(1)(e)-(h) may be eligible for awards under certain circumstances. These categories describe individuals who are generally ineligible because of their relationship with the subject of the whistleblower submission.³¹⁷ If a whistleblower who falls into these categories has a reasonable basis to believe that disclosure is necessary to prevent future or continuing substantial injury to the financial interests of the entity or investors, they may be eligible for an award. Further, if one of the excluded whistleblowers has a reasonable basis to believe the subject of the submission is engaged in conduct that will impede investigations, they may be eligible for a whistleblower award.

One unique and controversial feature of the OSC’s whistleblower eligibility criteria is the lack of a requirement that whistleblowers avail themselves of internal reporting and compliance systems before contacting the OSC Whistleblower Program. While the OSC “encourages whistleblowers who are employees to report potential violations … through an internal compliance and reporting mechanism,” this action is not a prerequisite to award

³¹⁴ *Ibid*, s 15(1).

³¹⁵ *Ibid*.

³¹⁶ *Ibid*, s 15(1)(o).

³¹⁷ These provisions exclude the following categories, respectively, from award eligibility subject to the exceptions under s 15(2) of the Ontario Securities Commission, “OSC Policy 15-601: Whistleblower Program” (4 October 2018): e) providers of auditing/external assurance services to the subject of the submission, f) investigators or inquiry participants, g) directors or officers of the subject of the submission, and h) Chief Compliance Officers (or functional equivalents) for the subject of the submission.

eligibility. The decision not to require whistleblowers to report potential violations internally reflects the OSC's belief that "there may be circumstances in which a whistleblower may appropriately wish not to report" to an internal compliance mechanism.³¹⁸

The decision to not include an internal reporting requirement has been criticized by the financial sector, which fears that the OSC Whistleblower Program (and the enticement of financial rewards) could undermine the sector's internal compliance and reporting programs. Critics, in particular issuers, have concerns that the OSC Whistleblower Program is structured such that employees will be tempted to bypass internal compliance systems in pursuit of a financial award.³¹⁹ Some fear that the lack of an internal reporting requirement will "disqualify registrants and reporting issuers from being able to self-identify, self-remediate and self-report in order to qualify for credit for cooperation."³²⁰ While the OSC has attempted to assuage these concerns by considering participation in internal compliance processes as a factor that may increase an award's amount, it is unclear that this satisfies the concerns of issuers.

Another element of whistleblower award eligibility that is regarded as controversial is the issue of culpable whistleblower eligibility. The OSC Whistleblower Program does not disqualify whistleblowers from awards on the basis of their unclean hands, but rather lists culpability as a factor that can decrease the amount of the award offered.³²¹ For the purposes of calculating that the CDN\$1 million threshold of "award eligible outcomes" has been met, any voluntary payments by or payments ordered against entities whose liability is "based substantially" on the conduct of the whistleblower will not be taken into account. Likewise, any portion of sanctions that are awarded against a whistleblower will be subtracted from the award that he or she is otherwise eligible to receive.

For the purpose of comparison, consider the position of the SEC with respect to culpable whistleblowers. Under the SEC Whistleblower Program, whistleblowers are precluded from award eligibility if they have been convicted of a securities-related criminal offence.³²² While the OSC regime does not absolutely preclude this class of whistleblower from receiving an award, it does limit the circumstances in which an individual can benefit from their own complicity. As described above, culpability will have an impact on both the determination of an "award eligible income" and the amount of any award given. Further, the submission of information by the whistleblower to the Commission does not preclude the possibility of

³¹⁸ Policy Document, *supra* note 306, s 16(1).

³¹⁹ John Tuzyk & Liam Churchill, "Commenters Reiterate Concerns about OSC's Proposed Whistleblower Program" (9 May 2016), online: *Blake, Cassels & Graydon LLP* <<https://www.blakes.com/insights/bulletins/2016/commenters-reiterate-concerns-about-oscs-proposed>>.

³²⁰ Jordan Deering and Linda Fuerst, "OSC Releases Further Changes to Proposed Whistleblower Program" (October 2015), online: *Norton Rose Fulbright LLP* <<http://www.nortonrosefulbright.com/knowledge/publications/133609/osc-releases-further-changes-to-proposed-whistleblower-program>>.

³²¹ Policy Document, *supra* note 306, s 17.

³²² Jennifer M Pacella, "Bounties for Bad Behavior: Rewarding Culpable Whistleblowers under the Dodd-Frank Act and Internal Revenue Code" (2015) 17 U Pa J Bus L 345 at 355.

action being taken against the whistleblower.³²³ Together, these measures ensure that the program does not unduly restrict the OSC with respect to the actions it can take against culpable whistleblowers. Rather, it allows OSC staff to evaluate cases as they arise and make an appropriate determination regarding award eligibility and other enforcement actions in the circumstances.

7.3.3 Award Formula

An award eligible outcome can only occur when an order made under section 127 of the *Securities Act* or section 60 of the *Commodities Futures Act* requires the guilty party to pay more than CDN\$1 million in voluntary payments to the OSC or in financial sanctions imposed by the OSC. If an eligible outcome results from a submission of income from an eligible whistleblower, an award of between 5% and 15% can be paid.³²⁴ If the sanctions imposed and/or voluntary payments made amount to over CDN\$10 million dollars, the maximum that will be awarded is generally CDN\$1.5 million.³²⁵ However, if over CDN\$10 million dollars is, in fact, collected, the whistleblower may receive an award between 5% and 15% of the total, to a maximum of CDN\$5 million.³²⁶

The fact that most awards under the OSC Whistleblower Program are not contingent on the actual collection of monetary sanctions has drawn ire regarding where the cost of the program will ultimately fall. The OSC Whistleblower Program allows for the possibility of a whistleblower receiving an award of up to CDN\$1.5 million without any money actually being collected by the OSC. Commentators have, again, drawn a comparison to the SEC Whistleblower Program, which requires tips to result in the collection of monetary sanctions before a whistleblower is eligible for an award. By not tying awards to collection, some commentators fear that the Program's costs will ultimately be borne by compliant issuers (and, ultimately, their shareholders) through increased fees.³²⁷ Whether these concerns will materialize remains to be seen, but it should be noted that any awards greater than CDN\$1.5 million are contingent on collection of funds. Further, given the modest caps (discussed below) on the maximum awards available, the risk that the OSC Whistleblower Program will pass costs onto issuers and investors is necessarily limited.

Section 25 of the Policy Document outlines the factors that ought to be considered by the OSC in determining the award amount. Factors that may increase the amount of a whistleblower award include: the timeliness of the report, the significance of the information provided, the degree of assistance provided, the impact of the information on the investigation/proceeding, efforts to remediate harm caused, whether the whistleblower participated in internal compliance systems, unique hardships experienced by the

³²³ Policy Document, *supra* note 306, s 17.

³²⁴ *Ibid*, s 18(1).

³²⁵ *Ibid*, s 18(4).

³²⁶ *Ibid*, s 18(5).

³²⁷ Cristian Blidariu, et al, "OSC Proposes Large Financial Awards for Whistleblowers" (4 February 2015), online (blog): *McCarthy Tetrault: Canadian Securities Regulatory Monitor* <<http://www.securitiesregulationcanada.com/2015/02/osc-proposes-large-financial-awards-for-whistleblowers/>>.

whistleblower, and contributions made to the OSC's mandate.³²⁸ Factors that may decrease the amount of a whistleblower award include: any erroneous or incomplete information, the whistleblower's culpability, any unreasonable delay in reporting, refusing to assist the OSC or interfering with its investigation, and interfering with internal compliance mechanisms.³²⁹ This broad range of factors allows OSC staff to tailor whistleblower awards such that they are appropriate in all of the circumstances of a particular case and justly compensate a whistleblower who provides actionable information to the OSC.

The OSC Whistleblower Program range of 5% to 15% of imposed sanctions (and the CDN\$1.5 million cap if sanctions are not collected) is relatively low compared to the SEC Whistleblower Program, which offers awards in the range of 10% to 30% of monetary sanctions collected. While this higher range can be attributed, in part, to the requirement of collection under the SEC regime, the OSC Whistleblower Program's financial incentives are arguably relatively modest. Further, the caps on award amounts under the OSC Whistleblower Program forestall excessively large payments being made, whereas the SEC Whistleblower Program (which does not include an award cap) is structured in a way that allows very large payments to be made in the event of a large financial penalty being collected.³³⁰

7.3.4 Anti-Reprisal Provisions

Upon and following the introduction of the OSC Whistleblower Program, the *Securities Act* (Ontario) has been amended to introduce new anti-reprisal provisions for employees who provide information or cooperate with the OSC or other specified regulatory bodies. Part XXI.2 of the *Securities Act* consists of three major components: anti-reprisal protections, contract voiding provisions, and actions relating to reprisal.

First, Part XXI.2 prohibits reprisals against employees by employers in certain circumstances. Section 125.5(2) defines a reprisal, for the purposes of this Part, as "any measure taken against an employee that adversely affects his or her employment." The section further includes a non-exhaustive list of reprisals, including termination of employment, demotion, disciplining, or suspending of an employee, imposition of penalties on the employee, threat of any of the above reprisals, or intimidation or coercion of an employee in relation to their employment.

The anti-reprisal provisions at ss. 121.5(1)-(2) protect employees who provide information regarding potential violations of Ontario securities law, seek advice about providing such information, or express an intention to provide such information. The information can refer to activity that has occurred, is ongoing, or is "about to occur" and the employee's belief of a violation must be reasonable. Further, these provisions are not limited to information provided to the Commission itself, but also information provided to the employer, a law

³²⁸ Policy Document, *supra* note 306, s 25(2).

³²⁹ *Ibid*, s 25(3).

³³⁰ See discussion above.

enforcement agency, or a “recognized self-regulatory organization.”³³¹ In other words, the reach of Part XXI.2 goes beyond participants in the OSC Whistleblower Program and protects employees more generally from reprisals by their employers.

On July 21, 2020, the OSC announced that it had approved a settlement agreement in respect of manners involving, *inter alia*, a reprisal against an internal whistleblower.³³² The settlement included a requirement that the company create an internal whistleblower program:

Additionally, Coinsquare and its subsidiary seeking registration with the OSC (Coinsquare Capital Markets Ltd.) must implement substantial corporate governance improvements. These include establishing independent boards of directors, appointing new CEOs and CCOs, creating an internal whistleblower program and implementing policies and procedures to monitor and assess compliance with Ontario securities law.

“Despite several employees raising concerns about inflated trading volumes, Coinsquare not only stuck with the practice, but lied to investors about it and retaliated against a whistleblower,” said Jeff Kehoe, Director of the Enforcement Branch at the OSC. “Being an innovator in our capital markets is not a free pass to disregard Ontario securities law. All market participants – including those in novel industries – must act honestly and responsibly.”

“This settlement holds the Respondents accountable for their misconduct and requires Coinsquare to implement significant changes to improve their corporate governance,[”] added Mr. Kehoe. **“This case is also an important milestone, as it is the first action we have taken for a reprisal against a whistleblower since important protections for employee whistleblowers were added to Ontario securities legislation in 2016.”** [emphasis added]³³³

The second major feature of Part XXI.2, the contract voiding provision, is found in section 121.5(3). This subsection dictates that a provision of an agreement (including confidentiality agreements) between employers and employees is “void to the extent that it precludes or purports to preclude” the employee from providing information, cooperating with, or testifying before the Commission or a recognized self-regulatory organization. In other words, section 121.5(3) prohibits employers from requiring their employees to give up their

³³¹ *Securities Act*, s 21.1, allows the Commission to recognize self-regulatory organizations (SROs) when “it is satisfied that to do so would be in the public interest.” There are currently two SROs recognized by the Commission: The Investment Industry Regulatory Organization of Canada (IIROC), and the Mutual Fund Dealers Association of Canada (MFDA). See: “Self Regulatory Organizations” (last visited 30 June 2021), online: *Ontario Securities Commission* <<https://www.osc.ca/en/industry/market-regulation/self-regulatory-organizations-sro>>.

³³² Ontario Securities Commission, News Release, “OSC Panel approves settlement with Coinsquare, Cole Diamond, Virgile Rostand and Felix Mazer” (21 July 2020), online: <https://www.osc.gov.on.ca/en/NewsEvents_nr_20200721_osc-panel-approves-settlement-with-coinsquare-diamond-rostand-mazer.htm>. The settlement agreement dated July 16, 2020 is available online at <https://www.osc.ca/sites/default/files/2020-09/set_20200716_coinsquare.pdf>.

³³³ OSC, News Release, *ibid*.

right to provide information regarding potential misconduct to regulatory bodies, including the Commission. The specific inclusion of confidentiality agreements in this section highlights a legislative commitment to prioritize the disclosure of information about potential violations of securities law by employees.

Finally, ss. 121.5(4)-(7) concern actions relating to reprisal. Subsection 121.5(4) states that where a person or company has taken a reprisal against an employee in contravention of subsection (1), without limiting the actions the employee may otherwise take, the employee may “(a) make a complaint to be dealt with by final and binding settlement by arbitration under a collective agreement; or (b) if final and binding settlement by arbitration under a collective agreement is not available, bring an action in the Superior Court of Justice.” Subsection (5) speaks to the burden of proof in such an action, which lies on the person or company to establish that they did not take a reprisal against an employee. Subsection (6) and (7) speak to remedies, which may be one or more of the employee’s reinstatement or “[p]ayment to the employee of two times the amount of remuneration the employee would have been paid by the employer if the contravention had not taken place between the date of the contravention and the date of the order, with interest.”

7.3.5 Future of Whistleblower Awards

In the first two years, the OSC Whistleblower Program generated about 200 tips and was reported to be “very effective in generating tips and shining a light on information that previously would have remained in the shadows.”³³⁴ As discussed, the OSC Whistleblower Program has paid out over CDN\$8.6 million in awards. This includes CDN\$7.5 million in 2019 and CDN\$0.5 million in 2020.³³⁵ Given its first-in-the-nation status, the success of the OSC program could potentially drive the expansion of paid whistleblower protection regimes in Canada, both within the financial sector and beyond it.³³⁶

8. CONCLUSION: WHERE DO WE GO FROM HERE?

An overview of best practices in whistleblower protection and legislation in the US, UK, and Canada prompts an important question: what constitutes “success” in whistleblower protection? Best practices are a measure against which we may judge the scope and

³³⁴ Ontario Securities Commission, News Release, “OSC Whistleblower Program contributing to a stronger culture of compliance” (29 June 2018), online:

<https://www.osc.gov.on.ca/en/NewsEvents_nr_20180629_osc-whistleblower-program-contributing-to-a-stronger-culture-of-compliance.htm>.

³³⁵ Ontario Securities Commission, *Management’s Discussion and Analysis 2020* (16 June 2020), online (pdf): <https://www.osc.ca/sites/default/files/2020-11/Publications_rpt_2020_osc-md-and-a_en.pdf>.

³³⁶ It should be noted that the *Autorité des marchés financiers* (AMF), which regulates securities in Quebec, also launched a whistleblowing program in 2016. The AMF’s regime does not, however, offer rewards to whistleblowers, citing “a review of various whistleblower programs around the world, including in the United Kingdom and Australia,” which did not convince the AMF of the effectiveness of financial incentives. See *Autorité des Marchés Financiers*, Press Release, “AMF Launches Whistleblower Program” (20 June 2016), online: <<https://lautorite.qc.ca/en/general-public/media-centre/news/fiche-dactualites/amf-launches-whistleblower-program-1>>.

comprehensiveness of legislation, but it is impossible to draw conclusions about the true efficacy of whistleblower protection legislation without data on how the legislation is being enforced. In this sense, best practices are of limited use in determining the effectiveness of whistleblower protection, and enacting a law that reflects best practices on paper may not accurately reflect whether whistleblowers are adequately protected in practice.

There is a critical need for research and analysis as to how the law is actually being applied.³³⁷ This has been noted by critics such as David Lewis, AJ Brown, and Richard Moberly, who call attention to academia's focus on the whistleblower as an individual rather than on the institutional response to disclosure:

The vast bulk of whistleblowing research to date has focused on whistleblowers: what makes them report, what they report, how many and how often whistleblowers come forward, and what happens to them. But to understand whistleblowing in context, and especially how whistleblowing can be made more effective, it must be recognized that whistleblower and non-whistleblower behavior, characteristics and outcomes are only one part of the puzzle. Increasingly important is the behavior of those who receive whistleblowing disclosures, and what they do about them. Indeed, while the study of whistleblower behavior and outcomes may remain a necessary and often fascinating focus, from a public policy perspective it is the response to disclosures which is actually the more important field of study – but which is in its relative infancy.³³⁸

Furthermore, the authors emphasize the need for research that will shed light on the extent that whistleblower legislation is being effectively utilized:

Most researchers, policy makers and managers know that legislation, in and of itself, is a blunt instrument for influencing organizational and behavioral change. The question of whether such legislative objectives are being implemented, or what strategies for whistleblower support and protection would be best supported and promoted by legal regimes, depends on knowledge of what actions are actually being taken by organizations and regulators to support whistleblowers in practice. Moreover, these questions depend on how whistleblowers are supported by managers and regulators in a proactive sense, once the disclosure is made, and not simply in reaction to any detrimental outcomes they may begin to suffer.³³⁹

“Successful” whistleblower laws will help to prevent and resolve wrongdoing by encouraging those who witness wrongdoing to disclose information, while also protecting whistleblowers from reprisals in any form. This is what whistleblower protection legislation in the US, UK, and Canada purports to do; however, the words of the legislation alone

³³⁷ The 2017 Review, *supra* note 273 at 91, stated: “Concerning the role of statistics, the Committee is of the view that meaningful and interpretable statistics should be produced with clear indicators to monitor the effectiveness of the Act.”

³³⁸ Lewis, Brown & Moberly, *supra* note 211 at 19.

³³⁹ *Ibid* at 31.

cannot give us a complete picture of the effectiveness of whistleblower protection in these countries. Regular reviews of the legislation are required to determine the impact that the laws have had on encouraging reporting and protecting whistleblowers. Indeed, reviews conducted of Canada's *PSDPA* in 2017 and the UK's *PIDA* in 2020 indicate that the legislation, in both cases, is not fulfilling its potential or purpose.

One potential measure of success is the impact that whistleblower legislation has on encouraging public sector employees who witness wrongdoing to disclose this information. Research methods such as surveys can help us to understand how many employees witness wrongdoing, and of these how many actually submit reports. Changes in reporting rates may help us to evaluate the impact of legislation on information disclosure. Such data has been collected in the US by the Merit Systems Protection Board, discussed in Section 5.1. Another example of a large-scale survey was conducted in Australia: it suggests that 71% of Australian public sector workers observed one of the enumerated types of wrongdoing.³⁴⁰ Of those respondents who observed wrongdoing, "[t]hose who reported the wrongdoing amounted to 39 per cent ... or 28 per cent of all respondents. As shown, almost all these respondents also regarded the wrongdoing that they reported as being at least somewhat serious; very few said they had reported matters they regarded as trivial."³⁴¹ Similar survey data of Canadian public sector employees might help to gauge awareness of the protections offered in the *PSDPA* as well as rates of reporting among those who witness wrongdoing, and qualitative focus group research conducted in 2015 is a good first step in this regard.³⁴²

Careful attention also needs to be paid to access to justice issues; that is, are the systems that are being set up in the legislation actually protecting whistleblowers, and are they *accessible* to those who have faced retaliation as a result of disclosing information? In Canada, the track record of the Public Servants Disclosure Protection Tribunal is ambiguous, at best, with regard to the success of the *PSDPA* in protecting whistleblowers from reprisals. Of the only eight reprisal cases listed on the Tribunal website, five were settled between the parties or through mediation. The Tribunal has released two final decisions on the merits; neither found that reprisals had been taken against the complainants in those cases. In the UK, as mentioned in Section 6, claims that are adjudicated by the Employment Tribunals have a far from even chance of being successful: "Over 70% [of claims made in *PIDA*'s first ten years] ... were settled or withdrawn without any public hearing. Of the remaining 30%, less than a quarter (22%) won."³⁴³ Thus, settlements are common in both the UK and Canada. It is difficult to assess whether the outcomes of these settlements represent successes or failures for the whistleblowers who have faced reprisals; it may be, in fact, that public sector employers readily accede to settlements where complainants have strong reprisal cases. Therefore, more in-depth research is required to understand these outcomes and what these numbers tell us regarding the efficacy of whistleblower protection laws.

³⁴⁰ AJ Brown, Evalynn Mazurski & Jane Olsen, "The Incidence and Significance of Whistleblowing" in AJ Brown, ed, *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (Canberra: ANU E Press, 2008) 25 at 28, online: <http://epress.anu.edu.au/whistleblowing_citation.html>.

³⁴¹ *Ibid* at 31.

³⁴² Phoenix SPI, *supra* note 286 at 21.

³⁴³ Stephenson & Levi, *supra* note 78 at 20.

Overall, while more and different types of research are needed to adequately evaluate whistleblower protections, it is clear that there has been positive movement in the recognition and protection of whistleblowers in the past fifteen to twenty years. Internationally, agreements and conventions such as UNCAC place whistleblower protection at the forefront of the global fight against corruption. In Canada, the *PSDPA* represents the country's first legislative effort to protect federal public sector whistleblowers, and a plethora of other laws have been introduced worldwide in response to the global movement against corruption. In order to ensure that this global legislative movement fulfills its potential, these laws must be utilized by whistleblowers and their protections must be enforced by the relevant institutions and authorities.

CHAPTER 14

CAMPAIGN FINANCE: CONTROLLING THE RISKS OF CORRUPTION AND PUBLIC CYNICISM

MADELINE REID AND DUFF CONACHER*

* The 2018 version of this chapter was written by Madeline Reid under the supervision of Gerry Ferguson. The 2021 version was significantly updated and revised by Duff Conacher.

CONTENTS

- 1. INTRODUCTION**
- 2. METHODS OF FINANCING ELECTION CAMPAIGNS**
- 3. TYPES OF CAMPAIGN FINANCE REGULATION**
- 4. RATIONALES FOR CAMPAIGN FINANCE REGULATION**
- 5. CHALLENGES IN REGULATING CAMPAIGN FINANCE**
- 6. REGULATION OF THIRD-PARTY CAMPAIGNERS**
- 7. INTERNATIONAL**
- 8. US**
- 9. UK**
- 10. CANADA**
- 11. CONCLUSION**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

Campaigning for public office generally requires money. The amount of money required depends on variables such as the size of the jurisdiction, the type of campaigning, the resources deployed, jurisdictional spending limits, and the level of funding that other candidates and/or parties have. While politicians and political parties across the spectrum claim that they need large sums of money to run campaigns and reach voters, their claim lacks evidence that such spending is necessary. While evidence shows that higher spending sometimes correlates with electoral success,¹ North American studies and analysis highlight the difficulty of establishing a causal connection between campaign spending and electoral success and whether other factors, such as being the incumbent candidate, have an equal or greater influence on election outcomes.²

Election campaigns have become increasingly expensive.³ While campaigns at a local level may be volunteer-run with little funding, national campaigns of political party leaders necessitate significant spending. While some expenses, such as campaign and support staff, travel and events, may be justified, others, such as surveys and broadcast advertising, may be questionable. Media outlets often publish survey results during elections, some jurisdictions offer free broadcasting time for party advertisements, and several studies show that the advertising has only a small effect on voters.⁴ The use of instantaneous

¹ OECD, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*, OECD Public Governance Reviews, (Paris: OECD Publishing, 2016) at 22, online:

<https://read.oecd-ilibrary.org/governance/financing-democracy_9789264249455-en#page1>.

² Among many other studies and analyses of campaign spending, see: Steven Sprick Schuster, "Does Campaign Spending Affect Election Outcomes? New Evidence from Transaction-Level Disbursement Data" (2020) 82:4 J Politics 1502; Brandon Barutt & Norman Schofield, "Measuring Campaign Spending Effects in Post-Citizens United Congressional Elections" in Maria Gallego & Norman Schofield, eds, *The Political Economy of Social Choices*, vol 2 (Cham: Springer, 2016) 205, DOI:

<https://doi.org/10.1007/978-3-319-40118-8_9>; Yasmine Bekkouche & Julia Cagé, "The Price of a Vote: Evidence from France, 1993–2014" (2018) CEPR Discussion Paper 12614, online:

<https://cepr.org/active/publications/discussion_papers/dp.php?dpno=12614>; Susan E Scarrow,

"Political Finance in Comparative Perspective" (2007) 10:1 Annu Rev Polit Sci 193, DOI:

<<https://doi.org/10.1146/annurev.polisci.10.080505.100115>>; "Did Money Win" (last visited 25 October 2021), online: *Open Secrets* <<https://www.opensecrets.org/elections-overview/winning-vs-spending?cycle=2020>>; Jordan Press & Joan Bryden, "Money a Factor in 2015 Election Results, But No Guarantee of Success: Analysis", *iPolitics* (3 April 2016), online: <<http://ipolitics.ca/2016/04/03/money-a-factor-in-2015-election-results-but-no-guarantee-of-success-analysis/>>.

³ Ingrid van Biezen, "State Intervention in Party Politics: The Public Funding and Regulation of Political Parties" in Keith Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (London: Routledge, 2011) 191 at 200–201.

⁴ Alexander Coppock, Seth J Hill & Lynn Vavreck, "The Small Effects of Political Advertising Are Small Regardless of Context, Message, Sender, or Receiver: Evidence From 59 Real-time Randomized Experiments" (2020) 6:36 Sci Advances; Jörg L Spenckuch & David Toniatti, "Political Advertising and Election Results" (2018) 133:4 QJ Econ 1981; Johanna Dunaway et al, "The Effects of Political Advertising: Assessing the Impact of Changing Technologies, Strategies, and Tactics" in Napoli, Philip, ed, *Mediated Communication*, vol 7 (De Gruyter Mouton: Berlin, 2018) 431; Joshua L Kalla & David E Broockman, "The Minimal Persuasive Effects of Campaign Contact in General Elections: Evidence From 49 Field Experiments" (2018) 112:1 Am Polit Sci Rev 148; Alan S Gerber et al, "How Large and

communications has also reduced the costs of reaching voters, including the phenomenon of political ads going viral on social media through a combination of sharing by the public and media coverage.⁵

Despite conflicting views on the efficacy of campaign spending, scholars propose several reasons for regulating and limiting campaign finance, including contributions and spending. The need for cash produces various threats to democratic systems, the first being corruption. Politicians may be inclined to reward wealthy campaign backers with favours, influence, or access. Campaign finance also carries other implications for equality and fairness. Unregulated financing may give well-resourced members of society disproportionate influence over electoral debate, electoral outcomes, and elected officials. In addition, without regulation, candidates and parties may face an unfair disadvantage if they lack personal wealth or wealthy supporters. Finally, campaign financing can affect public confidence in the integrity of government and policy-making. Cynicism creeps in when politicians accept hefty donations or benefit from expensive campaign advertising funded by corporations or wealthy individuals. Scandals involving political finance can further erode public confidence.

Campaign finance laws can help address the risks of corruption, inequality, unfairness, and public cynicism. Lawmakers may attempt to reduce these risks by promoting transparency, reducing politicians' reliance on large donors, and encouraging the financing of campaigns through small outlays from a wide range of individuals. Disclosure requirements, contribution limits, and other measures may further these goals. For example, Canada's 2003 spate of campaign finance reform, which restricted donations from individuals, corporations, unions, and other organizations, was likely an attempt to cushion the worst impacts of the sponsorship scandal, which erupted after Quebec advertising firms, that had donated to the federal Liberal Party, received lucrative government contracts in return for little work.⁶ Public funding of election campaigns is another option. The US, UK, and Canada each provide some form of partial public funding. Private fundraising, however, remains indispensable to parties and candidates in all three countries.

Regulation generally targets not only parties and candidates but also third-party campaigners. Third-party campaigners, whether individuals or organizations, fund their own advertising and other activities in support of a candidate or party or issue that may or may not be associated with a specific candidate or party. If parties and candidates are regulated, and third parties are not, private money may shift to support unregulated third-party groups. Even with full public funding of parties and candidates, the use of private

Long-lasting Are the Persuasive Effects of Televised Campaign Ads? Results from a Randomized Field Experiment" (2011) 105:1 Am Polit Sci Rev 135.

⁵ Maria Petrova, Ananya Sen & Pinar Yildirim, "Social Media and Political Contributions: The Impact of New Technology on Political Competition" (2020) Manage Sci, forthcoming, online: <<https://ssrn.com/abstract=2836323>>.

⁶ Lisa Young, "Shaping the Battlefield: Partisan Self-Interest and Election Finance Reform in Canada" in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (Ann Arbor: University of Michigan Press, 2015) [Boatright, *Campaign Finance Laws*] 107 at 111.

money in third-party campaigns would raise concerns in terms of effects on corruption and equality of access and influence in election campaigns and policy-making.

Lawmakers face various stumbling blocks when designing campaign finance regimes. Campaign finance laws may infringe constitutional guarantees, such as freedom of expression, freedom of association, and voting rights. Courts may, however, be willing to allow infringements of constitutional rights for the sake of equality, fairness, public confidence, and the prevention of corruption. Lawmakers also must be careful not to enact regulations that inadvertently favour incumbents by, for example, imposing spending limits that disadvantage challengers.⁷ Other difficulties include anticipating loopholes and defining the scope of regulated activities. Finally, lawmakers face the challenge of determining how to apply old regulatory approaches to new digital campaigning techniques.

Although the US, UK, and Canada impose transparency requirements for parties, candidates, and third-party campaigners, they each take a different approach to the regulation of campaign finance. In the US, freedom of speech jurisprudence has defeated various pieces of the federal campaign finance regime, including spending caps. Caps on contributions to candidates have survived (although they are very high compared to the average annual income level), along with a ban on corporate and union donations. Although transparency requirements in the US apply to parties, candidates, and third parties, transparency is weak for some types of institutional third-party campaigners.⁸ The UK limits spending, but political contributions are uncapped. Further, unlike in Canada, corporations, labour unions, and other entities are permitted to make donations to parties and candidates. Canada caps both contributions and spending at the federal level and in almost every province and territory (although at relatively high levels compared to the average annual income level). Corporations and other organizations are prohibited from making contributions to parties and candidates in almost all Canadian jurisdictions. The federal regime also provides extensive public funding to parties and candidates.

This chapter begins with a summary of how election campaigns are financed and how campaign finance may be regulated. Next, rationales for campaign finance regulation and the challenges involved in designing regulatory measures are set out, followed by a discussion of the regulation of third-party campaigners. Subsequently, the provisions directed at campaign financing in the United Nations Convention Against Corruption (UNCAC) and OECD guidelines are summarized. Finally, the campaign finance laws in Canada, the UK, and the US are examined in detail. For each country, the leading cases on freedom of expression and campaign finance are summarized first, and then each country's regulatory regime and common criticisms of those regimes are set out.

⁷ Yasmin Dawood, "Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context" (2006) 4:2 *Intl J Con L* 269 at 272.

⁸ 52 USC §§ 30104(c),(f); 11 CFR §§ 114.10(b)(1)–(2), 109.10(e)(1)(vi), 104.20(b), 104.20(c)(7)–(9); see also Diana Dwyre, "Campaign Finance Deregulation in the United States: What Has Changed and Why Does It Matter?" in Boatright, *Campaign Finance Laws*, *supra* note 6, 33 at 61.

2. METHODS OF FINANCING ELECTION CAMPAIGNS

2.1 Direct Contributions or Loans to Candidates and Political Parties

Campaigns may be financed by direct contributions to candidates or political parties. Contributions can take the form of cash, goods and services, or loans. In the US, if a political party or third party coordinates spending with a candidate, this spending is viewed as a contribution to the candidate.

2.2 Public Funding

The state may fund political parties and candidates through grants, funding that matches donations, reimbursement of election expenses, tax deductions for donors, per-vote funding, allocation of free or discounted broadcasting time, or other subsidies.

2.3 Independent Expenditures by Third Parties

Individuals and entities other than political parties and candidates may wish to fund advertising and other initiatives to support or oppose the electoral success of a party or candidate. This is referred to as third-party campaigning or outside spending. Individuals and organizations may choose to contribute to a third-party campaigner instead of a candidate or party. Third-party campaigners include individuals, corporations, labour unions, non-profit interest groups, or other organizations, such as the ubiquitous political action committee, or 'PAC,' in the US. Third-party campaign activities sometimes expressly support or oppose a candidate or party. In other instances, third parties advertise about an issue associated with a candidate or political party, often termed 'issue advertising.' Third-party campaigning can be entirely independent of parties and candidates, or third parties may work "in the shadow of political parties" or "in close concert with them."⁹

2.4 Self-Funding

Wealthy candidates for public office may wish to finance their own campaigns with personal resources. Canada imposes limits on candidate self-funding,¹⁰ but jurisprudence on freedom of speech precludes such limits in the US.¹¹

⁹ Anika Gauja & Graeme Orr, "Regulating 'Third Parties' as Electoral Actors: Comparative Insights and Questions for Democracy" (2015) 4:3 *Interest Groups & Advocacy* 249 at 251.

¹⁰ *Canada Elections Act*, SC 2000, c 9 [CEA], s 367(5)–(7).

¹¹ *Buckley v Valeo*, 424 US 1 at 54 (1976) [*Buckley*]; *Davis v Federal Election Commission*, 554 US 724 (2008) [*Davis*].

3. TYPES OF CAMPAIGN FINANCE REGULATION

This section describes the tools used to regulate campaign finance. The regulatory approaches summarized below are often applied not only to general elections, but also to nomination contests, leadership campaigns, and referendums.

Campaign finance regulation should be complemented by other laws promoting integrity in politics, such as rules on lobbying, conflict of interest, and whistleblower protection.¹² Without these rules, the improper influence of money could simply be redirected from campaign finance to other activities like lobbying.¹³

3.1 Transparency Requirements

Justice Brandeis wrote in 1913 that “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁴ Campaign finance regimes often attempt to prevent corruption through the disclosure of political contributions and spending. Disclosure may discourage large donations and deter politicians from rewarding donors or supportive third-party campaigners with favours.¹⁵ Disclosure of contributions and third-party spending, if made before election day (which many jurisdictions do not require), can also help facilitate informed voting, as awareness of the “interested money behind a candidate may give voters insight into what interests the candidate will promote if elected.”¹⁶ Critics of disclosure requirements argue that revealing the identity of donors represents an unacceptable incursion on donors’ privacy interests.¹⁷

3.2 Spending and Contribution Limits

Campaign finance regimes may attempt to curb demand for political money by imposing ceilings on spending by candidates, political parties, and third parties. The supply of political money can be limited by imposing ceilings on donations. Donation caps can help address corruption and equality concerns by encouraging candidates, parties, and third-party campaigners to seek small donations from a broad range of donors.

¹² OECD, *supra* note 1 at 16.

¹³ *Ibid.*

¹⁴ Dwyre, *supra* note 8 at 59, citing Louis Dembitz Brandeis, *Other People’s Money and How the Bankers Use It* (New York: Stokes, 1914).

¹⁵ For example, in the UK, the introduction of disclosure requirements led to embarrassment and scandal, causing some changes in behaviour on the part of parties and donors: see Section 9.3; see also K D Ewing, “The Disclosure of Political Donations in Britain” in K D Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (London: Bloomsbury Publishing, 2006) 57 at 67.

¹⁶ Dwyre, *supra* note 8 at 35, 59; see also Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Surrey: Ashgate Publishing, 2010) at 178.

¹⁷ Dwyre, *supra* note 8 at 62.

3.3 Public Funding

Some campaign finance regimes provide public funding to political parties and candidates. Public funding is intended to dilute the influence of wealthy supporters and level the playing field for small or new parties.¹⁸ However, legislation sometimes favours large parties and incumbents by calibrating funding to electoral performance.¹⁹ Public funding also compensates for falling party incomes and increasing campaign costs,²⁰ which have skyrocketed due to expensive mass media techniques and the professionalization of parties.²¹ Meanwhile, revenues are declining because of falling party membership.²² Public funding, in the form of an annual subsidy based on the votes received during the previous election, can supplement a party's annual income, even if public support and donations decrease.

Another means of reducing reliance on large donations is to allocate free broadcasting time to political parties and candidates. For example, the UK has imposed a blanket ban on paid political advertising on television and radio and provides free airtime to political parties during elections.²³ The scheme aims to reduce demand for money during election campaigns, level the playing field between competitors, and prevent distortion of electoral debate by the wealthy.²⁴ The question remains whether such measures are becoming irrelevant in the age of digital campaigning.

Opponents of public funding argue that taxpayers should not be forced to fund parties with whom they disagree.²⁵ They also point out that public funding of political parties diminishes their participatory character by replacing "labour and fund-raising efforts once provided by party members and interested citizens."²⁶

¹⁸ van Biezen, *supra* note 3 at 200–201.

¹⁹ For example, in *Figueroa v Canada (Attorney General)*, 2003 SCC 37, the Supreme Court of Canada struck down a law stipulating that parties must endorse at least fifty candidates in a general election to access public funding. In the Court's view, this requirement was an unjustifiable infringement of the right to vote in section 3 of the *Charter of Rights and Freedoms* because as the Court noted at para 54, it "exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public." The Court emphasized at para 39 that all parties have something meaningful to contribute to electoral debate, not simply those who are a "genuine 'government option.'" This set the stage for a later ruling by the Court concluding at para 91 that thresholds for some benefits that parties receive from the state were constitutional. Four years later, in *Longley v Canada (Attorney General)*, 2007 ONCA 852, the Ontario Court of Appeal ruled at para 54 that it was constitutionally justifiable to have a legal threshold that required political parties, in order to receive annual per-vote public funding, be supported by two percent of the total number of valid votes cast in the previous election or five percent of the votes cast in the districts in which the party ran candidates.

²⁰ van Biezen, *supra* note 3 at 200–201.

²¹ *Ibid.*

²² *Ibid.*

²³ *Communications Act 2003* (UK), c 21, s 321(2). The ban is discussed further in Section 9.2.2 and 9.3.

²⁴ Eric Barendt, *Freedom of Speech*, 2nd ed (Oxford: Oxford University Press, 2005) at 485.

²⁵ Young, *supra* note 6 at 119.

²⁶ Gauja, *supra* note 16 at 162–63. See also Navraj Singh Ghaleigh, "Expenditure, Donations and

4. RATIONALES FOR CAMPAIGN FINANCE REGULATION

4.1 Corruption and the Appearance of Corruption

If an individual or entity spends large sums supporting a politician's election campaign, the politician may feel obliged to repay the favour. Corruption could come in the form of *quid pro quos*, such as the provision of contracts, licenses, or tax breaks in exchange for large political donations.²⁷ Campaign financing may also produce more subtle yet pernicious forms of corruption. First, politicians often provide wealthy backers with special access.²⁸ As noted by the dissenting justices in *Citizens United v Federal Election Commission (Citizens United)*, access is a precondition for influence in the legislative process.²⁹ Privileged access may also lead to public cynicism. Second, monetary support for a candidate's campaign could taint the candidate's judgment once elected and give wealthy supporters undue influence over lawmakers. There are many opportunities for influence and distortion throughout the legislative process, starting with the decision to introduce bills or amendments in the first place.³⁰ Samuel Issacharoff observes that, after the election, lawmakers may be influenced by gratitude to large donors and a desire to secure "future support in order to retain the perquisites of office."³¹ This can produce a kind of "clientelism," in which private interests capture the powers of the state and obtain "legislation in the private interest."³² Yet the subtlety of such influence may allow politicians to "feel as if nothing improper has occurred."³³ Aside from effective governance issues, the potential for the wealthy to exert undue influence on the legislative process raises obvious equality concerns.³⁴

It may be impossible to separate the influence of large donors and supportive third-party campaigners over lawmakers from the influence of principles, constituents, and other factors.³⁵ An example of this difficulty is provided by *McCormick v United States (McCormick)*, in which the US Supreme Court overturned an elected official's conviction for corruption

Public Funding under the United Kingdom's PPERA 2000 – And Beyond?" in Ewing & Issacharoff, *supra* note 15, 35 [Ghaleigh, "Expenditure, Donations and Public Funding"] at 56.

²⁷ OECD, *supra* note 1 at 23.

²⁸ For example, Sheldon Adelson and his wife donated \$93 million to third-party campaigners in the American general election in 2012; in 2014, three Republican governors attended a donor conference in Las Vegas where each met one-on-one with Adelson: Jordan May, "Are We Corrupt Enough Yet? The Ambiguous Quid Pro Quo Corruption Requirement in Campaign Finance Restrictions" (2015) 54:2 Washburn LJ 357 at 357–58.

²⁹ *Citizens United v Federal Election Commission*, 558 US 310 at 455 (2010) [*Citizens United*].

³⁰ John P Sarbanes & Raymond O'Mara III, "Power and Opportunity: Campaign Finance Reform For the 21st Century" (2016) 53:1 Harv J Legis 1 at 6. Although some studies claim that monetary support does not influence policy outcomes in the US, Sarbanes & O'Mara argue that these studies focus on votes and ignore the potential for influence and distortion at earlier stages in the legislative process.

³¹ Samuel Issacharoff, "On Political Corruption" (2010) 124:1 Harv L Rev 118 at 126.

³² *Ibid* at 127.

³³ Sarbanes & O'Mara, *supra* note 30 at 12.

³⁴ The equality rationale for campaign finance regulation is discussed further in Section 4.2.

³⁵ OECD, *supra* note 1 at 22.

and struck down the law criminalizing the conduct.³⁶ The defendant politician had a long-standing reputation for favouring legislation beneficial to foreign doctors. The defendant was charged with corruption after accepting money from foreign doctors for his election campaign and subsequently sponsored legislation favourable to them. Because this was not a clear *quid pro quo*, the Court held that the defendant's actions did not constitute corruption. Dembitskiy criticizes this decision for its failure to address the appearance of corruption, which may be present even where an elected official is guided by their own principles, not their donors.³⁷

Publicly funded election campaigns help address the risk of corruption, but comprehensive public funding requires public support and political will. If election campaigns continue to be financed wholly or partly through private funds, many argue that corruption can be reduced by encouraging smaller donations from more sources.³⁸ This approach also accords with the argument that contributions are a valid form of participation in electoral debate.³⁹ In the US, micro-donations have become increasingly important in elections.⁴⁰ For example, President Trump raised as much from small donors (contributing \$200 or less) as Clinton and Sanders combined.⁴¹ Ninety-nine percent of the \$229 million raised by Sanders came from individual donors.⁴² In 2008, 38% of contributions to major party candidates seeking nomination came from micro-donors, compared to 25% in 2000.⁴³ From the perspective of corruption, fairness, equality, and public confidence, this trend is promising. On the other hand, some point out that reliance on small individual donations could lead politicians to cater to groups of small donors on the fringes, as opposed to cultivating the electoral support of voters who are more centrist but unlikely to make a donation.⁴⁴

The prevention of corruption is accepted by courts in the US, UK, and Canada as a legitimate justification for the burdens on freedom of expression involved in campaign finance

³⁶ *McCormick v United States*, 500 US 257 (1991) [*McCormick*].

³⁷ Vladyslav Dembitskiy, "Where Else is the Appearance of Corruption Protected by the Constitution? A Comparative Analysis of Campaign Finance Laws after *Citizens United* and *McCutcheon*" (2016) 43:4 Hastings Const LQ 885 at 886.

³⁸ Issacharoff, *supra* note 31 at 118, 137. Quebec's *financement populaire* embodies this approach. At both the provincial and municipal levels, campaign finance scandals have led to the imposition of low contribution caps in the hopes of achieving the "popular financing" of political parties; the scheme is supplemented by public funding: see Maxime Pelletier, "Municipal Political Reform in Quebec: The Myth of 'Popular Finance'" (2014) 43 J Eastern Township Stud 63. Pelletier observes that only a small percentage of voters in Quebec make political contributions and suggests that popular finance will remain a pipe dream if few citizens are interested in donating money to parties and candidates.

³⁹ Sarbanes & O'Mara, *supra* note 30 at 11.

⁴⁰ Richard L Hasen, "The Transformation of the Campaign Financing Regime for US Presidential Elections" in Ewing, Rowbottom & Tham, *supra* note 3, 225 at 229.

⁴¹ Fredreka Schouten, "President Trump Shatters Small-Donor Records, Gets Head Start on 2020 Race", *USA Today* (21 February 2017), online:

<<https://www.usatoday.com/story/news/politics/onpolitics/2017/02/21/president-trump-shattered-small-donor-records/98208462/>>.

⁴² Katelyn Ferral, "One Person, One Algorithm, One Vote: Campaigns are Doing More with Data, for Better or Worse", *The Capital Times* (4 January 2017) 24.

⁴³ Hasen, *supra* note 40 at 229.

⁴⁴ Young, *supra* note 6 at 124.

regulation. The US Supreme Court has further held that preventing corruption or the appearance of corruption is the *only* possible justification for the limits on political speech caused by contribution limits, spending limits, and other campaign finance laws. However, judicial definitions of corruption vary. The majority of the US Supreme Court has defined corruption narrowly to include only direct *quid pro quo* exchanges, not undue influence and access. However, direct *quid pro quos* are almost impossible to prove and are already captured by bribery laws.⁴⁵ The dissenting judges of the US Supreme Court in *Citizens United* argued in favour of viewing corruption as a “spectrum,” noting that “the difference between selling a vote and selling access is a matter of degree, not kind.”⁴⁶

Even under a broader conception of corruption, the anti-corruption rationale for campaign finance regulation fails, according to US courts, to justify some types of regulation.⁴⁷ For example, the majority of the US Supreme Court views the anti-corruption rationale as insufficient to justify restrictions on independent third-party expenditures, as the lack of coordination between the third party and the candidate reduces the value of the expenditure to the candidate, therefore reducing the risk of *quid pro quo* exchanges.⁴⁸ However, others argue that the absence of coordination does not prevent candidates from feeling grateful to third parties who have spent vast sums supporting their candidacies or from wishing to maintain their support for future elections.⁴⁹

4.2 Equality, Fairness, and Participation

Campaign finance regulations are sometimes motivated by the desire to promote equality and fairness in the electoral system. This egalitarian model of campaign finance can be contrasted with the libertarian model. The libertarian model responds to fears that “a regulated marketplace of ideas may result in the entrenchment of the powerful.”⁵⁰ The egalitarian model responds to concerns that “an unregulated marketplace of ideas may result in the entrenchment of the wealthy.”⁵¹ The Supreme Court of Canada has accepted the egalitarian model of campaign finance as a valid legislative choice.⁵² The majority of the US Supreme Court has settled on the libertarian model.⁵³

Various goals are tied to the equality and fairness rationale. First, many argue that campaign finance must be regulated to prevent the wealthy from drowning out other speakers and setting the issue agenda of electoral debate.⁵⁴ Otherwise, under-resourced viewpoints will be lost, and under-resourced citizens will be barred from meaningful participation in debate. In the House of Lords’ decision in *Animal Defenders International v the United Kingdom (Animal*

⁴⁵ Sarbanes & O’Mara, *supra* note 30.

⁴⁶ *Citizens United*, *supra* note 29.

⁴⁷ Barendt, *supra* note 24 at 482.

⁴⁸ Issacharoff, *supra* note 31 at 123.

⁴⁹ See Hasen, *supra* note 40 at 237.

⁵⁰ Dawood, *supra* note 7 at 290.

⁵¹ *Ibid.*

⁵² *Harper v Canada (Attorney General)*, 2004 SCC 33 [Harper] at para 62.

⁵³ The libertarian model is discussed further in Section 5.1.

⁵⁴ See e.g. Janet L Hiebert, “Elections, Democracy and Free Speech: More at Stake than an Unfettered Right to Advertise” in Ewing & Issacharoff, *supra* note 15, 269 at 269.

Defenders HL), Lord Bingham pointed out that, if “the playing field of debate” is not level, views “may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public have been conditioned to accept them.”⁵⁵ The Supreme Court of Canada has similarly emphasized that “[t]o ensure a right of equal participation in democratic government, laws limiting spending are needed to ... ensure that one person’s exercise of the freedom to spend does not hinder the communication opportunities of others.”⁵⁶

Second, many argue that unregulated campaign finance allows the wealthy to disproportionately impact electoral outcomes.⁵⁷ This is sometimes seen as a form of corruption, but a corruption of voters and the electoral system rather than elected officials.⁵⁸ Third, as discussed above, in the context of the anti-corruption rationale, campaign finance regulation seeks to ensure the wealthy do not have disproportionate influence over policy outcomes after the election. Finally, the equality and fairness rationale calls for regulation to level the playing field for parties and candidates. Unregulated campaigns may give candidates with personal wealth or wealthy supporters an unfair advantage. For example, in the US, the so-called “wealth primary” can screen out candidates with insufficient financial heft, which bodes poorly for racial and gender diversity in public office.⁵⁹

In attempting to ensure the wealthy do not wield disproportionate influence over debate, electoral outcomes, and post-election policy, the egalitarian model responds to concerns that wealthy donors and third-party campaigners are unrepresentative of wider society. In the US, studies have found the donor class to be “underrepresentative of most Americans.”⁶⁰ Most donors are “wealthier and older than average Americans, and they are more likely to be white and male than the general population.”⁶¹ Martin Gilen and Benjamin Page found that the policy preferences of wealthy donors differ from non-donors and people of colour.⁶² For example, an American study in 2016 found that 44% of donors giving \$5,000 or more supported the *Affordable Care Act*, compared to 53% of American adults. Likewise, 39% of donors contributing \$1,000 or more supported the Waxman-Markey clean energy bill, compared to 63% of non-donors.⁶³ Even if the policy preferences of the wealthy sometimes

⁵⁵ R (*Animal Defenders International*) v Secretary of State for Culture, Media and Sport, [2008] UKHL 15 [*Animal Defenders HL*] at para 28.

⁵⁶ *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 [*Libman*] at para 47.

⁵⁷ Raymond J La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform* (Ann Arbor, MI: University of Michigan Press, 2008) at 1.

⁵⁸ Issacharoff, *supra* note 31 at 122.

⁵⁹ Sarbanes & O’Mara, *supra* note 30 at 8.

⁶⁰ Hasen, *supra* note 40 at 238.

⁶¹ Sean McElwee, “D.C.’s White Donor Class: Outside Influence in a Diverse City” (2016) at 1, online (pdf): *Demos*

<<https://www.demos.org/sites/default/files/publications/DC%20Donor%20Report%20%28Sean%29.pdf>>.

⁶² Martin Gilens & Benjamin I Page, “Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens” (2014) 12:3 *Perspectives Polit* 564.

⁶³ Sean McElwee, Brian Schaffner, & Jesse Rhodes, “Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections” (2016), online (pdf): *Demos* <https://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf>.

align with those of the general public, John Sarbanes and Raymond O'Mara argue we should not be distracted from the problematic nature of the outsized impact of the wealthy in policy outcomes.⁶⁴

4.3 Informed Voting

Campaign finance regulation is often touted as a means of facilitating informed voting. Measures such as spending and contribution caps prevent well-resourced speakers from drowning out other speakers, thus making space for the effective dissemination of more information and viewpoints. Courts in Canada and Europe have upheld campaign finance regulations on the basis of the informed voting rationale. They interpret constitutional voting rights to include the right to an informed vote.⁶⁵ On the other hand, others argue that informed voting is better served by relaxing campaign finance and allowing unfettered dissemination of information. For example, the majority of the US Supreme Court views spending restrictions as a dangerous limitation on the quantity of information accessible to voters.⁶⁶

4.4 Public Confidence

Various studies in the US, UK, and Canada show falling public confidence in the electoral system, risking the “decay of civic engagement.”⁶⁷ In a UK study by Jennifer vanHeerde-Hudson and Justin Fisher, public opinion was characterized by the perception that “there is just ‘too much money’ in politics”⁶⁸ and the belief that wealthy donors have undue influence over politicians. In a 2012 survey in the US, 77% of respondents thought members of Congress were more likely to act in the interests of those who spent money supporting their election campaigns than they were to act in the public interest.⁶⁹ A 2014 poll indicated that three in four American voters think wealthy individuals have a better shot at influencing elections than the rest of the population has.⁷⁰ In Canada, after decades of corruption scandals at several levels of government, a national survey of 1,513 adult Canadians, released in October 2015, found that: 44% somewhat agreed and 19% completely agreed that “politics has a tendency to corrupt otherwise honest people”; 36% somewhat agreed and 15% strongly agreed with the statement that they would vote for a party that they didn’t really support if the politician or party they support acted unethically; and 14% somewhat

⁶⁴ Sarbanes & O'Mara, *supra* note 30 at 6.

⁶⁵ See e.g., *Harper (Attorney General)*, *supra* note 52 at para 62.

⁶⁶ Buckley, *supra* note 11 at 19.

⁶⁷ Sarbanes & O'Mara, *supra* note 30 at 3.

⁶⁸ Jennifer vanHeerde-Hudson & Justin Fisher, “Public Knowledge Of and Attitudes Towards Party Finance in Britain” (2013) 19:1 Party Politics 41.

⁶⁹ “National Survey: Super PACs, Corruption, and Democracy: Americans’ Attitudes about the Influence of Super PAC Spending on Government and the Implications for our Democracy” (24 April 2012), online: *Brennan Center for Justice* <<https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>>.

⁷⁰ Sarah Dutton et al, “Americans’ view of Congress: Throw ‘em out”, *CBS News* (21 May 2014), online: <<http://www.cbsnews.com/news/americans-view-of-congress-throw-em-out/>>.

agreed and 4% strongly agreed with the statement that political corruption had led them to stop voting.⁷¹

Arguments in favour of stricter campaign finance regulation often raise the issue of voter confidence. For example, in *Canada v Somerville (Somerville)*, the government argued that third-party spending limits are necessary to prevent the perception that lawmakers are more accountable to their wealthy supporters than their electors.⁷² In *Harper v Canada (Harper)*, the Supreme Court of Canada cited public confidence as a permissible justification for third-party spending limits and their limits on freedom of expression.⁷³ The US Supreme Court also accepts that the government may limit free speech to prevent the appearance of corruption, but the majority defines corruption narrowly to include only direct *quid pro quo* exchanges.⁷⁴

4.5 Other Rationales

Campaign fundraising is time-consuming for politicians. Limits on campaign spending may reduce the time politicians spend on fundraising, allowing them to focus on policy development and other valuable functions.⁷⁵ In addition, some argue that unrestrained campaign spending compromises the quality of public debate. For example, Ronald Dworkin argues that if electoral debate is simply a free-for-all, discourse may “be so cheapened as to altogether lose its democratic character.”⁷⁶ Similarly, the Neill Committee in the UK justified a ban on paid political advertising on broadcast media by pointing to the undesirability of a “continuous barrage of party political propaganda.”⁷⁷

5. CHALLENGES IN REGULATING CAMPAIGN FINANCE

5.1 Freedom of Expression and Association

Campaign finance regulation often entails limits on freedom of expression. As the US Supreme Court remarked in *Buckley v Valeo (Buckley)*, “virtually every type of communication in a modern mass democracy is dependent on expenditure.”⁷⁸ Limiting

⁷¹ Ted Rogers Leadership Centre, “Public Perceptions of the Ethics of Canada's Political Leadership” (5 November 2014), online: *Gandalf Group*

<<https://www.gandalfgroup.ca/downloads/2014/Ryerson%20Ethics%20Survey%20-%20Final%20Report%20Nov%205%20-%20TC.PDF>>.

⁷² *Canada (Attorney General) v Somerville*, 1996 ABCA 217 [Somerville] at para 11.

⁷³ *Harper*, *supra* note 52.

⁷⁴ See e.g. *McCutcheon v Federal Election Commission*, 572 US 185 at 206 (2014) [McCutcheon].

⁷⁵ Barendt, *supra* note 24 at 481.

⁷⁶ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000) at 369.

⁷⁷ UK, Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, vol 1 (London: London The Stationery Office, 1998) (Lord Nell of Bladen QC) at 174.

⁷⁸ *Buckley*, *supra* note 11 at 19.

spending and fundraising therefore limits the “quantity of expression.”⁷⁹ Further, campaign finance regulations impact *political* speech, which enjoys a preferred position under US law and stronger protection under the European Convention on Human Rights.⁸⁰ Some regulations also hinder freedom of association by preventing individuals from freely pooling their resources to finance a political message. Governments attempting to restrict spending, fundraising, broadcasting, and other aspects of election campaigns must therefore show that restrictions are a justified infringement of freedom of expression and association.

As Dworkin observes, critics of campaign finance regulation view any restriction of political speech as harmful to democracy, even if that restriction is aimed at enhancing the quality of democracy.⁸¹ These critics focus on the danger posed by government, rather than the wealthy, to democracy and individual freedom. The majority of the US Supreme Court follows this libertarian approach to freedom of speech. In *McCutcheon v Federal Election Commission*, for example, Chief Justice Roberts maintained that the government cannot be trusted to judge the value of certain speech over other speech, “even when the government purports to act through legislation reflecting ‘collective speech.’”⁸²

Dworkin dismisses this libertarian model as “prophylactic overkill.”⁸³ Under Dworkin’s “partnership” model of democracy, citizens participate in elections not only by voting, but by attempting to influence the opinions of others.⁸⁴ Dworkin argues that citizens who lose must be “satisfied that they had a chance to convince others … not merely that they have been outnumbered.”⁸⁵ However, if the “admission price” to political debate is too high, citizens will be denied, based on wealth, the opportunity to make persuasive efforts, “a circumstance … remote from the substance of opinion or argument.”⁸⁶

Many commentators agree with Dworkin, that campaign finance regulation can be a justified limit on freedom of speech. Some proponents of campaign finance reform go further, arguing that restrictions on spending and fundraising, for example, may actually enhance free speech values. Restrictions may prevent the wealthy from drowning out other speakers and thus facilitate the dissemination of a wider range of perspectives. In this vein, Owen Fiss argues that the state can be “a friend of speech,” not just its enemy.⁸⁷ According to Fiss, free speech should protect not only individual self-expression but also popular

⁷⁹ *Ibid.*

⁸⁰ Barendt, *supra* note 24 at 159.

⁸¹ Dworkin, *supra* note 76 at 353.

⁸² McCutcheon, *supra* note 74.

⁸³ Dworkin, *supra* note 76 at 369.

⁸⁴ *Ibid* at 358.

⁸⁵ *Ibid* at 364–65.

⁸⁶ *Ibid* at 364. Dworkin, at 176, also makes the argument that, in a society with a defensible distribution of wealth, “no one … could have the impact on political decisions, just in virtue of money spent in politics, that the rich can now have in the United States.” In this sense, the campaign finance laws struck down by the US Supreme Court do not victimize anyone, as Dworkin notes, they do not make anyone’s position “worse, with respect to the liberty in question, than it would most likely have been in a defensible distribution.”

⁸⁷ Owen M Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996) at 83.

sovereignty.⁸⁸ To accomplish this, “the state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech.”⁸⁹

5.2 Entrenching Incumbents and Differential Impacts on Political Parties

Campaign finance regulations tend to have disproportionate impacts on different parties and candidates. These impacts may be unintended. For example, in Canada, the federal Liberal Party introduced campaign finance measures, which ultimately turned out most favourable to the Conservative Party.⁹⁰ In other instances, partisan finagling may be at work. Raymond La Raja argues that the design of campaign finance regulation can often “be tied to partisan strategies for influencing the value of one faction’s resources relative to one’s rivals.”⁹¹

Most concerning is the potential for campaign finance regulation that favours incumbents.⁹² For example, ceilings on candidate spending may give incumbents an advantage because they already have publicity.⁹³ As a result, critics argue that spending caps “limit competition and undemocratically serve to preserve the *status quo*.⁹⁴ Such arguments are particularly salient in the US, where “elections are candidate-centered and big campaigns are sometimes needed to blast out incumbents.”⁹⁵

Campaign finance regulations may also have differential impacts depending on the ideology and fundraising methods of different political parties. For example, in the UK, restrictions on donations from labour unions would clearly disadvantage the Labour Party. In Canada, scholars pointed out that for years after they were established, “contribution limits have created a persistent funding advantage for the federal Conservative Party”⁹⁶ as it had greater success gathering many small donations from individuals. Because party expenditure is also limited, the Conservative Party often has money left over to spend on attack ads between elections.⁹⁷ The federal New Democratic Party, on the other hand, faced a greater disadvantage than the Liberals and Conservatives after the erosion of public funding in Canada in 2014, since the New Democrats derived a larger portion of their income from the public funding regime.⁹⁸

⁸⁸ *Ibid* at 3–4.

⁸⁹ *Ibid.*

⁹⁰ Colin Feasby, “Canadian Political Finance Regulation and Jurisprudence” in Ewing, Rowbottom & Tham, *supra* note 3, 206 at 217.

⁹¹ La Raja, *supra* note 56 at 6.

⁹² Richard A Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003) at 240.

⁹³ *Ibid*; Barendt, *supra* note 24 at 482.

⁹⁴ Gauja & Orr, *supra* note 9 at 250.

⁹⁵ *Ibid.*

⁹⁶ Feasby, *supra* note 90 at 217; see also Young, *supra* note 6 at 119.

⁹⁷ Feasby, *supra* note 90 at 217, 219.

⁹⁸ Young, *supra* note 6 at 118.

5.3 Loopholes

Loopholes are another challenge in crafting effective campaign finance regimes. The goals of ameliorating corruption, unfairness, and inequality will be subverted if donors simply find new ways to funnel money to politicians. Issacharoff points out that “the perverse ‘hydraulic’ of money finding its outlet” has caused many attempts at campaign finance reform to “backfire.”⁹⁹ For example, after Congress tightened regulations governing party fundraising and spending in the US in 2002,¹⁰⁰ spending by third-party campaigners jumped, suggesting that money was simply redirected to a new outlet.¹⁰¹ Even if campaign finance regulations are skillfully designed to minimize these shifts, prospective donors may direct money to other activities like lobbying to achieve their ends.¹⁰²

5.4 Circumscribing the Scope of Regulated Activities

Another difficulty in designing campaign finance regulations is drawing the line between regulated and unregulated activities. Distinguishing between election activities and general political activities can be difficult, and entities and individuals will always try to fall on the unregulated side of the line.¹⁰³ Third parties might attempt to split costs between election-related spending and general expenses to avoid hitting the thresholds for regulatory requirements.¹⁰⁴ In addition, it may be unclear whether an advertisement on a contentious political issue during an election aims to improve the chances of a particular political party or is merely part of general political debate. Responding to this difficulty, Eric Barendt has argued that the Supreme Court of Canada’s willingness to allow third-party spending limits¹⁰⁵ is based on the incorrect assumption that “a sensible line can be drawn between campaign expenditure on the one hand and expenditure on general political and social discussion”¹⁰⁶ on the other.

Lawmakers may also encounter difficulty in drawing the line between regulated and unregulated time periods. Campaign finance regulation often kicks in when an election begins. However, because election campaigning has become more or less permanent, some commentators argue that lawmakers should approach political finance as a whole rather than focusing on campaign finance alone.¹⁰⁷ Further, contemporary digital campaigning techniques have shifted the timing of expenses. Many costly activities, such as forming databases of voters, occur before the election period begins, allowing expenses for these

⁹⁹ Issacharoff, *supra* note 31 at 120.

¹⁰⁰ Bipartisan Campaign Finance Reform Act of 2002, Pub L No 107-155, 116 Stat 81 [BCRA].

¹⁰¹ Dwyre, *supra* note 8 at 54.

¹⁰² OECD, *supra* note 1 at 16.

¹⁰³ Keith D Ewing & Jacob Rowbottom, “The Role of Spending Controls” in Ewing, Rowbottom & Tham, *supra* note 3, at 85.

¹⁰⁴ *Ibid.*

¹⁰⁵ See e.g. Harper, *supra* note 52.

¹⁰⁶ Barendt, *supra* note 24 at 479–80.

¹⁰⁷ Gauja & Orr, *supra* note 9 at 259.

activities to slip through the regulatory net.¹⁰⁸ On the other hand, an overly broad cap on general party expenditures could impact valuable activities such as policy development.¹⁰⁹

5.5 New Campaigning Techniques

The next challenge in campaign finance is the application of old regulatory regimes to new methods of campaigning. Traditionally, campaign finance regulation is designed with media like television and radio in mind. However, campaigns are increasingly reliant on digital techniques like “micro-targeting,” which involves using data purchased from data companies to predict how particular voters might feel about certain issues and targeting small groups of voters with tailored advertisements.¹¹⁰ Existing regulatory frameworks may be ill-suited to these new techniques. For example, spending caps may be undermined by the difficulty of tracking online and social media expenses.¹¹¹ Further, as discussed in Section 5.4, some activities involved in digital campaigning may take place before the election period begins, allowing expenses for these activities to escape unregulated.¹¹²

6. REGULATION OF THIRD-PARTY CANDIDATES

6.1 The Role of Third-Party Candidates

In this section the proper role of third-party campaigners in elections is debated. On one hand, third parties may provide helpful perspectives and additional information not offered by parties and candidates. As the Alberta Court of Appeal observed in *Somerville*:

The citizenry looks to its community, political and religious leaders, and interest groups for input. Voters want the benefit of the independent advice and information on candidates and parties from others with similar ideologies and without the self interest involved in candidate and party advertising.¹¹³

The Alberta Court of Appeal noted further that, without third-party campaigners, voters would only receive the information politicians and the media choose to disseminate.¹¹⁴ This is particularly problematic in relation to issues avoided by political parties as “non-winners” since their positions on such issues are “critical to the voter.”¹¹⁵ The dissent in *Harper* echoed these points, arguing that deliberative democracy necessitates giving a voice to unpopular

¹⁰⁸ Damian Tambini et al, *Media Policy Brief 19: The New Political Campaigning* (London: London School of Economics & Political Science, 2017) at 5, online (pdf): <<http://eprints.lse.ac.uk/id/eprint/71945>>.

¹⁰⁹ Ewing & Rowbottom, *supra* note 103 at 81.

¹¹⁰ Ferral, *supra* note 42.

¹¹¹ Tambini et al, *supra* note 108 at 5.

¹¹² *Ibid.*

¹¹³ *Somerville*, *supra* note 72 at para 75.

¹¹⁴ *Ibid* at para 48.

¹¹⁵ *Ibid* at para 76.

views avoided by political parties or candidates.¹¹⁶ In this conception of elections, “parties and third parties are on an equal footing” and third party “voices are seen to be in the interests of either open deliberation or competitive pluralism.”¹¹⁷

On the other hand, many commentators argue that political parties and candidates should be the primary players in elections, rather than unaccountable third-party groups with narrow interests.¹¹⁸ The Royal Commission on Electoral Reform and Party Financing (the Canadian Lortie Commission) summarized this argument:

Parties remain the primary political organizations for recruiting and selecting candidates for election to the House of Commons, for organizing the processes of responsible parliamentary government, and for formulating policy that accommodates and reconciles competing regional and socio-economic interests. As legitimate as interest groups are in a free and democratic society, by their nature they cannot perform these crucial functions.... It is therefore imperative that electoral reform address the fundamental objective of strengthening political parties as primary political organizations.¹¹⁹

In addition, since third-party organizations, such as corporations, do not have the right to vote, some argue they should be barred “from exercising an undue voice within the electoral process.”¹²⁰

The growth of outside spending, suggest some commentators, can deteriorate the centrality of candidates and political parties in campaigns. Diana Dwyre argues that this deterioration is “detrimental to the overall health of American representative democracy” that can lead to a “democratic deficit”¹²¹ and a disenchanted electorate. Parties “link voters to lawmakers” and provide an “accountability mechanism.”¹²² They also give voters an idea of what to expect from candidates.¹²³

6.2 Reinforcing other Campaign Finance Controls

Third-party campaign regulations may help ensure the effectiveness of regulations governing parties and candidates. If party and candidate spending is limited without corresponding limits on third-party spending, parties and candidates may be forced to use their limited spending capacity to “fend off attacks” by third parties rather than advertising

¹¹⁶ Harper, *supra* note 52 at para 14.

¹¹⁷ Gauja & Orr, *supra* note 9 at 263.

¹¹⁸ See e.g. La Raja, *supra* note 57 at 7; Issacharoff, *supra* note 31 at 136, 141; dissenting judgment in *Citizens United*, *supra* note 29.

¹¹⁹ Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report*, vol 1 (Ottawa: Minister of Supply and Services, 1991) (Pierre Lortie) at 13.

¹²⁰ Gauja & Orr, *supra* note 9 at 254.

¹²¹ Dwyre, *supra* note 8 at 35, 53, 57–58.

¹²² *Ibid* at 53, 57–58.

¹²³ Robert G Boatright, “US Interest Groups in a Deregulated Campaign Finance System” in Boatright, *Campaign Finance Laws*, *supra* note 6, 71 [Boatright, “US Interest Groups”] at 99–100.

their policy positions.¹²⁴ The regulation of third parties also prevents circumvention of regulations governing spending, contributions, and transparency for candidates and political parties. A failure to regulate third parties could produce a “waterbed effect” in which front groups are “used to channel spending for parties and candidates.”¹²⁵ Anika Gauja and Graeme Orr add that third-party regulations must prevent organizations from proliferating to circumvent spending caps.¹²⁶

6.3 Freedom of Speech

Third-party spending caps raise particularly potent freedom of expression concerns. Their constitutional validity is therefore controversial. As noted by the Alberta Court of Appeal in *Somerville*, limits on third-party spending “purport … to protect the democratic process, by means of infringing the very rights which are fundamental to a democracy.”¹²⁷

Third-party spending limits have survived freedom of expression challenges in Canada and the UK. However, in the US, caps on independent third-party expenditures have been struck down as an unjustifiable limit on freedom of speech.¹²⁸ Freedom of expression and third-party spending limits are discussed further below in the context of the Canadian cases of *Somerville*,¹²⁹ *Libman v Quebec*,¹³⁰ and *Harper*;¹³¹ the British case of *Bowman v the United Kingdom*;¹³² and the American cases of *Buckley*,¹³³ *Austin v Michigan Chamber of Commerce*,¹³⁴ *McConnell v Federal Election Commission*,¹³⁵ *Citizens United*,¹³⁶ and *SpeechNow.org v Federal Election Commission*.¹³⁷

6.4 Spending and Corruption

A lack of consensus persists regarding the extent to which independent third-party campaigning entails a risk of corruption. Many argue that politicians may be inclined to reward third parties who fund advertising to support their campaigns, even if the third parties act independently. However, American courts, assisted in this conclusion by a narrow definition of corruption, have concluded that independent third-party campaign

¹²⁴ Gauja & Orr, *supra* note 9 at 254. See also Ewing & Rowbottom, *supra* note 103 at 82.

¹²⁵ Gauja & Orr, *supra* note 9 at 254.

¹²⁶ *Ibid* at 263.

¹²⁷ *Somerville*, *supra* note 72 at para 65.

¹²⁸ See *Buckley*, *supra* note 11; *SpeechNow.org v Federal Election Commission*, 599 F (3d) 686 (DC Cir 2010) [*SpeechNow*]; *Citizens United*, *supra* note 29.

¹²⁹ *Somerville*, *supra* note 72.

¹³⁰ *Libman* *supra* note 56.

¹³¹ *Harper*, *supra* note 52.

¹³² *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4 [*Bowman*].

¹³³ *Buckley*, *supra* note 11.

¹³⁴ *Austin v Michigan Chamber of Commerce*, 494 US 652 (1989) [*Austin*].

¹³⁵ *McConnell v Federal Election Commission*, 540 US 93 (2003) [*McConnell*].

¹³⁶ *Citizens United*, *supra* note 29.

¹³⁷ *SpeechNow*, *supra* note 128.

expenditures entail no significant risk of corruption or the appearance of corruption. This debate is summarized in Section 8.3.

6.5 Institutional Third Parties

Institutional campaign spending may carry different implications for the quality of democracy depending on the type of institution in question. Jacob Rowbottom points out that “some institutions can be an important vehicle for participation.... Other institutions, however, may act as a conduit for wealthy individuals and organisations.”¹³⁸ In some cases, the difference between an individual donation and an institutional donation may be meaningless, as when an individual controls the institution and lacks accountability to members.¹³⁹ For example, Robert Boatright notes that some interest groups in the US have a small membership to whom they are accountable, making them look more like for-profit corporations than vehicles for “representing citizens’ views to politicians.”¹⁴⁰ In other cases, institutional spending results from the “pooling of resources among lots of people,”¹⁴¹ which reduces both corruption and equality concerns. This type of institutional spending is also a means of enhancing the effectiveness of small donations.¹⁴² Some institutions may also require “internal debate” before making political expenditures, contributing to the deliberative process.¹⁴³

Blanket prohibitions or caps on institutional political spending may close off healthy “channels for participation.”¹⁴⁴ Rowbottom argues that the design of campaigning controls for institutions should not be based on their status as corporations, unions, or unincorporated associations, but rather on the “democratic credentials of the institution”¹⁴⁵ and its ability to provide an effective channel for citizen participation.

6.5.1 Corporations

For-profit corporations are an example of an institution in which members have little influence over political spending. Rowbottom points out that “since a company does not represent its shareholders (or anyone else) and has its own legal identity ... it may be questioned why companies are legally permissible donors at all.”¹⁴⁶ A corporation’s money

¹³⁸ Jacob Rowbottom, “Institutional Donations to Political Parties” in Ewing, Rowbottom & Tham, *supra* note 3, 11 at 11.

¹³⁹ Hasen, *supra* note 40; Rowbottom, *supra* note 138 at 17.

¹⁴⁰ Boatright, “US Interest Groups”, *supra* note 123 at 100.

¹⁴¹ Rowbottom, *supra* note 138 at 16.

¹⁴² *Ibid.*

¹⁴³ *Ibid* at 18.

¹⁴⁴ *Ibid* at 16.

¹⁴⁵ *Ibid* at 27.

¹⁴⁶ *Ibid* at 22. Note that corporations are impermissible donors to candidates and parties at the federal level in Canada and are also prohibited from making contributions to candidates at the federal level in the US: see Sections 8.2.2 and 10.2(b). Corporations may, however, engage in third-party campaigning in Canada and the US. For an opposing view on the role of corporations in elections, see the judgement of Kennedy J in *Citizens United*, *supra* note 29. At 364, Kennedy J maintained that “[o]n certain topics, corporations may possess valuable expertise, leaving them the best

is not the property of the shareholders. If a company makes a political donation or expenditure at odds with the views of a shareholder, the shareholder's only recourse may be, if they hold a small minority of shares, to sell their shares.¹⁴⁷ As noted by the dissent in the American case of *Citizens United*, corporate communications are "at least one degree removed from the views of individual citizens, and ... may not even reflect the views of those who pay for it."¹⁴⁸ If a corporation is closely held or has a controlling shareholder, donations from the corporation could be viewed by candidates and by the public as donations from the controlling individual, raising issues related to corruption and public confidence.¹⁴⁹ Directors are somewhat restrained when directing money to political purposes by their duty to further the company's interests, but this restraint is vaguely defined and therefore not very effective.¹⁵⁰

In the UK, companies are required to obtain a member resolution authorizing any political donations or expenditures in advance.¹⁵¹ However, the resolution "must be expressed in general terms ... and must not purport to authorize particular donations or expenditure."¹⁵² Further, the resolution will have effect for four years.¹⁵³ As a result, this mechanism does little to promote accountability or attenuate the control of the company's management over political spending.

In contrast to for-profit corporations, incorporated interest groups could be a healthy means of participation for small donors wishing to act collectively. Individuals contribute money to the group because of its political agenda, as opposed to for-profit corporations, in which the company's political activities have nothing to do with investor support.¹⁵⁴ Thus, as Rowbottom points out, corporate status "says little about whether donations should be permissible or capped."¹⁵⁵

Issacharoff maintains that for-profit corporations in the US lack the desire and ability to overwhelm elections.¹⁵⁶ Studies indicate that corporate spending is low compared to other third-party spending in the US.¹⁵⁷ Further, after a US Supreme Court decision struck down restrictions on corporate electioneering, there was no explosion in corporate spending.¹⁵⁸ Rather, money has come primarily from wealthy individuals.¹⁵⁹ Issacharoff explains this phenomenon by pointing out that corporations are probably unwilling to risk a backlash by supporting candidates with controversial positions.¹⁶⁰ For example, Target faced a boycott

equipped to point out errors or fallacies in speech of all sorts."

¹⁴⁷ Rowbottom, *supra* note 138 at 22.

¹⁴⁸ *Citizens United*, *supra* note 29 at 419.

¹⁴⁹ Rowbottom, *supra* note 138 at 21.

¹⁵⁰ *Ibid.* at 21.

¹⁵¹ *Companies Act 2006* (UK), c 46, s 366.

¹⁵² *Ibid.*, s 367.

¹⁵³ *Ibid.*, s 368.

¹⁵⁴ Rowbottom, *supra* note 138 at 23.

¹⁵⁵ *Ibid.*

¹⁵⁶ Issacharoff, *supra* note 31 at 130.

¹⁵⁷ *Ibid.*

¹⁵⁸ Boatright, "US Interest Groups", *supra* note 123 at 71.

¹⁵⁹ *Ibid.*

¹⁶⁰ Issacharoff, *supra* note 31 at 130.

in 2010 after contributing to a candidate that opposed same-sex marriage.¹⁶¹ Issacharoff argues that for-profit corporations are more likely to direct their money towards lobbying, which is more effective and discreet.¹⁶²

6.5.2 Labour Unions

Labour unions¹⁶³ are often grouped with corporations in discussions of campaign finance. For example, the dissenting justices of the US Supreme Court in *Citizens United* discussed corporations and unions together, stating that both represent “narrow interests.”¹⁶⁴ However, political spending by labour unions arguably differs from political spending by for-profit corporations in regards to its implications for corruption and equality. Ewing, commenting in the UK context, points out that “the trade union model of party funding is one that involves millions of people of modest means making a small annual contribution to sustain the political process.”¹⁶⁵ In Ewing’s view, “[t]his is precisely what we should be trying to encourage.”¹⁶⁶ Rowbottom adds that unions often have some form of “internal democracy,” such as requirements for internal debate on proposed political spending and measures to promote the accountability of union leaders.¹⁶⁷ For these reasons, Rowbottom argues that union spending is not problematic from the perspective of equality.¹⁶⁸ Nevertheless, unions are the most heavily regulated donors in the UK.¹⁶⁹ In contrast to the thin shareholder resolution requirement for UK corporations, unions in the UK must ballot their members to establish a separate political fund for any political spending.¹⁷⁰ Individual members must then opt in to payments into the fund.¹⁷¹

6.6 Incidence of Third-Party Electioneering in Canada and the UK

Gauja and Orr argue that “there is relatively little demand for ‘big money’ third-party campaigning in parliamentary democracies,” especially those, like Canada and the UK, that are “culturally, rather than legally driven,”¹⁷² to accept limits on third-party spending. In the UK, third parties rarely approach their spending limits, although this could be partly due to gaps in reporting requirements or cost splitting by third parties.¹⁷³ Similarly, third parties in Canada have not generally reached their spending limits.¹⁷⁴ Colin Feasby argues that third

¹⁶¹ Dwyre, *supra* note 8 at 55.

¹⁶² Issacharoff, *supra* note 31 at 131.

¹⁶³ According to Gauja and Orr, labour unions are the most active third-party campaigners in the UK, Canada, New Zealand, and Australia: Gauja & Orr, *supra* note 9 at 268.

¹⁶⁴ *Citizens United*, *supra* note 29 at 412.

¹⁶⁵ Keith D Ewing, “The Trade Union Question in British Political Funding” in Ewing, Rowbottom & Tham, *supra* note 3, 54 at 72.

¹⁶⁶ *Ibid.*

¹⁶⁷ Rowbottom, *supra* note 138 at 24.

¹⁶⁸ *Ibid* at 25.

¹⁶⁹ *Ibid* at 23.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Gauja & Orr, *supra* note 9 at 268.

¹⁷³ Ewing & Rowbottom, *supra* note 103 at 82, 88.

¹⁷⁴ Feasby, *supra* note 90 at 212.

parties in Canada, up until 2012, have shown little “appetite … for big money campaigns,” while the “lack of co-ordination between third parties suggests that third parties are not affecting electoral fortunes on a national level.”¹⁷⁵ In Canada’s 2008 federal general election, while political parties spent over CDN\$58 million, third-party spending was relatively negligible at just under CDN\$1.5 million.¹⁷⁶ In the 2015 federal general election, 104 third parties collectively spent over CDN\$6 million on election advertising, but spending limits were much higher in 2015 because of the unusually long campaign.¹⁷⁷ Lawlor and Crandall add that third parties are probably not used to circumventing party and candidate contribution limits.¹⁷⁸ Based on these observations, they argue that third-party spending restrictions in Canada seem “to be a preventative rather than a responsive approach.”¹⁷⁹

However, Canada’s 1988 federal general election suggests that third-party spending limits could play a significant role in elections in which a single issue dominates, although such elections are rare in Canada.¹⁸⁰ The 1988 election, during which third-party spending was unlimited, was essentially reduced to a referendum on free trade.¹⁸¹ Most of the CDN\$4.7 million spent by third-party campaigners was directed toward the free trade issue and four times more money went toward promoting free trade than opposing it.¹⁸² This indirectly supported the ultimately successful Progressive Conservative Party, which campaigned on a platform supporting free trade. As the Supreme Court of Canada noted in *Libman v Quebec (Libman)*, “[t]he 1988 federal election showed clearly how independent spending could influence the outcome of voting.”¹⁸³

7. INTERNATIONAL

7.1 UNCAC

The United Nations Convention against Corruption (UNCAC) addresses transparency in campaign finance. Article 7(3) of UNCAC states that “[e]ach States Party shall consider taking appropriate legislative and administrative measures … to enhance transparency in

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ The top ten spenders were mainly labour unions: Joan Bryden, “Third Parties Spent \$6-million to Influence 2015 Election”, *The Globe and Mail* (1 April 2016), online:

<<http://www.theglobeandmail.com/news/politics/third-parties-spent-6-million-to-influence-2015-vote/article29491009/>>.

¹⁷⁸ Andrea Lawlor & Erin Crandall, “Understanding Third Party Advertising: An Analysis of the 2004, 2006 and 2008 Canadian Elections” (2011) 54:4 Can Pub Pol'y 509 at 509.

¹⁷⁹ *Ibid* at 527.

¹⁸⁰ *Ibid* at 526.

¹⁸¹ Desmond Morton, “Should Elections be Fair or Just Free?” in David Schneiderman, ed, *Freedom of Expression and the Charter* (Calgary, AB: Thomson Professional Publishing Canada, 1991) 460 at 463.

¹⁸² Royal Commission on Electoral Reform and Party Financing, *supra* note 119 at 337.

¹⁸³ *Libman*, *supra* note 56 at para 51.

the funding of candidatures for elected public office and, where applicable, the funding of political parties.”¹⁸⁴

7.2 OECD

The OECD’s *Guidelines for Multinational Enterprises* advise companies to follow local law on political contributions, stating that “enterprises should … [n]ot make illegal contributions to candidates for public office or to political parties or other political organizations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.”¹⁸⁵ Political financing is also mentioned in the *Recommendation for Further Combating Bribery*, which recommends that companies develop measures to prevent bribery in a range of areas, including “political contributions.”¹⁸⁶

The OECD is showing an increased interest in campaign finance and its consequences for integrity in government. This interest is demonstrated in its 2016 report, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*.¹⁸⁷ The report outlines a recommended policy framework with four “pillars.” First, policy-makers should encourage transparency and accountability through “[c]omprehensive disclosure of income sources of political parties and candidates” and “user-friendly”¹⁸⁸ organization of disclosed information. Second, policy-makers should promote a level playing field through measures such as public funding, spending limits, bans on certain types of private contributions (e.g., contributions from corporations, unions, and other organizations), and rules to limit abuse of state resources.¹⁸⁹ Third, policy-makers should foster a culture of integrity by developing rules in areas like conflict of interest and whistleblower protection.¹⁹⁰ Standards of integrity for private donors are also important in creating a culture of integrity.¹⁹¹ Finally, policy-makers should encourage regular review of campaign finance regimes and ensure compliance through dissuasive sanctions, independent oversight, and the provision of support to political parties to assist in compliance.¹⁹²

¹⁸⁴ United Nations Convention Against Corruption, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005), online (pdf):

<https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

¹⁸⁵ OECD, *Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011) at 48, online (pdf): <<http://mneguidelines.oecd.org/guidelines/>>.

¹⁸⁶ OECD, *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance (Paris: OECD Publishing, 2010), online (pdf): <<http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>>.

¹⁸⁷ OECD, *supra* note 1.

¹⁸⁸ *Ibid* at 65.

¹⁸⁹ *Ibid* at 30.

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid*.

¹⁹² *Ibid* at 31.

8. US

In the US, freedom of speech jurisprudence has led to the demise of various campaign finance regulatory measures.¹⁹³ Commenting on this deregulatory bent, Boatright observes that the US “begins from a different place”¹⁹⁴ compared to some other countries when it comes to the regulation of campaign finance. This “different place” involves a long-standing reluctance to regulate campaign finance and the recognition of third-party campaigner organizations as an integral part of the electoral process.¹⁹⁵ Despite these cultural tendencies and the American courts’ fierce protection of freedom of speech, limits and source restrictions on political contributions and transparency requirements for political spending have survived. However, it should be noted that the amount limits on contributions, ranging from \$2,900 up to \$109,500 in 2021, are high compared to the average annual income in the US.¹⁹⁶ Further, transparency requirements for some types of third parties are weak, allowing political money to be funnelled through non-transparent organizations.¹⁹⁷

The next section focuses on the interaction between free speech and campaign finance regulation, followed by a brief overview of the federal regulatory scheme in the US.

8.1 Constitutional Rights and Campaign Finance Regulation

8.1.1 First Amendment

The First Amendment of the US *Constitution* (the First Amendment) states:

Congress shall make no law … abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹⁹⁸

Political speech enjoys a “preferred position”¹⁹⁹ in American constitutional law. According to the US Supreme Court, “[l]aws that burden political speech are ‘subject to strict scrutiny,’ which requires government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”²⁰⁰ In the context of campaign finance regulation, the US Supreme Court has generally held, beginning with a ruling in 1976, that

¹⁹³ Dwyre notes that recent rulings and regulations made by the Federal Election Commission have contributed further to the relaxation of regulation: Dwyre, *supra* note 8 at 35.

¹⁹⁴ Boatright, “US Interest Groups”, *supra* note 123 at 71.

¹⁹⁵ *Ibid.*

¹⁹⁶ “Contribution Limits for 2021-2022 Federal Elections” (last visited 26 October 2021), online: *Federal Election Commission* <<https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/>>.

¹⁹⁷ See Section 8.3.

¹⁹⁸ US Const amend I.

¹⁹⁹ Barendt, *supra* note 24 at 154. See also Buckley, *supra* note 11 at 14.

²⁰⁰ *Citizens United*, *supra* note 29 at 340, quoting *Federal Election Commission v Wisconsin Right to Life Inc*, 551 US 449 at 464 (2007); see also Deborah A Roy, “The Narrowing Government Interest in Campaign Finance Regulations: Republic Lost?” (2015) 46:1 U Mem L Rev 1.

the only permissible governmental interest in restricting political speech is the prevention of corruption.²⁰¹ Further, the majority of the US Supreme Court has defined corruption narrowly to include only direct *quid pro quo* exchanges.²⁰² In the majority's view, influence and access alone do not raise the spectre of corruption.²⁰³ Kang calls this approach to corruption "disappointingly underdeveloped."²⁰⁴

By narrowly circumscribing the possible justifications for campaign finance regulation, the majority of the US Supreme Court guards against the risk of governmental influence over voters' thoughts and decisions while overlooking the potential for undue influence by the wealthy over public discourse and elected officials. Other interests, such as equality and fairness, are considered insufficiently compelling to justify burdens on First Amendment rights. Thus, the protection of individual freedom is arguably accomplished at the expense of equality between individuals. This libertarian approach to campaign finance accords with the view that the First Amendment is "premised on mistrust of governmental power."²⁰⁵ In line with this mistrust, Chief Justice Roberts of the US Supreme Court maintains that the public must be left to "determine for itself what speech and speakers are worthy of consideration."²⁰⁶

The US Supreme Court's adoption of a libertarian campaign finance model has resulted in the rejection of campaign expenditure limits. However, the Court has concluded that contribution limits are permissible because they pursue the legitimate governmental interest of anti-corruption.²⁰⁷ The Court has also upheld transparency requirements for both expenditures and contributions, although loopholes in statutes allow for both secret donations and spending.²⁰⁸

A contingent of justices on the US Supreme Court has accepted a wider range of justifications for the burdens on political speech associated with campaign finance regulations. At one point, these justices formed the majority of the Court, leading to decisions upholding various campaign finance controls.²⁰⁹ However, from 2006 to 2016, in a series of cases decided by five-four split rulings, that contingent was in the minority in every case. Their earlier decisions were overruled, and several restrictions on donations and spending were removed and public funding systems were ruled unconstitutional.²¹⁰

²⁰¹ See e.g. *Buckley*, *supra* note 12.

²⁰² See e.g. *Citizens United*, *supra* note 29.

²⁰³ *Ibid.*

²⁰⁴ Michael S Kang, "The Brave New World of Party Campaign Finance Law" (2016) 101:3 Cornell L Rev 531 at 534.

²⁰⁵ *Citizens United*, *supra* note 29 at 340.

²⁰⁶ *Ibid* at 341.

²⁰⁷ See e.g. *Buckley*, *supra* note 11.

²⁰⁸ *Ibid*; "Dark Money Basics" (last visited 26 October 2021), online: *Open Secrets* <<https://www.opensecrets.org/dark-money/basics>>.

²⁰⁹ See e.g. *Austin*, *supra* note 134; *McConnell*, *supra* note 135. See Section 8.1.2.2.

²¹⁰ Lawrence Norden, Brent Ferguson & Douglas Keith, *Five to Four* (New York: Brennan Center for Justice, 2016), online (pdf): <https://www.brennancenter.org/sites/default/files/2019-08/Report_Five_to_Four_Final.pdf>.

8.1.2 Jurisprudence on the Constitutional Validity of Campaign Finance Regulation

8.1.2.1 *Buckley v Valeo*

Buckley v Valeo (*Buckley*) is a foundational case for American campaign finance regulation and represents the beginning of the end for expenditure limits in the US.²¹¹ In *Buckley*, the US Supreme Court found that ceilings on independent, uncoordinated third-party campaign expenditures were an unacceptable restriction on political speech under the First Amendment.²¹² In the majority's view, the impugned spending ceiling precluded anyone other than candidates, parties, and the press from making "any significant use of the most effective modes of communication."²¹³ The Court observed that "virtually every type of communication in a modern mass democracy is dependent on expenditure."²¹⁴ Thus, restricting spending "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."²¹⁵

In the Court's view, the government's interest in preventing corruption did not justify the third-party expenditure limits.²¹⁶ The Court held that independent third-party campaign expenditures do not pose the same risk of corruption as large contributions to candidates.²¹⁷ The Court explained that "[t]he absence of prearrangement and coordination of an expenditure with the candidate ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."²¹⁸

The Court also rejected the argument that independent expenditure caps were justified by a governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections."²¹⁹ According to the Court, the idea that "government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."²²⁰ Rather, the First Amendment was intended to promote unfettered dissemination of information and ideas.²²¹ The Court cited similar concerns in striking down a limit on candidate self-funding.²²²

The Court did, however, uphold limits on direct contributions to candidates. First, unlike expenditure ceilings, contribution caps impose only a "marginal," indirect restriction on the contributor's right to free speech.²²³ According to the Court, a "contribution serves as a

²¹¹ *Buckley*, *supra* note 11.

²¹² "Uncoordinated" refers to not being coordinated with candidates. In other words, the spending ceiling at issue applied to independent third-party campaigners.

²¹³ *Buckley*, *supra* note 11 at 19–20.

²¹⁴ *Ibid* at 19.

²¹⁵ *Ibid*.

²¹⁶ *Ibid* at 44.

²¹⁷ *Ibid* at 46.

²¹⁸ *Ibid* at 47.

²¹⁹ *Ibid* at 48.

²²⁰ *Ibid* at 49.

²²¹ *Ibid*.

²²² *Ibid* at 54.

²²³ *Ibid* at 20.

general expression of support for the candidate and his views”²²⁴ and this symbolic expression does not depend on the size of the contribution. Further, the eventual speaker will be someone other than the contributor.²²⁵ Second, the Court found that the contribution limits pursued the permissible objective of preventing corruption and its appearance. According to the Court, contribution limits address the risk that large donations will be “given to secure a political *quid pro quo* from current and potential office holders.”²²⁶ Equally important, contribution limits address “the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”²²⁷

In *Buckley*, the US Supreme Court established several principles that continue to influence American jurisprudence on campaign finance regulation. First, the Court rejected the egalitarian rationale for regulation. Only the anti-corruption rationale was accepted as a legitimate justification for limits on political speech during election campaigns. Second, the Court held that independent expenditures by third parties do not raise a significant risk of corruption. This holding set the stage for the growth of independent third-party spending in American elections by groups such as super-PACs (discussed further below). Finally, the Court distinguished between the First Amendment implications of contributions and expenditures. This explains why the concept of coordination is important in American campaign finance law. If spending by a third party or political party is coordinated with a candidate, it is viewed as a contribution to the candidate. As a result, coordinated expenditures, like contributions, are subject to caps and other restrictions. Only truly independent expenditures are unregulated. Various commentators have criticized this distinction between expenditures and contributions as unworkable in practice.²²⁸ Chief Justice Burger’s dissenting opinion in *Buckley* argued that “contributions and expenditures are two sides of the same First Amendment coin.”²²⁹

8.1.2.2 *Austin v Michigan Chamber of Commerce and McConnell v Federal Election Commission*

The cases of *Austin v Michigan Chamber of Commerce* (*Austin*)²³⁰ and *McConnell v Federal Election Commission* (*McConnell*)²³¹ are no longer in line with the US Supreme Court’s approach to campaign finance regulation. The views expressed in the majority judgements in both cases reflect the views of the dissenting justices in more recent cases on campaign finance regulation.

²²⁴ *Ibid* at 21.

²²⁵ *Ibid*.

²²⁶ *Ibid* at 26.

²²⁷ *Ibid* at 27.

²²⁸ See e.g. Gauja, *supra* note 16 at 182; *Colorado Republican Federal Campaign Committee v Federal Election Commission*, 518 US 604 (1996).

²²⁹ *Buckley*, *supra* note 12 at 241. Burger CJ would have struck down both the expenditure limits and the contribution limits.

²³⁰ *Austin*, *supra* note 134.

²³¹ *McConnell*, *supra* note 135.

In *Austin*, the majority of the US Supreme Court upheld a Michigan law that prohibited corporations from using general funds for independent expenditures in support of or opposition to a candidate's election. Corporations could still pay for political advertising, but were required to use a separate fund.²³² Although the majority appeared to accept the idea, originating in *Buckley*, that political speech may only be burdened in the name of preventing corruption, the majority broadened the concept of corruption to include "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."²³³ Thus, the majority appeared to blend the equality rationale for campaign finance regulation with the anti-corruption rationale. The majority's decision also accepted that the speech of corporations and natural persons may be treated differently since corporate status confers "special benefits ... and present[s] the potential for distorting the political process."²³⁴ This decision was overturned in *Citizens United*, discussed further in Section 8.1.2.4.

In *McConnell*, the majority of the US Supreme Court upheld the ban on "soft money" in the *Bipartisan Campaign Finance Reform Act (BCRA)* of 2002.²³⁵ Soft money referred to unregulated donations to political parties for the purpose of party-building activities, such as issue advertising and voter-turnout efforts. Before the *BCRA*, political parties could raise unlimited funds for these activities.²³⁶ In *McConnell*, the majority held that contributions may be restricted for anti-corruption purposes, as in *Buckley*. However, it expanded the definition of "corruption" beyond the *quid pro quo* to include the risk of undue influence on lawmakers. In the majority's view, the soft money ban was directed toward the legitimate goal of preventing corruption, as it prevented the circumvention of contribution limits. The soft money ban is still in place.

In accordance with *Austin*, the majority in *McConnell* also upheld a provision prohibiting corporations and trade unions from using general funds for independent expenditures on "electioneering communications." Electioneering communications are a category of election advertisements created by the *BCRA* that refer to a candidate in the period before the election. The category is broader than the category of "express advocacy," which involves words like "vote for" or "vote against." The Court noted that corporations were allowed to establish segregated funds to pay for electioneering communications. Further, the same rationale for prohibiting corporations from spending general funds on express advocacy, discussed in *Austin*, also applied to the broader category of electioneering communications. This part of the judgment was overturned in *Citizens United*.

²³² Corporations could only solicit contributions to the segregated political fund from certain persons: *Austin*, *supra* note 134 at 656.

²³³ *Ibid* at 660.

²³⁴ *Ibid* at 661.

²³⁵ *BCRA*, *supra* note 100.

²³⁶ Boatright, "US Interest Groups", *supra* note 123 at 74. For more on soft money see Richard Briffault, "Soft Money, Congress and the Supreme Court" in Ewing & Issacharoff, *supra* note 15, 191.

8.1.2.3 *Davis v Federal Election Commission*

Davis v Federal Election Commission (*Davis*) aligns with current US Supreme Court jurisprudence on campaign finance regulation and freedom of speech.²³⁷ In *Davis*, the majority of the US Supreme Court struck down the “millionaire’s amendment,” a provision of the BCRA stipulating that candidates could benefit from a higher donation ceiling if facing a self-funded opponent whose spending reached a certain threshold. The Court found that the impugned provision was an unjustifiable burden on the freedom of speech of self-funded candidates. In *Buckley*, the Court had already struck down an attempt to cap candidates’ use of personal funds since the cap interfered with candidates’ right to advocate intensively for their election and lacked an anti-corruption purpose.²³⁸ In *Davis*, the Court emphasized “the fundamental nature of the right to spend personal funds for campaign speech” and observed that the millionaire’s amendment imposed “an unprecedented penalty on any candidate who robustly exercises that First Amendment right.”²³⁹ This penalty was not justified by an anti-corruption interest, as using personal funds actually decreases the risk of corruption by reducing candidates’ dependence on donations. Relying on *Buckley*, the Court rejected the idea that egalitarian concerns could justify a burden on First Amendment rights.²⁴⁰ The Court warned that allowing the state to limit political speech for the purpose of furthering equality “would permit Congress to arrogate the voters’ authority to evaluate the strengths of candidates competing for office.”²⁴¹ The majority likened wealth to other “strengths” candidates may have, such as fame or “a well-known family name,” and emphasized that “[t]he Constitution … confers upon voters, not Congress, the power to choose”²⁴² officeholders.

8.1.2.4 *Citizens United v Federal Election Commission*

In *Citizens United*,²⁴³ the majority of the US Supreme Court departed from its earlier decisions in *McConnell* and *Austin*. Although the Court upheld a ban on direct contributions to candidates from corporations and unions, along with various transparency requirements, the majority struck down limits on independent expenditures by corporations and unions. Under the BCRA, corporations and unions were prohibited from using general treasury funds for independent expenditures on express advocacy and electioneering communications. As mentioned above, express advocacy involves the use of “magic words” like “vote for” or “vote against.” Electioneering communications, a category of communications created by the BCRA, refer to a candidate in the period before the election, but fall short of express advocacy. The majority of the Court held that the First Amendment precludes the government from prohibiting the use of general funds for either express advocacy or electioneering communications.

²³⁷ *Davis*, *supra* note 11.

²³⁸ *Ibid* at 738.

²³⁹ *Ibid* at 738–39.

²⁴⁰ *Ibid* at 741.

²⁴¹ *Ibid* at 742.

²⁴² *Ibid*.

²⁴³ *Citizens United*, *supra* note 29.

Writing for the majority, Justice Kennedy began by asserting that the First Amendment restrains government from treating speakers differently based on their identity. Thus, corporations, including for-profit corporations, cannot be treated differently from natural persons in the context of political speech. Restricting some speakers but not others would “deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”²⁴⁴ In Justice Kennedy’s view, the “governing rule” should be “more speech, not less.”²⁴⁵

In response to the majority’s decision on this point, Justice Stevens quipped that “American democracy is imperfect, [but] few … would have thought its flaws included a dearth of corporate money in politics.”²⁴⁶ Justice Stevens disagreed that corporations and natural persons must be treated identically in the electoral context. Rather, in this context, “the distinction between corporate and human speakers is significant.”²⁴⁷ Corporations are not part of “We the People” and carry a special risk of corrupting the electoral process.²⁴⁸ Unlike human speech, corporate speech is “derivative,” and restrictions on corporate speech do not prevent individuals from speaking themselves.²⁴⁹ Further, the amount of money in a corporation’s general account does not reflect public or even shareholder support for the corporation’s political activities.²⁵⁰

The majority went on to find that the impugned provisions amounted to content-based “censorship” and an outright ban on corporate speech.²⁵¹ The dissent disagreed, pointing out that, far from banning corporate speech, the BCRA continued to allow corporations to fund political speech by forming separate segregated fund accounts. However, in Justice Kennedy’s view, creating these accounts was too administratively “burdensome” to be an adequate alternative.²⁵² The dissent also argued that an exception to the prohibition could be carved out for non-profit corporations that raise funds almost exclusively from individuals, like Citizens United. However, to Justice Kennedy, the alternatives suggested by the dissent were unworkable because they would nonetheless “chill … political speech.”²⁵³ Further, according to Justice Kennedy, the “purpose and effect [of the ban on corporate independent expenditures] are to silence entities whose voices the Government deems to be suspect.”²⁵⁴ Although the impugned prohibition was not overtly content-based,

²⁴⁴ *Ibid* at 341.

²⁴⁵ *Ibid* at 361.

²⁴⁶ *Ibid* at 479.

²⁴⁷ *Ibid* at 394.

²⁴⁸ *Ibid* at 465, 454. At 454, Stevens J noted that “[b]usiness corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort … make *quid pro quo* corruption and its appearance inherently more likely when they … spend unrestricted sums on elections.” Stevens J then pointed, at 455, to past instances in which corporations received something from elected officials in exchange for funding independent, uncoordinated issue advertisements.

²⁴⁹ *Ibid* at 466.

²⁵⁰ *Ibid* at 419, 465.

²⁵¹ *Ibid* at 337.

²⁵² *Ibid*.

²⁵³ *Ibid* at 329.

²⁵⁴ *Ibid* at 339.

Justice Kennedy noted that restrictions “based on the identity of the speaker” can be “a means to control content.”²⁵⁵

The majority and the dissent also disagreed on the governmental interests capable of justifying limits on electoral speech. Following *Buckley*, Justice Kennedy held that the government may only limit campaign expenditure in the name of preventing corruption or its appearance. In Justice Kennedy’s view, independent, uncoordinated expenditures do not give rise to corruption or the appearance of corruption. Justice Kennedy reached this conclusion by defining corruption narrowly to encompass only direct *quid pro quo* exchanges. According to the majority, the provision of “influence or access” is not corruption and “will not cause the electorate to lose faith in our democracy.”²⁵⁶ Justice Kennedy attempted to support this proposition by explaining that “[d]emocracy is premised on responsiveness,” and the only reason to vote for or contribute to a candidate is to ensure the candidate “will respond by producing those political outcomes the supporter favors.”²⁵⁷ This seems to suggest that, in Justice Kennedy’s view, big donors *should* benefit from greater influence, or “responsiveness,” than non-donors.

The dissent disagreed with Justice Kennedy’s definition of corruption. First, in the dissident’s view, Justice Kennedy defined *quid pro quo* corruption too narrowly. Justice Stevens argued that *quid pro quo* exchanges need not “take the form of outright vote buying or bribes.... Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder.”²⁵⁸

Second, the dissent would have expanded the definition of corruption beyond the *quid pro quo* exchange:

Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf. Corruption operates along a spectrum, and the majority’s apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.²⁵⁹

Further, the dissent observed that, even if “ingratiation and access” are not corruption, they create the opportunity for and the appearance of *quid pro quo* exchanges.²⁶⁰

The dissent and the majority also disagreed on the validity of *Austin*’s “anti-distortion” rationale for regulating corporate campaign finance. The majority rejected the idea from *Austin* that the state may limit corporate speech to prevent the distortion of electoral debate

²⁵⁵ *Ibid* at 340.

²⁵⁶ *Ibid* at 359–60.

²⁵⁷ *Ibid* at 360.

²⁵⁸ *Ibid* at 452.

²⁵⁹ *Ibid* at 447–48.

²⁶⁰ *Ibid* at 455.

by well-resourced corporations. Relying on *Buckley*, Justice Kennedy held that Congress cannot restrict political speech based on the speaker's wealth or with the goal of equalizing the relative ability of people and entities to influence electoral outcomes.²⁶¹ In Justice Kennedy's view, attempts by Congress to regulate electoral speech for these equality-related purposes would constitute an impermissible attempt to influence voters' choices.²⁶²

The dissent argued in favour of the "anti-distortion" rationale from *Austin*. In the dissident's view, the impugned law represented an acceptable attempt to balance the First Amendment rights of listeners against those of speakers.²⁶³ Corporations amass funds that natural persons cannot, allowing them to flood broadcast media with their communications. Since citizens do not have unlimited time to consider all speech transmitted during an election, "corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints."²⁶⁴ Further, corporate domination of electoral debate could lead individuals to feel cynicism about their own ability to be heard.²⁶⁵ The dissent concluded that *Austin*'s "anti-distortion" rationale was intended to "facilitate First Amendment values by preserving some breathing room around the electoral 'marketplace' of ideas."²⁶⁶

Although the majority struck down the prohibition on the use of corporate and union general funds, they upheld disclaimer and disclosure requirements for entities funding express advocacy and electioneering communications. According to Justice Kennedy, these transparency requirements were justified burdens on speech because they allow "the electorate to make informed decisions and give proper weight to different speakers and messages."²⁶⁷

In October 2014, the Federal Election Commission (FEC) approved new rules in response to *Citizens United*. The rules permit corporations and unions to make independent expenditures on express advocacy and electioneering communications.²⁶⁸ The regulations were also revised to allow corporations and unions to finance partisan voter registration and get-out-the-vote initiatives, as long as these activities are uncoordinated with parties or candidates.²⁶⁹ Funds used for these activities are required to be disclosed if express advocacy is involved and the reporting threshold of \$2,000 is exceeded.²⁷⁰ The FEC further clarified that foreign nationals, national banks, and corporations created by a law of Congress continue to be prohibited from contributing to accounts used to fund electioneering communications.²⁷¹

²⁶¹ *Ibid* at 350.

²⁶² *Ibid*.

²⁶³ *Ibid* at 473. The idea that the First Amendment protects both listeners and speakers is echoed in Fiss' arguments in favour of campaign finance regulation: Fiss, *supra* note 87.

²⁶⁴ *Citizens United*, *supra* note 29 at 472.

²⁶⁵ *Ibid* at 470.

²⁶⁶ *Ibid* at 473.

²⁶⁷ *Ibid* at 371.

²⁶⁸ 11 CFR § 114.4 (2021).

²⁶⁹ *Ibid*, § 114.3(c)(4).

²⁷⁰ *Ibid*, § 114.3(c)(4).

²⁷¹ *Ibid*, § 104.20(c)(7).

8.1.2.5 *SpeechNow.org v Federal Election Commission*

Political action committees, or PACs, are organized under section 527 of the *Internal Revenue Code*.²⁷² So-called “traditional PACs” coordinate at least some of their spending with candidates. This coordinated spending is treated as a contribution to the candidate. Prior to the US Supreme Court’s decision in *SpeechNow.org v Federal Election Commission (SpeechNow)*, contributions to all PACs were subject to the same restrictions as contributions to candidates.²⁷³ For example, PACs could not accept donations over \$5,000, just like candidates. These restrictions were intended to prevent donors from circumventing caps on donations to candidates, as prospective donors could, in the absence of such restrictions, simply create a PAC, donate large amounts to the PAC, and direct the PAC to engage in coordinated spending with the candidate.

In *SpeechNow*, a PAC organized solely to make uncoordinated expenditures challenged the contribution cap.²⁷⁴ The District of Columbia Circuit Court sided with SpeechNow.org on the basis that restricting independent expenditures does not serve the governmental interest of preventing corruption or its appearance. This decision hatched the “super-PAC,” or “independent-expenditure-only PAC,” which engages solely in uncoordinated spending and therefore has unlimited fundraising and spending capacity. The Court did, however, uphold registration and disclosure requirements for super-PACs. After this decision, the FEC released an advisory opinion clarifying that the combined effect of *Citizens United* and *SpeechNow* is to allow corporations and unions to contribute unlimited amounts to super-PACs.²⁷⁵

8.1.2.6 *McCutcheon v Federal Election Commission*

In *McCutcheon v Federal Election Commission (McCutcheon)*, the US Supreme Court struck down the BCRA’s aggregate limits on contributions from a single contributor to different candidates, national party committees, and traditional PACs.²⁷⁶ However, the Court upheld the base limits on contributions per election to a single candidate and the base limits on contributions per year to national party committees and traditional PACs. The Court also upheld disclosure requirements for contributions. The majority pointed out that disclosure serves a valuable informational role for the electorate and deters corruption. In the majority’s view, disclosure requirements are preferable to contribution caps, as limiting contributions could provoke the movement of money into less transparent campaigning vehicles.²⁷⁷

Chief Justice Roberts, for the majority, found that the aggregate limits imposed a significant infringement on freedom of speech and association since a “donor must limit the number of candidates he supports and may have to choose which of several policy concerns he will

²⁷² 26 USC § 527 (2019).

²⁷³ *SpeechNow*, *supra* note 128.

²⁷⁴ *Ibid.*

²⁷⁵ Dwyre, *supra* note 8 at 41–42. See 11 CFR § 114.2(b) (2021). Corporations and unions may also contribute to the independent-expenditure-only accounts of hybrid PACs. Corporations and unions may also contribute to the independent-expenditure-only accounts of hybrid PACs.

²⁷⁶ *McCutcheon*, *supra* note 74.

²⁷⁷ *Ibid* at 223–224, Roberts CJ.

advance.”²⁷⁸ The government argued that donors could support a large number of candidates and stay within the aggregate limits by simply contributing less to each candidate or committee. However, Chief Justice Roberts found this option inadequate because it would impose a “special burden on broader participation” in support of a wide range of candidates or causes.²⁷⁹ This conclusion flowed from Chief Justice Roberts’ conviction that all forms of political expression, regardless of whether that expression involves handing out a few leaflets or spending vast sums on a national advertising campaign, are deserving of equal protection.²⁸⁰

Chief Justice Roberts confirmed that the sole governmental interest capable of justifying restrictions on campaign finance is the prevention of *quid pro quo* corruption or its appearance. Chief Justice Roberts also confirmed that corruption does not include “ingratiation and access,” but is limited to a “direct exchange of an official act for money.”²⁸¹ Each contribution is subject to base limits, meaning the aggregate limits do not, in themselves, prevent corruption.²⁸² Therefore, the First Amendment bars Congress from imposing contribution limits to prevent parties and candidates from rewarding donors with privileged access and influence. In Chief Justice Roberts’ view, it is a “central feature of democracy” that “constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”²⁸³ To prohibit this support would, in Chief Justice Roberts’ view, “dangerously broaden … the circumscribed definition of *quid pro quo* corruption” to include “general, broad-based support of a political party.”²⁸⁴ Chief Justice Roberts also rejected the argument that aggregate limits prevent circumvention of base limits, finding fears of circumvention too speculative. Owing to other provisions in the BCRA, such as restrictions on earmarking, Chief Justice Roberts argued that it would be difficult for a donor to channel large sums to a candidate and still get credit for the donation. If the donor receives no credit for their donation, there is no risk of a *quid pro quo*.

Thus, like Justice Kennedy in *Citizens United*, Justice Roberts appeared comfortable with the idea that officeholders would be particularly responsive to wealthy backers. The dissent criticized this approach for failing to differentiate “between influence resting upon public opinion and influence bought by money alone.”²⁸⁵ As in *Citizens United*, the majority also confirmed that the government must not “restrict the political participation of some in order to enhance the relative influence of others.”²⁸⁶ The majority emphasized that the First Amendment is intended to ensure that public debate is left in the hands of the public, not the government.²⁸⁷ In accordance with the libertarian approach to freedom of speech, Chief Justice Roberts maintained that government cannot be trusted to judge the value of certain

²⁷⁸ *Ibid* at 204, Roberts CJ.

²⁷⁹ *Ibid* at 204–205, Roberts CJ.

²⁸⁰ *Ibid* at 205–206, Roberts CJ.

²⁸¹ *Ibid* at 192, Roberts CJ.

²⁸² *Ibid* at 204, Roberts CJ.

²⁸³ *Ibid* at 192, Roberts CJ.

²⁸⁴ *Ibid* at 225, Roberts CJ.

²⁸⁵ *Ibid* at 261, Breyer J, dissenting.

²⁸⁶ *Ibid* at 191, Roberts CJ.

²⁸⁷ *Ibid* at 203, Roberts CJ.

speech over other speech, “even when the government purports to act through legislation reflecting ‘collective speech.’”²⁸⁸ In Chief Justice Roberts’s view, by attempting to level the playing field through aggregate limits, Congress was meddling impermissibly in electoral debate and trying “to help decide who should govern.”²⁸⁹ Thus, Congress must not intervene even if non-interference means the wealthy decide who governs.

As in *Citizens United*, the dissent, written by Justice Breyer, argued for a broader conception of corruption that goes beyond “act[s] akin to bribery” to capture the influence that large contributions may exert over elected officials’ judgement, as the government had argued.²⁹⁰ The dissent concluded that candidates who solicit large cheques for their party “will be deeply grateful to the checkwriter, and surely could reward him with a *quid pro quo* favor.”²⁹¹ Further, Justice Breyer suggested that corruption encompasses the tendency of money to drown out the “voices of the many” and disrupt the responsiveness of elected officials to the people.²⁹² This conception of corruption echoes the equality rationale for campaign finance regulation.

8.2 Regulatory Regime

This section provides a brief overview of federal campaign finance regulations in the US.²⁹³

8.2.1 Expenditures

Because of the jurisprudence discussed above, campaign expenditures are unlimited in the US for candidates, political parties, and third parties. Third parties, such as corporations, unions, and independent-expenditure-only PACs (or “super-PACs”), may spend unlimited amounts in support of a candidate, party, or issue associated with a candidate or party, as long as that spending is not coordinated with a candidate. Candidates may also spend unlimited personal funds on their own campaigns.

8.2.2 Contributions and Coordinated Spending

Contributions to candidates are defined as including money and in-kind services and are subject to caps and source restrictions.²⁹⁴ Candidates are prohibited from accepting direct

²⁸⁸ *Ibid* at 206, Roberts CJ.

²⁸⁹ *Ibid* at 192, Roberts CJ.

²⁹⁰ *Ibid* at 235, 237, 241, Breyer J, dissenting.

²⁹¹ *Ibid* at 251, Breyer J, dissenting.

²⁹² *Ibid* at 239, Breyer J, dissenting.

²⁹³ For more detail on the federal regulatory regime, see: 52 USC §§ 30101–30146; 11 CFR; “Legal Resources” (last visited 27 October 2021), online: *Federal Election Commission* <<https://www.fec.gov/legal-resources/>>; “Resource Center” (last visited 27 October 2021), online: *Open Secrets* <<https://www.opensecrets.org/resources/>>; Samuel Issacharoff et al, *The Law of Democracy: Legal Structure of the Political Process*, 5th ed (New York: Foundation Press, 2016); “Campaign Finance” (last visited 27 October 2021) online: *Campaign Legal Center* <<https://campaignlegal.org/issues/campaign-finance/>>; “Campaign Finance Law” (last visited 27 October 2021), online: *The Campaign Finance Institute* <<http://www.cfinst.org/law.aspx>>.

²⁹⁴ 52 USC § 30116; 11 CFR §§ 110.1–110.4 (2021); Federal Election Commission, *supra* note 196.

contributions from corporations, unions, foreign nationals, national banks or federal government contractors.²⁹⁵ Coordinated spending with a candidate is viewed as a contribution to the candidate. As a result, these prohibited contributors may not engage in coordinated spending with a candidate.²⁹⁶ Further, to prevent circumvention of the rules governing contributions to candidates, donations to entities that engage in coordinated spending with candidates, such as political party committees and traditional PACs, are also subject to caps and source restrictions.²⁹⁷ Before the BCRA was enacted, limits on contributions to political party committees could be circumvented by donating “soft money” to the party. Soft money was used for “party-building activities” and was unregulated.²⁹⁸ However, the BCRA closed this loophole, stipulating that political parties may only raise money for permitted purposes under federal regulation.²⁹⁹

Super-PACs, which engage solely in “independent expenditures,” are not subject to these caps or source restrictions. Super-PACs, therefore, have unlimited spending and fundraising capacity. Hybrid-PACs, which engage in both coordinated and independent spending, are required to maintain a separate fund for independent expenditures, which will not be subject to contribution caps or source restrictions. All expenditures by single-candidate PACs are considered contributions to their candidate, even if some of the PAC’s spending is technically uncoordinated.

A relatively new political finance phenomenon in the US remains unaddressed by legislation, namely when an advisor or former advisor to a politician establishes a non-profit organization that raises and spends money to back their politician’s agenda and actions while in office. These non-profits evade legislation in four ways:

1. they don’t lobby and so are not subject to the disclosure requirements in lobbying registration laws;
2. they are not making financial contributions or giving gifts to the politician and so are not restricted by contribution limits;
3. they don’t campaign during election periods and so are not subject to disclosure requirements that apply during those periods; and
4. loopholes in conflict of interest laws can allow an advisor to also play a role in such a non-profit, and a politician essentially to work in coordination with the non-profit and his or her former advisors.³⁰⁰

²⁹⁵ 52 USC §§ 30118, 30119, 30121; 11 CFR § 110.20 (2012). Issacharoff notes this rule may be up for grabs in relation to corporations after *Citizens United*, in which the majority of the US Supreme Court frowned upon making distinctions between corporations and natural persons: Issacharoff, *supra* note 31 at 132.

²⁹⁶ See e.g. 11 CFR § 114.10(a) (2021).

²⁹⁷ See 52 USC § 30116 for contribution limits to political party committees.

²⁹⁸ Boatright, “US Interest Groups”, *supra* note 123 at 74. For more on soft money see Briffault, *supra* note 236 at 191.

²⁹⁹ BCRA, *supra* note 100.

³⁰⁰ Chisun Lee, Douglas Keith & Ava Mehta, *Elected Officials, Secret Cash: How Politicians Use Nonprofits To Cloak Spending After Election Day* (New York: Brennan Center for Justice, 2018), online

GLOBAL CORRUPTION

A criminal case filed in Ohio in July 2020 will test elements of whether such a “contribution” scheme is legal. Larry Householder, Speaker of the House in Ohio, his advisor, two lobbyists, and a non-profit 501(c)(4) entity established in 2017 by the advisor, called Generation Now, were charged for participating in an alleged racketeering conspiracy.³⁰¹ The conspiracy involved approximately \$60 million paid to Generation Now by a power utility company. Generation Now, effectively controlled by Householder and his advisor, used the money to campaign in support of legislation that provided a billion-dollar bailout of two nuclear plants owned by the power utility company and against a referendum that would have overturned the legislation.³⁰² Part of the money was allegedly also used to support a slate of 21 state election candidates connected to Householder who, after being elected, would support him becoming Speaker, and also \$400,000 was allegedly given directly to Householder to pay for various personal expenses.³⁰³ The advisor and one of the lobbyists pleaded guilty on October 29, 2020,³⁰⁴ and Generation Now pleaded guilty in February 2021.³⁰⁵ The case will take into account the US Supreme Court’s ruling in *McCormick* concerning whether contributions can amount to corruption.³⁰⁶

In March 2021, the US House of Representatives passed a Democrat-backed bill entitled the *For the People Act* that contains several changes to the US federal election and government ethics laws, including restrictions on contributions and coordination. A version of the bill was introduced in the Senate where it was blocked by Republican senators in June 2021. A similar Democrat bill was blocked in 2019.³⁰⁷ A subsequent *Freedom to Vote Act*, which

(pdf): <https://www.brennancenter.org/sites/default/files/2019-08/Report_Elected_Officials_Secret_Cash.pdf>.

³⁰¹ Department of Justice, News Release, “Ohio House Speaker, Former Chair of Ohio Republican Party, 3 Other Individuals & 501(c)(4) Entity Charged in Federal Public Corruption Racketeering Conspiracy Involving \$60 Million” (21 July 2020), online: <<https://www.justice.gov/usao-sdoh/pr/ohio-house-speaker-former-chair-ohio-republican-party-3-other-individuals-501c4-entity>>.

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ Department of Justice, News Release, “Political Strategist & Lobbyist Each Plead Guilty in Federal Public Corruption Racketeering Conspiracy Involving More Than \$60 Million” (29 October 2020), online: <<https://www.justice.gov/usao-sdoh/pr/political-strategist-lobbyist-each-plead-guilty-federal-public-corruption-racketeering>>.

³⁰⁵ Department of Justice, News Release, “Purported 501(c)(4) Admits to Being Used to Conceal Corrupt Payments Related to Passage of Legislation” (19 February 2021), online: <<https://www.justice.gov/usao-sdoh/pr/purported-501c4-admits-being-used-conceal-corrupt-payments-related-passage-legislation>>.

³⁰⁶ Elkan Abramowitz & Jonathan S Sack, “Where’s the Quid? DOJ Tests the Limits Of Public Corruption Law” (8 March 2021), online (blog):

<<https://www.lexology.com/library/detail.aspx?g=8bf29948-6e3d-4147-968b-18f32810d9ef>>. See also *McCormick*, *supra* note 36.

³⁰⁷ Karl Evers-Hillstrom, “House Democrats Pass Campaign Finance Overhaul, Senate GOP to Block Bill” (4 March 2021), online: *Open Secrets* <<https://www.opensecrets.org/news/2021/03/for-the-people-act-gop-block/>>; “The For the People Act: How Key H.R. 1 Provisions Would Fix Democracy Problems” (24 December 2020), online (pdf): *Campaign Legal Center* <<https://campaignlegal.org/sites/default/files/2021-01/FINAL%20HR%202020Document%2012.24%2010.40am.pdf>>; “Annotated Guide to the For the People Act of 2021” (last updated 18 March 2021), online: *Brennan Center for Justice* <<https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>>;

mirrored the *For the People Act* but rolled back various provisions to address concerns of Republican Senators, was also blocked by the Senate in October 2021.³⁰⁸ Among many other changes to federal US law, the *For the People Act* proposed to restrict super-PACs by expanding the type of spending that will be considered a contribution to a candidate. Further, people with connections to a candidate would have been categorized as “coordinated spenders” so that if they worked with a super-PAC, all of its spending will be considered a contribution to the candidate.³⁰⁹

8.2.3 Transparency Requirements

The US Supreme Court’s rulings on the country’s political finance system are somewhat based on the premise that transparency is enough to combat corruption. Disclosure of donors and supporters allows voters to determine which parties and candidates they want to support and makes it more difficult for politicians and governments to return the favour of the donations and support. However, US statutes and regulations have loopholes that allow for what has come to be called “dark money” to be donated in support of various political actors and organizations without disclosing the source.³¹⁰

Generally, candidates, parties, and super-PACs are all required to disclose their donors and campaign expenditures regularly (annually, quarterly, or monthly, depending on the year.) However, spending during the pre-election period does not require disclosure. Further, some donations are not required to be disclosed before election day, simply because of deadlines for filing disclosure reports.³¹¹ For example, in reports to the FEC, super-PACs are required to include the source, amount, and date of contributions to the super-PAC for any purpose, along with the amount, purpose, date, and recipient of disbursements over \$200 in a calendar year.³¹² Super-PACs are also required to disclose separately their spending on express advocacy, but this rule means spending that does not explicitly support or oppose a candidate or party is not required to be disclosed.³¹³

Barbara Sprunt “Senate Republicans Block Democrats’ Sweeping Voting Rights Legislation”, *NPR* (22 June 2021), online: <<https://www.npr.org/2021/06/22/1008737806/democrats-sweeping-voting-rights-legislation-is-headed-for-failure-in-the-senate>>.

³⁰⁸ Juana Summers & Deirdre Walsh, “Democrats’ Biggest push for Voting Rights Fails with No Republicans on Board”, *NPR* (20 October 2021), online: <<https://www.npr.org/2021/10/20/1040238982/senate-democrats-are-pushing-a-voting-rights-bill-republicans-have-vowed-to-bloc>>.

³⁰⁹ US, Bill S 1, *For the People Act of 2021*, 117th Congress, 2021, s 6191–6103.

³¹⁰ “Dark Money Basics”, *supra* note 208.

³¹¹ US, Congressional Research Service, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress* (R41542) (2021), online (pdf):

<<https://crsreports.congress.gov/product/pdf/R/R41542>>; “Help for Candidates and Committees” (last visited 31 October 2021), online: *Federal Election Commission* <<https://www.fec.gov/help-candidates-and-committees/>>.

³¹² 52 USC §§ 30104(b)(3), 30104(b)(5)(A); 11 CFR § 104.3(a)(4).

³¹³ 52 USC § 30104(b)(6)(B)(iii); 11 CFR §§ 104.3(b)(3)(vii), 104.4, 109.10(a) (2021). As discussed above, express advocacy uses words like “vote for” or “vote against.”

Corporations, unions, and groups organized under 26 USC § 501(c), often termed “501(c) organizations,”³¹⁴ are required to disclose expenditures made for the purpose of express advocacy and electioneering communications.³¹⁵ However, corporations, unions, and 501(c) organizations are not required to report the source of their donations to the FEC, unless the donations were made specifically for the purpose of funding express advocacy or electioneering communications.³¹⁶ The same general rules apply to groups organized under 26 USC § 527, or “527 organizations” that are not candidate or party committees or political action committees, meaning their main activities are not political.³¹⁷

Some entities also have disclosure obligations to agencies other than the FEC, such as tax-exempt charities and other organizations reporting to the Internal Revenue Service (IRS).³¹⁸ In April 2021, the US Supreme Court heard a case in which a charity challenged as unconstitutional a California legal requirement that it disclose its significant donors to the state government. The charity claimed this requirement restricts their donors’ freedom of expression rights by possibly exposing their donation to the public.³¹⁹ If the Court rules that the requirement is unconstitutional, it will likely derail any future statutory measure that requires 501(c) organizations that are charities or tax-exempt to disclose their donors.

The blocked *For the People Act* included measures to strengthen and close loopholes in donor and spending disclosure requirements.³²⁰ If fully enacted, the bill would have, among many

³¹⁴ 501(c) organizations may engage in political campaigning activity so long as it is not their primary activity; however, Dwyre notes that the Internal Revenue Agency has done little to investigate whether 501(c) organizations are making campaigning activity their primary activity: Dwyre, *supra* note 8 at 48–50. The most relevant types of 501(c) organizations in the context of election campaigns are labour organizations (organized under 26 USC § 501(c)(5)), trade associations or business leagues like the Chamber of Commerce (organized under 26 USC § 501(c)(6)), and “social welfare organizations” (organized under 26 USC § 501(c)(4)): Dwyre, *supra* note 8 at 48–50.

³¹⁵ 52 USC §§ 30104(c),(f); 11 CFR §§ 104.20, 109.10(b), 114.10(b)(1)–(2). “Electioneering communications” are defined in 11 CFR § 100.29(a). As discussed above, the category of “electioneering communications” was created by the BCRA and captures a broader range of advertising than the category of “express advocacy” does.

³¹⁶ 52 USC §§ 30104(c),(f); 11 CFR §§ 114.10(b)(1)–(2), 109.10(e)(1)(vi), 104.20(b), 104.20(c)(7)–(9). See also Dwyre, *supra* note 8 at 61. “Dark Money Basics”, *supra* note 208. Note that labour unions organized under 26 USC 501(c)(5) must disclose the source of all contributions of \$5,000 or more to the Department of Labor: see note 318.

³¹⁷ 52 USC §§ 30104(c),(f); 11 CFR §§ 109.10(b)–(e), 104.20(b).

³¹⁸ Congressional Research Service, *supra* note 311. Another example is that labour organizations organized under 26 USC § 501(c)(5) are required, in reports to the Department of Labor, to disclose the identity of any contributor giving \$5,000 or more in the twelve-month reporting period, along with the purpose, date, and amount of the contribution: 29 USC § 431; 29 CFR § 403. Labour organizations are also required to disclose to the Department of Labor any political disbursements intended to influence elections and referendums: 29 USC § 431, 29 CFR § 403.

³¹⁹ *Americans for Prosperity v Rodriguez*, 594 US (2021), online: <https://www.supremecourt.gov/opinions/20pdf/19-251_p86b.pdf>; Ciara Torres-Spelliscy, “The Supreme Court’s Looming Dark Money Decision” (23 April 23 2021), online: *Brennan Center for Justice* <<https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-looming-dark-money-decision>>.

³²⁰ “Annotated Guide to the For the People Act of 2021”, *supra* note 307.

other changes, allowed the IRS to require tax-exempt organizations to disclose their donors³²¹ and also would have required:

1. disclosure of offers from representatives of foreign governments of significant contributions or collaboration to affect an election;³²²
2. certification that no foreign nationals are involved in decision-making concerning contributions and spending by a corporation or other entity;³²³
3. disclosure of donors who donate \$10,000 or more to 501(c) organizations in support of the organization spending more than \$10,000 on campaign-related advertisements, and disclosure of disbursements of more than \$1,000 that support or oppose a candidate;³²⁴
4. disclosure in the advertisement of who paid for any online advertisement in the last 30 days of a primary and last 60 days of a general election, and a requirement that large online sites establish a registry of all such ads;³²⁵
5. disclosure in the advertisement by outside groups like super-PACs of the most significant donors paying for any advertisement, and the groups' top official;³²⁶
6. consultation with shareholders by publicly traded companies concerning their preferences concerning political expenditures, if the company is allowed to engage in such expenditures;³²⁷ and
7. a report by the FEC to Congress on how to ensure disclosure of all political donations before election day.³²⁸

8.2.4 Public Funding

The US has used an egalitarian opt-in public funding system for candidates in parties' presidential candidate nomination races, known as "primaries," and for general presidential election candidates since 1976. However, the Republican Party presidential candidates have not opted into the system since John McCain's candidacy in 2008. This is mainly due to funding amounts for major party candidates that have not increased in decades and are significantly less than what candidates are able to raise. For example, the 2020 general election amount for presidential candidates was \$103.7 million.³²⁹

³²¹ *For the People Act*, *supra* note 309, s 4501.

³²² *Ibid*, ss 4001–4006.

³²³ *Ibid*, ss 4101–4106, 4401–4404.

³²⁴ *Ibid*, ss 4111–4113.

³²⁵ *Ibid*, ss 4201–4210.

³²⁶ *Ibid*, ss 4301–4305.

³²⁷ *Ibid*, s 4602.

³²⁸ *Ibid*, ss 4301–4305.

³²⁹ "Public Funding of Presidential Elections" (last visited 27 October 2021), online: *Federal Election Commission* <<https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/>>; Dwyre, *supra* note 8 at 35; Hasen, *supra* note 40 at 225.

To qualify for public funding in the primaries, a candidate must raise \$5,000 in a minimum of 20 states in donations of no more than \$250 each.³³⁰ Candidates who opt in are required to limit their spending in each state primary and overall, and limit spending of their own funds to \$50,000. In return, the candidate receives public funding that matches the first \$250 of each donation they receive.³³¹

In the general presidential election, candidates are automatically qualified for a lump-sum public funding grant that varies in amount depending on whether the candidate is from a major party (whose candidate received more than 25% of the vote in the previous election), minor party (whose candidate received between 5% and 25% of the vote in the previous election) or new party (whose candidate receives the funding after the election if the candidate obtains more than 5% of the votes), along with a few other detailed provisions. However, to receive funding, a candidate is required to:

1. limit their spending (the limit increases by the cost of living allowance amount (COLA) each election cycle, and exempts some core expenses);
2. limit spending of their own funds to \$50,000;
3. not receive private contributions other than into a special account only to be used to pay for legal and accounting expenses incurred to comply with the law;
4. keep records of spending and cooperate with an FEC audit; and
5. use closed-captioning in all TV commercials.³³²

The blocked *For the People Act* bill would have replaced the lump-sum public funding grants for presidential candidates in primaries and the general election with a system that provides \$6 for every \$1 that a candidate raises, up to a maximum of \$250 million in public funding for the general election. If a candidate participated in the public funding program during their party's primaries and won the party nomination, they must also use the program during the general election. The bill would have also eliminated the cap on spending by participating candidates and increased the amount national party committees can spend in coordination with their candidate.³³³

From 1976 to 2012, the US government also provided public grants to federal political party committees for party conventions,³³⁴ but this funding was terminated in 2014.³³⁵ Public funding has been proposed several times for federal elections for members of Congress, but

³³⁰ *Ibid.* A contributor may contribute up to that election's candidate contribution limit, but only \$250 of their donation counts towards qualifying for the system. The public funding comes from taxpayers who indicate on their annual tax form that they would like \$3 of their taxes to be diverted to the fund.

³³¹ *Ibid.*

³³² "Receiving a Public Funding Grant for the General Election" (last visited 27 October 2021), online: *Federal Election Commission* <<https://www.fec.gov/help-candidates-and-committees/understanding-public-funding-presidential-elections/receiving-public-funding-grant-for-general-election/>>.

³³³ "Annotated Guide to the For the People Act of 2021", *supra* note 307; US, Bill S 1, *For the People Act of 2021*, 117th Congress, 2021, ss 5212, 5214.

³³⁴ Gauja, *supra* note 16 at 158.

³³⁵ *The Gabriella Miller Kids First Research Act*, Pub L No 113-94, 128 Stat 1085 (2014).

has never been enacted.³³⁶ The blocked *For the People Act* bill, would have provided public funding of six times the amount of any donation of \$200 or less received by a candidate. The source of the public funding was proposed to be a small surcharge on some criminal fines and civil and administrative penalties collected by the federal government, primarily from corporate defendants and their executives, as well as wealthy individuals who commit tax fraud and are in the highest tax bracket. As well, the bill would have established pilot “voucher” donation system programs in three states.³³⁷ Finally, to encourage parties to seek small donations, the bill would have allowed parties to establish special accounts for donations of \$200 or less and then transfer up to \$10,000 from the account to any candidate or spending unlimited amounts from the account in coordination with any candidate.³³⁸

Several states provide public funding in the form of lump sums for candidates who raise a specific amount in small donations or matching donations and for party conventions and voter turnout activities.³³⁹ These, along with tax deductions for donations, and “voucher” systems (where each voter is provided with a voucher of an amount of public funds which the voter can donate to one or more candidates) are the only public funding systems that the courts have ruled are constitutional in the US. The majority ruling in the US Supreme Court’s 2007 ruling in *Davis* (summarized in Section 8.1.2.3) was echoed in *Arizona Free Enterprise Club’s Freedom Club PAC v Bennett (Bennett)*,³⁴⁰ which struck down Arizona’s “millionaire’s amendment” system. The system, as in the measures in the federal BCRA that were struck in *Davis*, provided an initial amount of public funding to a candidate who opted into the system, and then dollar-for-dollar matching funding to that candidate if they faced a privately financed candidate whose expenditures, combined with support from the expenditures of independent groups, exceeded the publicly financed candidate’s initial public funding. The candidate would receive matching funds up to twice the amount of the candidate’s initial public funding. In *Bennett*, as in *Davis*, the Supreme Court rejected arguments that the system levelled the playing field for candidates and instead criticized it for inhibiting the freedom of the privately financed candidate to spend as much as they want. The ruling chilled and derailed similar public funding systems in other states.

8.2.5 Role of the Federal Election Commission

The FEC is responsible for disclosing information on campaign finance, monitoring compliance with legislative requirements, and administering public funding of presidential

³³⁶ Congressional Research Service, *Public Financing of Congressional Campaigns: Overview and Analysis* (RL33814) (2011) online: <<https://www.everycrsreport.com/reports/RL33814.html>>. Congressional Research Service, *supra* note 311.

³³⁷ *For the People Act*, *supra* note 309, s 5101.

³³⁸ *Ibid*, s 5401; Gareth Fowler & Daniel I. Weiner, “Small Donor Matching in the ‘For the People Act’” (last updated 11 February 2021), online: *Brennan Centre for Justice* <<https://www.brennancenter.org/our-work/research-reports/small-donor-for-the-people-act>>; “Annotated Guide to the For the People Act of 2021”, *supra* note 307.

³³⁹ “Public Financing of Campaigns: Overview” (8 February 2019), online: *National Conference of State Legislatures* <<https://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx>>.

³⁴⁰ *Arizona Free Enterprise Club’s Freedom Club PAC v Bennett*, 564 U.S. 721 (2011), consolidated with *McComish v Bennett*.

campaigns.³⁴¹ To assist in promoting compliance, the FEC promulgates rules and regulations and issues advisory opinions, of which there are over 1,000.³⁴² The FEC is only responsible for civil enforcement of campaign finance laws, not criminal enforcement, which falls under the Justice Department's mandate.³⁴³

8.3 Criticisms of Campaign Finance Regulation

The American regulatory regime is often criticized for encouraging the movement of campaign money away from relatively transparent political parties to unaccountable and less transparent outside spending groups, such as 501(c) organizations.³⁴⁴ The dissenting justices in *Citizens United* deplored this trend, noting that political parties represent "broad coalitions" while corporations and unions, the third parties at issue, in that case, represent "narrow interests."³⁴⁵ Other types of third parties may also represent narrow interests. For example, in the 2012 general election, 93% of the money spent by super-PACs came from 0.0011% of the population, raising significant equality concerns.³⁴⁶

The growth of outside spending is driven by the absence of independent expenditure limits for third parties, the BCRA's prohibition on soft money for political parties, the limits on coordinated spending in support of political parties and candidates, and the less stringent transparency requirements for outside spenders like corporations, unions, 501(c) groups, and 527 non-political organizations. Although the lack of mandatory disclosure makes confirmation impossible, Dwyre speculates that many corporations direct their election campaign spending through 501(c) organizations to avoid revealing their support for particular candidates or parties.³⁴⁷

According to a majority of US Supreme Court cases, like *Citizens United*, all this outside spending raises no risk of corruption or even the risk of the appearance of corruption, as long as the spending is independent and uncoordinated with candidates. Yet this premise is highly debatable. Many question whether 'independent expenditures' are truly 'independent' in the current environment of pervasive outside spending. Dwyre observes that many super-PACs are run by "former party officials, Congressional staff, and partisan operatives,"³⁴⁸ and candidates and elected officials are allowed to speak at super-PAC fundraisers. Boatright argues that there is "implicit coordination between groups and between groups and candidates and parties."³⁴⁹ He suggests that some party functions have

³⁴¹ Thomas E Mann, "The FEC: Administering and Enforcing Campaign Finance Law" in Anthony Corrado et al, eds, *The New Campaign Finance Sourcebook* (Washington, DC: Brookings Institution Press, 2005) 232 at 234.

³⁴² *Ibid* at 235–36.

³⁴³ *Ibid* at 236

³⁴⁴ See, for example, Hasen, *supra* note 40 at 225.

³⁴⁵ *Citizens United*, *supra* note 29 at 412.

³⁴⁶ Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections* (New York: Demos, 2013) at 8, online (pdf): <<http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections>>.

³⁴⁷ Dwyre, *supra* note 8 at 55.

³⁴⁸ *Ibid* at 46.

³⁴⁹ Boatright, "US Interest Groups", *supra* note 123 at 73.

been *de facto* outsourced to outside groups because of the restrictions on party financing, creating a “network” of parties and outside groups that is guided by “mechanisms of coordination.”³⁵⁰ Boatright bolsters this argument by pointing out that personnel tend to move between interest groups, candidate campaigns, and political party committees, suggesting there is “informal” coordination.³⁵¹ This can have the effect of reducing the responsiveness of parties to voters, and also raises the spectre of corruption, since parties and candidates may wish to show gratitude toward the outside groups in their “network.”³⁵²

Even if outside spending is truly independent, many argue that independent expenditures nonetheless give rise to the risk or appearance of corruption. Based on the record before Congress in the lead-up to the BCRA’s enactment, the dissent in *Citizens United* pointed out that “corporate independent expenditures … had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements.”³⁵³ The record indicated that candidates’ campaigns are generally aware of who is behind independent advertisements on the candidates’ behalf.³⁵⁴ Further, even if independent outside spending does not produce direct *quid pro quo* corruption, Richard Hasen argues that it may lead to the sale of access to candidates.³⁵⁵ Hasen makes the common sense observation that “[p]residential candidates are likely to notice and appreciate when an individual spends millions of dollars supporting or opposing the candidate through an independent effort,” which may lead to “special access … after the election.”³⁵⁶ The record cited by the dissent in *Citizens United* supported this argument since it demonstrated that “the sponsors of … advertisements were routinely granted special access after the campaign was over.”³⁵⁷

Some commentators argue that political party financing in the US should be deregulated to reduce outside spending and restore the role of the political parties in elections. Boatright has suggested raising contribution caps for political parties, relaxing restrictions on coordinated spending of parties and candidates, providing more public funding to political parties, and tightening disclosure requirements for third parties.³⁵⁸ However, Sarbanes and O’Mara argue that deregulating contributions to political parties would only exacerbate the disproportionate influence of wealthy donors in American politics.³⁵⁹ Others agree that deregulating party finance is not the answer, as allowing “parties to engage in the same type of courting and solicitation of the very wealthy as Super PACs” is unlikely to “mitigate the ongoing distributional shift of the campaign finance system toward the interests of the very wealthy.”³⁶⁰

³⁵⁰ *Ibid.*

³⁵¹ *Ibid* at 87.

³⁵² *Ibid* at 73.

³⁵³ *Citizens United*, *supra* note 29 at 455.

³⁵⁴ *Ibid.*

³⁵⁵ Of course, the majority of the US Supreme Court does not recognize this kind of exchange as “corruption”: see *Buckley*, *supra* note 11; *SpeechNow*, *supra* note 137; *Citizens United*, *supra* note 29; *McCutcheon*, *supra* note 74.

³⁵⁶ Hasen, *supra* note 40 at 237.

³⁵⁷ *Citizens United*, *supra* note 29 at 455.

³⁵⁸ Boatright, “US Interest Groups”, *supra* note 123 at 100.

³⁵⁹ Sarbanes & O’mara, *supra* note 30 at 33.

³⁶⁰ Kang, *supra* note 204 at 536.

Campaign finance legislation in the US is criticized for a variety of other problems. For example, the BCRA's ban on soft money was intended to reduce the risk of corruption by preventing political parties from accepting unregulated, unlimited contributions. However, Hasen argues that the practice of "bundling" has replaced, to some extent, the use of soft money to gain access to politicians.³⁶¹ Bundling involves one individual soliciting many donations from their acquaintances. Bundlers who reach certain thresholds are rewarded with access and other perquisites.³⁶² Others criticize the regulatory regime for falling behind new developments in campaign finance. The public funding regime for presidential candidates provides an example of this "policy drift."³⁶³ Dwyre calls the presidential public funding regime a "quaint remnant of a bygone era when public funding provided a way to level the playing field between presidential contenders."³⁶⁴ Hasen agrees that the scheme is "no longer viable."³⁶⁵ For example, in 2008, former President Obama opted out of the public funding regime and raised \$745.7 million for his presidential campaign.³⁶⁶ If he had opted in, he would have received \$84.1 million in public funding, and his spending would have been limited to that amount.³⁶⁷

The FEC is also criticized for its lack of success in imposing "serious sanctions on high-stakes violations."³⁶⁸ Enforcement problems are exacerbated by a complicated and slow enforcement process.³⁶⁹ Further, the FEC's endless advisory opinions and other policy documents have led to an unwieldy and overly complex regime.³⁷⁰ Dwyre also notes that political deadlock among the Commissioners has prevented the FEC from keeping up with changing practices and newly discovered loopholes, thus feeding policy drift.³⁷¹

9. UK

Campaign finance-related scandals in past decades have led to increasing regulation of political financing in the UK.³⁷² The UK's campaign finance regime imposes spending limits and transparency requirements on parties, candidates, and third-party campaigners. However, unlike in Canada and the US, contributions to parties and candidates are

³⁶¹ Hasen, *supra* note 40 at 234.

³⁶² *Ibid* at 229.

³⁶³ Dwyre, *supra* note 8 at 34.

³⁶⁴ *Ibid* at 35.

³⁶⁵ Hasen, *supra* note 40 at 225.

³⁶⁶ *Ibid*.

³⁶⁷ Adam Nagourney & Jeff Zeleny, "Obama Forgoes Public Funds in First for Major Candidate", *The New York Times* (20 June 2008), online:

<<http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.html>>; Fredreka Schouten, "Obama Opted Out of Public Funds" *USA Today* (20 June 2008), online:

<<https://abcnews.go.com/Politics/story?id=5208695&page=1>>.

³⁶⁸ Mann, *supra* note 341 at 237.

³⁶⁹ *Ibid*.

³⁷⁰ The problem of complexity was pointed out in *Citizens United*, *supra* note 29 at 335-6.

³⁷¹ Dwyre, *supra* note 8 at 34.

³⁷² See Justin Fisher, "Britain's 'Stop-Go' Approach to Party Finance Reform" in Boatright, *Campaign Finance Laws*, *supra* note 6, 152.

uncapped, although contributions are only allowed from permissible sources. In other words, demand is limited, but supply is not. Paid political broadcasting is also prohibited in the UK. The UK's limits on political spending and broadcasting have survived challenges based on freedom of expression, providing a stark contrast to American freedom of speech jurisprudence.³⁷³

9.1 Freedom of Expression and Campaign Finance Regulation

In two cases dealing with the UK's campaign finance laws, the European Court of Human Rights (ECtHR) accepted that states may impose some limits on campaign financing without falling afoul of the guarantees of freedom of expression and free elections.³⁷⁴ Article 10 of the European Convention on Human Rights (the Convention)³⁷⁵ provides as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 3 of Protocol 1 to the Convention provides that contracting parties shall "undertake to hold free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."³⁷⁶

³⁷³ See Section 8.1.2 for a discussion of freedom of speech jurisprudence in the US. Issacharoff points out that the UK has a tradition of treating elections as "an administrative tallying of preferences as they exist", which could play a part in the courts' willingness to allow limits on freedom of expression during elections: Samuel Issacharoff, "The Constitutional Logic of Campaign Finance Regulation" (2009) 26:2 Pepperdine L Rev 373 at 384.

³⁷⁴ Brexit does not directly affect the weight of the Convention and ECtHR decisions in the UK. The ECtHR is a judicial body of the Council of Europe, which is separate from the European Union, and the Convention is incorporated into UK law through the UK *Human Rights Act*. For more information, see Chloe Smith, "Lawyers Fear for UK's Future in ECHR After Brexit Vote", *The Law Society Gazette* (24 June 2016), online: <<https://www.lawgazette.co.uk/law/lawyers-fear-for-uks-future-in-echr-after-brexit-vote/5056112.article>>.

³⁷⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

³⁷⁶ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* 1952, ETS No 009.

9.1.1 *Bowman v the United Kingdom*

In *Bowman v the United Kingdom (Bowman)*, the ECtHR considered a provision of the *Representation of the People Act, 1983 (RPA)*, providing that third parties could spend no more than £5 on publications promoting the election of a particular candidate in any one constituency in the six weeks before a general election.³⁷⁷ The applicant was charged under the *RPA* after distributing some 1.5 million leaflets in various constituencies to inform voters about candidates' views on abortion.³⁷⁸

Although the spending limit infringed freedom of expression, the ECtHR accepted that it had the legitimate aim of protecting the rights and freedoms of others, as required by Article 10(2) of the Convention. The ECtHR identified the "others" as other candidates, since the provision aimed to promote "equality between candidates" and the electorate.³⁷⁹ However, the ECtHR found that the impugned provision was disproportionate to its goal. The spending cap formed a "total barrier" for third parties wishing to inform people in their area about a candidate's views on a particular issue, even though the limit applied only in the four to six weeks before a general election.³⁸⁰ In response to this decision, Parliament raised the third-party spending cap at the constituency level for general parliamentary elections.³⁸¹

In *Bowman*, the ECtHR discussed the interaction between the right to free elections and the right to free expression. According to the ECtHR, these two guarantees are the "bedrock" of democracy and reinforce one another, but they may also come into conflict.³⁸² The ECtHR accepted that states may need to limit freedom of expression during elections to ensure "free expression of the opinion of the people," as required by the right to free elections. However, information must nonetheless be permitted to "circulate freely" during an election.³⁸³ Like the Supreme Court of Canada in *Harper*,³⁸⁴ the ECtHR thus acknowledged the usefulness of third-party spending limits in enhancing electoral debate, but warned against stifling the flow of information through too restrictive spending caps.

9.1.2 *Animal Defenders International v the United Kingdom*

In *Animal Defenders International v the United Kingdom (Animal Defenders)*, the ECtHR confirmed its willingness to allow limits on free expression of opinion during elections for the sake of fairness and robust debate.³⁸⁵ In this case, the applicant challenged a blanket ban on paid political advertising on broadcast media for political parties, candidates, and third

³⁷⁷ *Bowman*, *supra* note 132.

³⁷⁸ *Ibid* at paras 11–12.

³⁷⁹ *Ibid* at para 38.

³⁸⁰ *Ibid* at para 45.

³⁸¹ See Section 9.2.3.3 for current rules on third-party spending limits at the constituency level.

³⁸² *Bowman*, *supra* note 132 at para 42.

³⁸³ *Ibid* at para 42.

³⁸⁴ *Harper*, *supra* note 52. See Section 10.1.2.3, for a summary of the ruling.

³⁸⁵ *Animal Defenders International v the United Kingdom [GC]*, [2013] ECHR 362, [*Animal Defenders* ECHR].

parties under the *Communications Act 2003*.³⁸⁶ The UK House of Lords and the ECtHR upheld the ban.

In its decision, the House of Lords emphasized that a level playing field in public debate enables citizens “to make up their own minds on the important issues of the day.”³⁸⁷ According to the House of Lords, the blanket ban on paid political advertising “avoid[s] the grosser distortions [in electoral debate] which unrestricted access to the broadcast media will bring.”³⁸⁸ In recognizing the need to prevent the wealthy from distorting electoral debate, the House of Lords accepted the egalitarian rationale for campaign regulation and acknowledged that limiting electoral speech can actually enhance the exchange of information and ideas. Speaking bluntly, Baroness Hale bolstered the majority’s conclusions by warning against “the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States of America” and the “[e]normous sums”³⁸⁹ spent on such advertising.

At the ECtHR, the parties agreed that the legislative objective of the ban on paid political advertising was to preserve the “impartiality of broadcasting on public interest matters and, thereby … protect … the democratic process.”³⁹⁰ The majority of the ECtHR accepted that this objective fell within the legitimate aim of protecting the rights of others, as required by Article 10(2) of the Convention. The ECtHR also concluded that the ban could reasonably be considered necessary in a democratic society. According to the majority, without the ban, the wealthy could “obtain competitive advantage in the area of paid advertising and thereby curtail a free and pluralist debate, of which the State remains the ultimate guarantor.”³⁹¹

Finally, on the issue of proportionality, the majority of the ECtHR found the ban to be properly tailored to the “risk of distortion.”³⁹² The ban applied to media with “particular influence,” those media being television and radio, and a narrower ban could lead to abuse and uncertainty.³⁹³ The ECtHR also pointed out the availability of alternatives to paid political advertising for third-party groups, such as participation in radio or television programs or the formation of a charitable arm to fund non-political paid advertising.³⁹⁴

By concluding that the state is the “ultimate guarantor” of robust debate, the ECtHR revealed a significant divergence from the US Supreme Court’s approach to freedom of speech. In campaign finance cases, the majority of the US Supreme Court has demonstrated an unwavering suspicion of state power and has emphasized the role of constitutional rights in shielding the individual from that power.³⁹⁵ In *Animal Defenders*, by contrast, the ECtHR’s

³⁸⁶ *Communications Act 2003*, *supra* note 23, ss 321(2)–(3). Broadcasters are required to provide free airtime to political parties for political and campaign broadcasts: *Communications Act 2003*, *supra* note 23, ss 319(2)(g), 333.

³⁸⁷ *Animal Defenders* HL, *supra* note 55 at para 48.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid* at para 47.

³⁹⁰ *Animal Defenders* ECHR, *supra* note 385 at para 78.

³⁹¹ *Ibid* at para 112.

³⁹² *Ibid* at paras 117–22.

³⁹³ *Ibid.*

³⁹⁴ *Ibid* at para 124.

³⁹⁵ See Section 10.1.2.

approach recalls Fiss' theory that the state may enhance free speech, not merely threaten it.³⁹⁶

9.2 Regulatory Regime

The UK's campaign finance regime attempts to level the playing field for parties and candidates by limiting demand for, but not supply of, political money. In the UK, parties, candidates, and third parties are subject to expenditure limits, but contributions to all three are uncapped, although contributions are only allowed from permissible sources. The UK's ban on paid political advertising on broadcast media is intended to further curb political parties' demand for money.

Under the UK's scheme of uncapped contributions, parties and candidates could rely solely on a small number of large donors to finance their campaigns. This raises obvious corruption concerns. The system includes disclosure requirements which, it is argued, address the risk of corruption by discouraging large contributions, as big donors may find themselves the subject of unwanted media attention, and ensuring the public knows what support parties and candidates have received.

In the UK, different legislation applies to the campaigning of political parties and candidates. Registered parties are governed by the *Political Parties, Elections and Referendums Act 2000 (PPERA)*,³⁹⁷ while candidates are governed by the *RPA*.³⁹⁸ Both acts also regulate third-party campaigning in general parliamentary elections, with *PPERA* addressing national third-party campaigns and *RPA* addressing third-party campaigns at the constituency level. The campaign finance provisions in both acts were amended by the *Electoral Administration Act 2006*,³⁹⁹ the *Political Parties and Elections Act 2009*,⁴⁰⁰ and the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (the Transparency of Non-Party Campaigning Act)*.⁴⁰¹ The next section will focus on the rules in *PPERA* and the *RPA* in relation to general parliamentary elections. The UK also regulates campaign financing in referendums and local government elections.

9.2.1 Campaign Financing for Political Parties and Candidates

9.2.1.1 Spending Limits for Registered Parties and Candidates

In the UK, ceilings on candidate spending date back to 1883 and were extended to political parties and third parties in 2000 by *PPERA*.⁴⁰² In *Attorney General v Jones*,⁴⁰³ the Court of

³⁹⁶ Fiss, *supra* note 87. See Section 5.1 for more on Fiss' arguments regarding freedom of speech and campaign finance regulation.

³⁹⁷ *Political Parties, Elections and Referendums Act 2000* (UK), c 41 [*PPERA*].

³⁹⁸ *Representation of the People Act 1983* (UK), c 2 [*RPA*].

³⁹⁹ *Electoral Administration Act 2006* (UK), c 22.

⁴⁰⁰ *Political Parties and Elections Act 2009* (UK), c 12.

⁴⁰¹ *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c 4 [*Transparency of Non-Party Campaigning Act*].

⁴⁰² Ewing & Rowbottom, *supra* note 103 at 77.

⁴⁰³ *Attorney General v Jones*, [1999] EWHC 837, [2000] QB 66.

Appeal explained that the purpose of spending caps is to promote “a level financial playing field between competing candidates, so as to prevent perversion of the voters’ democratic choice between competing candidates within constituencies by significant disparities of local expenditure.”⁴⁰⁴ By contrast, American courts view the objective of levelling the playing field as an insufficient basis for restricting campaign spending.⁴⁰⁵

a) Expenses Captured by Spending Limits

(i) Registered Parties: Definition of “Campaign Expenditure”

Registered parties are subject to ceilings on “campaign expenditure” under *PPERA*. Campaign expenditure is defined as an expense incurred by a party for election purposes that falls within Schedule 8 of *PPERA*, which lists such matters as advertising, publishing documents with the party’s policies, market research, and rallies or other events.⁴⁰⁶ The phrase “for election purposes” is defined as “for the purpose of or in connection with (a) promoting or procuring electoral success for the party … or (b) otherwise enhancing the standing”⁴⁰⁷ of the party or its candidates. This includes attempts to prejudice the chances or standing of other parties or candidates.⁴⁰⁸ Further, an activity could be done “for election purposes” even if no express mention is made of any party or candidate.⁴⁰⁹ Finally, a registered party’s campaign expenditure does not include expenditures that are to be included in a candidate’s election expenses return, which prevents the same expenses from counting toward the spending limits of both a candidate and its party.

Even if an expense falls within the definition of campaign expenditure, it will not count towards the party’s spending limit under *PPERA*, unless it was incurred in the 365 days before a general parliamentary election.⁴¹⁰

(ii) Candidates: Definition of “Election Expenses”

The *RPA* limits the amount candidates may spend on “election expenses.” The definition of election expenses is similar to the definition of campaign expenditure for political parties. Election expenses are defined in the *RPA* as:

- any expenses incurred at any time
- in respect of any matter specified in Part 1 of Schedule 4A
- which is used for the purposes of the candidate’s election
- after the date when he becomes a candidate at the election.⁴¹¹

⁴⁰⁴ *Ibid* at 255.

⁴⁰⁵ See e.g. *Buckley, supra* note 11.

⁴⁰⁶ *PPERA, supra* note 397, s 72(2).

⁴⁰⁷ *Ibid*, s 72(4).

⁴⁰⁸ *Ibid*, s 72(5)(a).

⁴⁰⁹ *Ibid*, s 72(5)(b).

⁴¹⁰ *Ibid*, Schedule 9, para 3(7).

⁴¹¹ *RPA, supra* note 398, s 90ZA(1).

The matters in Part 1 of Schedule 4A include advertising, distributing unsolicited material to electors, transport, public meetings, and accommodation and administration costs. The phrase “for the purposes of the candidate’s election” is defined as “with a view to, or otherwise in connection with, promoting or procuring the candidates election,” which includes “prejudicing the electoral prospects of another candidate.”⁴¹² Exclusions are made for certain expenses, such as those related to the publication of non-advertising material in newspapers and periodicals.⁴¹³ Further, the value of volunteer services provided on the volunteer’s own time is not considered an election expense.⁴¹⁴

b) Spending Limits

(i) Registered Parties

In the 365 days before a general parliamentary election, registered parties’ campaign expenditure is limited to £30,000 per constituency contested by the party, or £810,000 in England, £120,000 in Scotland, and £60,000 in Wales, whichever is greater.⁴¹⁵ Constituency-level branches of registered parties are not subject to limits on spending in support of candidates in their constituencies.⁴¹⁶ However, if a constituency-level branch spends money promoting the party as a whole, this spending will count toward the national party’s spending limit.⁴¹⁷

It should be noted that, while general election dates are somewhat fixed every four years by statute in the UK, an election can occur at any time in two scenarios: First, the Prime Minister can propose a resolution calling an election and two-thirds of the members of the House of Commons approve the resolution, or second, a majority of members approve a resolution stating non-confidence in the government, and do not vote to withdraw that resolution in the two-weeks after it is approved. The Queen can approve the calling of the election instead of approving an opposition party or combination of parties to attempt to govern after the government has resigned.⁴¹⁸ As a result, if such a vote occurs and an election is called with only two weeks of notice, the spending limits do not apply retroactively for the period of the previous 365 days.

(ii) Candidates

Candidate spending limits are determined by adding a base amount and a “top up” that depends on the number of registered electors in the candidate’s constituency.⁴¹⁹ There are

⁴¹² *Ibid*, ss 90ZA(3),(6).

⁴¹³ *Ibid*, Schedule 4A, para 8.

⁴¹⁴ *Ibid*, Schedule 4A, para 10.

⁴¹⁵ PPERA, *supra* note 397, Schedule 9, paras 3(2)–(3),(7).

⁴¹⁶ Ron Johnston & Charles Pattie, “Local Parties, Local Money, and Local Campaigns: Regulatory Issues” in Ewing, Rowbottom & Tham, *supra* note 3, at 92.

⁴¹⁷ *Ibid*.

⁴¹⁸ Fixed-term Parliaments Act 2011 (UK), c 14.

⁴¹⁹ UK, The Electoral Commission, *UK Parliamentary General Election 2017: Guidance for Candidates and Agents* (Guidance Document) vol 3 [Electoral Commission, *Guidance for Candidates and Agents*], online (pdf): <https://www.electoralcommission.org.uk/sites/default/files/pdf_file/UKPGE-Part-3-Spending-and-donations.pdf>.

two relevant time periods for candidate spending under the *RPA*. One limit applies to post-candidacy election expenses, while a separate limit applies to pre-candidacy election expenses under certain circumstances. The limit for post-candidacy expenses covers all election expenses incurred for things used after the person becomes a candidate, even if the expenses were actually incurred before they became a candidate, as indicated by the definition of election expenses.⁴²⁰ In the 2017 general parliamentary election, the post-candidacy spending limit consisted of a base amount of £8,700 with a top up of 9p per elector in county constituencies.⁴²¹

A separate spending cap applies to pre-candidacy election expenses in some circumstances. If Parliament is not dissolved for 55 months, election expenses will be capped between the end of the 55-month period and the day a person becomes a candidate.⁴²² In other words, if an expense is incurred for something used during this pre-candidacy window, it will count toward the pre-candidacy spending limit. This window could last up to four months. In the 2015 general parliamentary election, spending during this period was limited to a base amount of £30,700 with a top up of 6p per elector.⁴²³ The addition of this pre-candidacy limit in 2009 was presumably directed toward preventing the circumvention of pre-existing post-candidacy spending limits.

9.2.1.2 Contributions to Registered Parties and Candidates

As mentioned, contributions to candidates and political parties in the UK are subject to source restrictions and disclosure requirements, but the amount of each contribution is unlimited. The source restrictions and disclosure requirements apply to all donations to political parties, regardless of whether donations are specifically intended for the purpose of election campaigning, although disclosure is required more frequently during election periods.

a) Definition of "Donation"

(i) Definition of "donation" for parties: PPERA

"Donation" is defined in section 50(2) of *PPEREA* to include gifts of money or property; membership fees; payments of the party's expenses by a third person; and the provision of property, services, or facilities "otherwise than on commercial terms." "Sponsorship" is also included in the definition and is defined in section 51 of *PPEREA* as the transfer of money or property to the party to help the party meet expenses for events, research, or publications.

⁴²⁰ *RPA*, *supra* note 398, s 90ZA.

⁴²¹ *Ibid*, s 76; *Representation of the People (Variation of Limits of Candidates' Election Expenses) Order 2014* (UK), SI 2014/1870, art 4. See also Electoral Commission, *Guidance for Candidates and Agents*, *supra* note 419 at 7. In the 2017 parliamentary general election, there was no pre-candidacy spending limit, since Parliament was dissolved before the 55 month period expired.

⁴²² *RPA*, *supra* note 398, s 76ZA. Note that, for the purposes of section 76ZA, the definition of "election expenses" in section 90ZA(1) is changed to omit the words "after the date when he becomes a candidate at the election": s 76ZA(1).

⁴²³ *Ibid*, s 76ZA(2); *Representation of the People (Variation of Limits of Candidates' Election Expenses) Order 2014* (UK), SI 2014/1870, art 4. See also Electoral Commission, *Guidance for Candidates and Agents*, *supra* note 419 at 7.

However, sponsorship does not include the price of admission to events and payments to access party publications.⁴²⁴ The definition of donation also excludes various things, such as the provision of volunteer services on one's own time free of charge.⁴²⁵ In addition, donations of £500 or less are excluded from the definition of donation and are therefore exempt from source restrictions and disclosure requirements.⁴²⁶

Loans with a value over £500 are included within the regulatory scheme.⁴²⁷ After the self-explanatory "loans for peerages" scandal of 2006, the *Election Administration Act 2006* amended PPERA to ensure loans could not be used to circumvent source restrictions and disclosure requirements for donations.⁴²⁸

(ii) Definition of "donation" for candidates: the RPA

The definition of donation under the *RPA* is similar to the definition under PPERA. Donation is defined to include gifts; sponsorship; money lent on non-commercial terms; and the provision of property, services, or facilities on non-commercial terms.⁴²⁹ Donations of £50 or less are excluded.⁴³⁰ Volunteer services provided free of charge on the volunteer's own time are also excluded.⁴³¹

b) Source Restrictions

Source restrictions are similar for candidates and registered parties.⁴³² As indicated by the definitions of donation, these restrictions are triggered by donations and loans over £500 for parties and by donations over £50 for candidates. Donations and loans over these thresholds are only allowed from permissible donors whose identities are disclosed.⁴³³ Permissible donors include individuals registered in the electoral register in the UK, companies and limited liability partnerships that carry on business in the UK, unincorporated associations that carry on their activities primarily in the UK and have their main office in the UK, and trade unions listed under UK legislation.⁴³⁴ Charities are not allowed to make political donations.⁴³⁵ An additional restriction applies to donations and loans to political parties.

⁴²⁴ PPERA, *supra* note 397, s 51(3).

⁴²⁵ *Ibid*, s 52(1).

⁴²⁶ *Ibid*, s 52(2).

⁴²⁷ *Ibid*, ss 71F(3), 71F(12)(b).

⁴²⁸ Fisher, *supra* note 372 at 155; Gauja, *supra* note 16 at 179. *Parties and Elections: Legislating for Representative Democracy* (Ashgate Publishing, 2010) at 179.

⁴²⁹ RPA, *supra* note 398, Schedule 2A, para 2(1). "Sponsorship" is defined in para 3 of Schedule 2A.

⁴³⁰ *Ibid*, Schedule 2A, para 4(2).

⁴³¹ *Ibid*, Schedule 2A, para 4(1)(b).

⁴³² Third-party campaigners are subject to these same source restrictions under PPERA, as discussed in Section 9.2.3.2.

⁴³³ PPERA, *supra* note 397, s 54(1)(a); RPA, *supra* note 398, Schedule 2A, para 6(1)(b).

⁴³⁴ *Ibid*, Schedule 2A, para 6(1)(a). By contrast, under the federal regime in Canada, only individuals may contribute to political parties and candidates: see Section 8.2.1.2.

⁴³⁵ UK, The Electoral Commission, *Permissibility Checks for Political Parties*, (Guidance Document), [Electoral Commission, *Permissibility Checks*] at 4, online (pdf):

<https://www.electoralcommission.org.uk/sites/default/files/2021-01/sp-permissibility-rp_0.pdf>; Rowbottom, *supra* note 138 at 26.

Individuals contributing or lending more than £7,500 to a registered party are required to be resident, ordinarily resident, and domiciled in the UK for tax purposes.⁴³⁶

When accepting a donation from an unincorporated association, the Electoral Commission advises party officers to ascertain whether the association has an identifiable membership, a set of rules or a constitution, and a separate existence from its members.⁴³⁷ If these criteria are met, the party officer may accept the donation without inquiring further into the identity of the individuals funding the association, even if those individuals might be impermissible donors. The party officer is required simply to record the association's name and the address of its main office, in accordance with PPERA's transparency requirements.⁴³⁸ If the above criteria are not met, party officers are directed to "consider whether the donation is actually from individuals" within the association "or if someone within the association is acting as an agent for others."⁴³⁹ If so, the officer is required to ensure the individuals in question are permissible donors.⁴⁴⁰

c) Disclosure Requirements

Donations and loans to registered parties, along with donations to candidates, are subject to disclosure requirements. These transparency requirements will be discussed next.

9.2.1.3 Transparency Requirements for Registered Parties and Candidates

a) Registered Parties

The treasurer of a registered party is required to submit a campaign expenditure return to the Electoral Commission within six months after a general election.⁴⁴¹ The return is required to contain all campaign expenditures in the 365 days before the election, along with supporting invoices and receipts.⁴⁴² The treasurer is also required to submit a declaration that the return is complete and correct and, if the party's campaign expenditure exceeds £250,000, an auditor's report.⁴⁴³ The Electoral Commission is required to make the campaign expenditure returns available for public inspection "as soon as reasonably practicable,"⁴⁴⁴ but may destroy returns two years after receiving them.

⁴³⁶ PPERA, *supra* note 397, ss 54(2)(a), (2ZA), 71HZA(1)–(2).

⁴³⁷ Electoral Commission, *Permissibility Checks*, *supra* note 435 at 9.

⁴³⁸ *Ibid.* However, some additional transparency is provided by the reporting requirements for unincorporated associations. If an unincorporated association donates or lends over £25,000 in a year to a registered party, the association is required to report to the Electoral Commission any gifts over £7,500 received by the association before and after the association makes the donation or loan: PPERA, *supra* note 397, Schedule 19A, para 2.

⁴³⁹ Electoral Commission, *Permissibility Checks*, *supra* note 435 at 9.

⁴⁴⁰ *Ibid.*

⁴⁴¹ PPERA, *supra* note 397, ss 80, 82(1). The treasurer commits an offence if they fail to submit the report on time without reasonable excuse: s 84(1).

⁴⁴² *Ibid*, ss 80(3), (4).

⁴⁴³ *Ibid*, ss 83(2), 81.

⁴⁴⁴ *Ibid*, s 84.

Party treasurers are required to also submit quarterly donation reports.⁴⁴⁵ As mentioned, only contributions over £500 meet the definition of donation and only loans of a value of over £500 count as regulated transactions under *PPERA*. Donation reports are required to include donations or loans over £7,500, donations or loans from the same source that add up to £7,500 in a calendar year, and donations or loans over £1,500 that come from a source already reported in that year.⁴⁴⁶ Further, the treasurer is required to include donations or loans over £1,500 to the party's accounting units or constituency-level branches.⁴⁴⁷ If one person makes several donations to different branches of the party, the donations will be treated as a donation to the central party and is required to be reported if over £7,500 in the aggregate.⁴⁴⁸ Reports are required to include information about the donor or lender, such as name and address.⁴⁴⁹ During a general election, these reports are required to be submitted weekly.⁴⁵⁰ If there is nothing to report, the treasurer is required to submit a nil return.⁴⁵¹ The Electoral Commission maintains a register of donations and loans reported under *PPERA*, which is required to include the amount and source of each donation or loan.⁴⁵² Donations are to be entered into the register "as soon as reasonably practicable."⁴⁵³

b) Candidates

Candidates are required to submit a spending return within 35 days after the election result is declared.⁴⁵⁴ The return is required to include all election expenses incurred and payments made, along with a statement of the amount of money provided from the candidate's own resources to cover election expenses.⁴⁵⁵ Even if the candidate has incurred no election expenses, they are required to submit a nil return.⁴⁵⁶ The return is required to also list donations received and information about the donations, such as the date of acceptance, the amount of the donation, and the name and address of the donor.⁴⁵⁷ As noted above, these requirements only apply to donations over £50, as donations under this threshold do not meet the definition of donation in the *RPA*.⁴⁵⁸ If a candidate fails to deliver their return on time and is a Member of Parliament, the candidate is prohibited from sitting or voting in the

⁴⁴⁵ *Ibid*, ss 62(1), 71M(1).

⁴⁴⁶ *Ibid*, ss 62, 71M; UK, The Electoral Commission, *Overview of Donations to Political Parties* (Guidance Document) at 6, online (pdf):

<http://www.electoralcommission.org.uk/__data/assets/pdf_file/0014/102263/to-donations-rp.pdf>; UK, The Electoral Commission, *Overview of Loans to Political Parties* (Guidance Document) at 6, online: <https://www.electoralcommission.org.uk/sites/default/files/pdf_file/to-loans-rp.pdf>.

⁴⁴⁷ UK, The Electoral Commission, *Reporting Donations and Loans: Parties With Accounting Units* (Guidance Document) at 4, online:

<https://www.electoralcommission.org.uk/sites/default/files/pdf_file/sp-reporting-with-au-rp.pdf>.

⁴⁴⁸ *Ibid*.

⁴⁴⁹ *PPERA*, *supra* note 397, ss 62(13), 71M(13); Schedule 6, para 2; Schedule 6A, para 2.

⁴⁵⁰ *Ibid*, ss 63, 71Q.

⁴⁵¹ *Ibid*, ss 62(10), 71M(10).

⁴⁵² *Ibid*, ss 69, 71V.

⁴⁵³ *Ibid*, ss 69(5), 71V.

⁴⁵⁴ *RPA*, *supra* note 398, s 81(1).

⁴⁵⁵ *Ibid*, ss 81(1), (3).

⁴⁵⁶ Electoral Commission, *Guidance for Candidates and Agents*, *supra* note 419 at 16.

⁴⁵⁷ *RPA*, *supra* note 398, Schedule 2A, para 11; *PPERA*, *supra* note 397, Schedule 6, para 2.

⁴⁵⁸ *RPA*, *supra* note 398, Schedule 2A, para 4(2).

House of Commons until delivery is complete.⁴⁵⁹ The *RPA* also requires a candidate's donation returns to be published in at least two newspapers in their constituency.⁴⁶⁰

9.2.2 Public Funding

The UK's campaign finance regime provides little in the way of public funding for parties or candidates. There are no tax credits for political donations and no reimbursements or allowances. Justin Fisher notes that a tradition of "voluntarism as the basis for party finance" may explain the absence of robust public funding for election campaigns in the UK.⁴⁶¹

9.2.2.1 Policy Development Grants

Policy development grants for political parties are intended to help fund long-term research, thus encouraging parties to become a source of ideas in politics, not just electoral campaigning machines.⁴⁶² The Electoral Commission is not authorized to make more than £2 million in policy grants per year.⁴⁶³

9.2.2.2 Broadcasting Regulations

The *Communications Act 2003* prohibits paid political advertising on television and radio and requires broadcasters to provide free airtime to registered political parties for political and campaign broadcasts.⁴⁶⁴ Licensed broadcasters are required to allocate political broadcasting time in accordance with the minimum requirements set out by Ofcom, the UK's communications regulator.⁴⁶⁵ As long as these minimum requirements are met, broadcasters

⁴⁵⁹ *Ibid*, s 85(1). If a Member of Parliament contravenes this prohibition, they will be fined £100 for every day they sit or vote without submitting the return.

⁴⁶⁰ *Ibid*, s 88.

⁴⁶¹ Fisher, *supra* note 372 at 169.

⁴⁶² Gahleigh, "Expenditure, Donations and Public Funding", *supra* note 26 at 53.

⁴⁶³ PPERA, *supra* note 397, s 12(8).

⁴⁶⁴ *Communications Act 2003*, *supra* note 23, ss 319(2)(g), 333. For more information on the ban on paid political broadcasting, see Jacob Rowbottom, "Access to the Airwaves and Equality: The Case against Political Advertising on the Broadcast Media" in Rowbottom, *supra* note 138, at 77. Rowbottom argues in favour of broadcasting restrictions by pointing out that access to broadcast media is always limited, but should not be limited on the basis of wealth: 96. See also Andrew Geddis, "The Press: The Media and the 'Rupert Murdoch Problem'" in Ewing, Rowbottom & Tham, *supra* note 3, at 136. For criticism of the ban on paid political advertising, see Section 9.3.

⁴⁶⁵ "Ofcom Rules on Party Political and Referendum Broadcasts" (31 December 2020), online (pdf): Ofcom <https://www.ofcom.org.uk/_data/assets/pdf_file/0035/99188/pprb-rules-march-2017.pdf>. Ofcom advises at paragraph 14 that, before general elections, licensed broadcasters and the BBC should allocate one or more Party Election Broadcasts to each registered party "having regard to the circumstances of a particular election, the nation in which it is held, and the individual party's past electoral support and/or current support in that nation." At paragraph 15, Ofcom clarifies that registered parties should qualify for an election broadcast if contesting one sixth or more of the seats in a general election (in jurisdictions using proportional representation voting a formula determines whether a party qualifies). Further, Ofcom states at paragraph 16 that licensed broadcasters and the BBC "should consider making additional allocations of ... [election broadcasts] to registered parties ... if evidence of their past electoral support and/or current support at a particular election or in a relevant nation/electoral area means it would be appropriate to do so." Paragraph 24 to 26 stipulates

have the discretion to set their own rules on the length, frequency, allocation, and scheduling of political broadcasts.⁴⁶⁶

Under section 321(2) of the *Communications Act 2003*, an advertisement will contravene the prohibition on paid political advertising if it is inserted by a body whose objects are wholly or mainly of a political nature or if it is directed towards a political end. Objects of a political nature and political ends include attempts to influence the outcome of elections or referendums, among other non-election-related purposes.⁴⁶⁷

The regulation of political broadcasting is motivated by the “fear of the societal consequences of unbridled private control of an especially potent form of communication,”⁴⁶⁸ although the potency of television and radio is arguably being diluted by other media. The prohibition on paid political broadcasting also aims to reduce demand for campaign funds among political parties and candidates, which theoretically helps to address corruption, equality, and fairness concerns.

As discussed above, the European Court of Human Rights upheld the ban on paid political advertising in *Animal Defenders*.⁴⁶⁹ A “strong cultural antipathy to political advertising”⁴⁷⁰ in the UK also supports the continuing existence of the ban.

9.2.3 Third-Party Campaign Financing

The *RPA* governs third-party campaigns in relation to candidates in either a ward for a local municipal government election or a constituency for a UK general election. Broader campaigns for or against a political party or category of candidates, or on policies or issues associated with a party or category of candidates, are governed by *PPERA*.⁴⁷¹

The regulation of third-party campaigners in the UK mirrors the regulation of political parties and candidates. Third-party campaigners are subject to spending limits and, if they spend above a certain amount, they are required to comply with reporting requirements and source restrictions for donations.

that registered parties may choose for each television broadcast a length of 2'40", 3'40", or 4'40" and a length of up to 2'30" for each radio broadcast, and that political broadcasts are required to be aired between 5:30 pm and 11:30 pm on television and between 6:00 am and 10:00 pm on radio. In the context of general elections, paragraphs one and eight state that the relevant licensed broadcasters are “licensed public service television channel[s]” and “national (i.e., UK-wide, commercial) analogue radio service[s].”

⁴⁶⁶ *Ibid* at paras 3–4.

⁴⁶⁷ *Communications Act 2003*, c 21, s 321(3).

⁴⁶⁸ Geddis, *supra* note 464 at 146.

⁴⁶⁹ *Animal Defenders* ECHR, *supra* note 385.

⁴⁷⁰ Stephanie Palmer, “The Courts: Legal Challenges to Political Finance and Election Laws” in Ewing, Rowbottom & Tham, *supra* note 3, at 184.

⁴⁷¹ UK, The Electoral Commission, *Northern Ireland Assembly Election March 2017: Non-party Campaigners* (Guidance Document) [Electoral Commission, *Northern Ireland Assembly Election*] at 5, online (pdf): <https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Northern-Ireland-Assembly-NPC-2017.pdf>.

9.2.3.1 Activities Captured by Third-Party Campaign Regulations

a) PPERA

(i) Meaning of "Recognised" Third Party

"Third party" is defined in *PPERA* as "any person or body other than a registered party,"⁴⁷² or a registered party if it campaigns to promote the electoral success of other parties or candidates from other parties.

PPERA creates a scheme of unregistered and registered, or "recognised" third parties for general national elections. Unregistered third-party campaigners can only spend up to a certain amount on controlled expenditures during the regulated period and are then required to register. Once registered, they become a "recognised third party" with a much higher spending limit, and are subject to various other requirements, such as reporting requirements.⁴⁷³

(ii) Definition of "Controlled Expenditure"

As mentioned above, once a third party reaches a certain threshold of "controlled expenditure," they must register and meet various requirements. The definition of controlled expenditure in section 85 of *PPERA* has two components. First, a controlled expenditure is an expense incurred by or on behalf of the third party that falls under Part 1 of Schedule 8A, which includes expenses incurred for the "production or publication of material ... made available to the public in whatever form and by whatever means,"⁴⁷⁴ canvassing or market research, press conferences, and public rallies other than annual conferences of the third party, among other things. Various expenses are excluded from the definition, such as expenses incurred by an individual to provide volunteer services on their own time.⁴⁷⁵ Second, a controlled expenditure must be capable of being reasonably "regarded as intended to promote or procure the electoral success"⁴⁷⁶ of a party and its candidates or of a particular category of parties or candidates. A category of parties or candidates may be characterized by, for example, a policy position.⁴⁷⁷ A third party promotes the electoral success of parties or candidates if it engages in "prejudicing the electoral prospects ... of other parties or candidates."⁴⁷⁸

Promoting electoral success also does not require express mention of any party or candidate,⁴⁷⁹ nor does the expenditure need to be solely for the purpose of promoting a party

⁴⁷² *PPERA*, *supra* note 397, ss 85(8)–(9).

⁴⁷³ For registrations see "Registrations" (last visited 31 October 2021), online: *The Electoral Commission* <<http://search.electoralcommission.org.uk/Search/Registrations?currentPage=1&rows=20&sort=RegulatedEntityNameℴ=asc&open=filter&et=tp®ister=none®Status=registered&optCols=EntityStatusName>>.

⁴⁷⁴ *PPERA*, *supra* note 397, Schedule 8A, para 1.

⁴⁷⁵ *Ibid*, Schedule 8A, para 2(1)(a)(i).

⁴⁷⁶ *Ibid*, s 85(2).

⁴⁷⁷ *Ibid*, s 85(2)(b).

⁴⁷⁸ *Ibid*, s 85(4)(b).

⁴⁷⁹ *Ibid*, s 85(4)(c).

or candidate's electoral success in order to fit within the definition of controlled expenditure.⁴⁸⁰

In its guidance for non-party campaigners, the Electoral Commission has superimposed an alternative or additional two-step test for determining whether spending on an activity is a controlled expenditure under *PPERA*. The first step is the "purpose test," which involves asking whether the activity can reasonably be regarded as intended to influence voters to vote for or against a party or category of candidates.⁴⁸¹ The purpose test will be met if the activity promotes or opposes policies so closely associated with the party or category of candidates that it can reasonably be regarded as intended to influence voters.⁴⁸² The second step is the "public test," which involves asking whether the activity is aimed at, seen by or heard by the public or involves the public.⁴⁸³ The "public" does not include members of the non-party campaigner organization or its "committed supporters."⁴⁸⁴

b) *The RPA*

Under the *RPA*, persons other than the candidate, the candidate's election agent, and those authorized by the election agent are subject to regulations if they incur expenses for matters such as public meetings or advertising with a view to promoting or procuring the election of a candidate.⁴⁸⁵

9.2.3.2 Contributions to Recognised Third Parties under *PPERA*

Under *PPERA*, donations to recognised third parties are not capped but are subject to other requirements if their value exceeds £500, such as reporting requirements.⁴⁸⁶ The reporting requirements are discussed in Section 9.2.3.4. Donations of over £500 to recognised third parties for the purpose of controlled expenditures are only allowed from permissible donors, just like donations to political parties.⁴⁸⁷ In relation to a recognised third party, donations are defined as gifts; sponsorship; membership fees; and the provision of goods, services, and facilities, among other things, but volunteer services do not count as a donation.⁴⁸⁸

⁴⁸⁰ *Ibid*, s 85(4A).

⁴⁸¹ Electoral Commission, *Northern Ireland Assembly Election*, *supra* note 471 at 8.

⁴⁸² UK, The Electoral Commission, *Overview of Regulated Non-party Campaigning* (Guidance Document) [Electoral Commission, *Regulated Non-party Campaigning*] at 6, online: <<https://www.electoralcommission.org.uk/sites/default/files/2020-12/Overview%20of%20regulated%20non-party%20campaigning%20May%20202021.pdf>>; UK Electoral Commission, *Non-Party Campaigners: Where to Start* (Guidance Document), online: <<https://www.electoralcommission.org.uk/non-party-campaigners-where-start>>.

⁴⁸³ Electoral Commission, *Northern Ireland Assembly Election*, *supra* note 471 at 8.

⁴⁸⁴ Electoral Commission, *Regulated Non-party Campaigning*, *supra* note 482 at 7.

⁴⁸⁵ *RPA*, *supra* note 398, s 75.

⁴⁸⁶ *PPERA*, *supra* note 397, Schedule 11, para 4(2).

⁴⁸⁷ *Ibid*, Schedule 11, para 6. See section 54(2) of *PPERA* for the list of permissible donors.

⁴⁸⁸ *Ibid*, Schedule 11, paras 2(1), 4(1). "Sponsorship" is defined in para 3.

9.2.3.3 Spending by Third Parties

a) PPERA

The spending limits for recognised third parties in different parts of the UK apply for 365 days before a parliamentary general election,⁴⁸⁹ but expenses incurred before the regulated period will count toward the limit if they are incurred for property, services or facilities that are used during this regulated period.⁴⁹⁰ Again, under the *Fixed-term Parliaments Act 2011*, if approval for an election occurs before the standard four years date, the spending limits do not apply retroactively for the period of the previous 365 days.⁴⁹¹

Recognised third parties have a higher spending limit than unregistered third parties. In England, the limit on controlled, non-targeted expenditures by a recognised third party is 2% of the maximum campaign expenditure limit for England.⁴⁹² The “maximum campaign expenditure limit” refers to the maximum amount a political party is allowed to spend in a particular part of the UK.⁴⁹³ A recognised third party may not spend more than 0.05% of the maximum campaign expenditure limit in any one constituency.⁴⁹⁴ If a recognised third party exceeds the spending limit, they will commit an offence under *PPERA* if they reasonably ought to have known that their expenditures would exceed the limit.⁴⁹⁵

If a registered third party’s spending is “targeted” at convincing voters to vote for a specific party, and the spending is approved by that party, the third party can spend whatever amount the party approves up to the maximum limit. However, if the spending is targeted in favour of one party but not approved by that party, then the spending limit is much lower (approximately 6% of the maximum limit).⁴⁹⁶ This allowance for express, authorized coordination of campaigning by a party and third party raises obvious questions concerning the party’s political feeling. If they win the election, they may have a sense of obligation to return the favour of the third party’s targeted support.

Unregistered third parties can spend up to £20,000 in England and up to £10,000 in each of Scotland, Wales, and Northern Ireland on controlled expenditures in the 365 days before a parliamentary general election.⁴⁹⁷ Like recognised third parties, unregistered third parties are prohibited from spending more than 0.05% of the maximum campaign expenditure in a

⁴⁸⁹ *Ibid*, Schedule 10, para 3(3).

⁴⁹⁰ *Ibid*, s 94(8).

⁴⁹¹ *Fixed-term Parliaments Act 2011*, *supra* note 418.

⁴⁹² *PPERA*, Schedule 10, para 3. In 2019, the spending limit in effect for non-targeted third-party spending across England was £479,550. UK, The Electoral Commission, *UK Parliamentary General Election 2019: Non-Party Campaigners* (Guidance Document) [Electoral Commission, *Non-Party Campaigners*] at 11, online (pdf):

<<https://www.electoralcommission.org.uk/sites/default/files/2019-11/Non-party%20campaigner%20UKPGE%202019.pdf>>.

⁴⁹³ *PPERA*, s 94(10)(e).

⁴⁹⁴ *Ibid*, Schedule 10, para 3(2A).

⁴⁹⁵ *Ibid*, s 94(2).

⁴⁹⁶ Electoral Commission, *Non-Party Campaigners*, *supra* note 492 at 13.

⁴⁹⁷ *PPERA*, ss 94(3)–(5).

particular constituency.⁴⁹⁸ If a third party exceeds these limits without registering, they will commit an offence under *PPERA*.⁴⁹⁹

b) *The RPA*

Under the *RPA*, third parties can spend up to £700 campaigning for the election of a candidate after the date the person becomes a candidate.⁵⁰⁰ Expenses incurred before the person becomes a candidate will count toward this limit if incurred for something to be used after the candidacy begins.⁵⁰¹ A person becomes a candidate the day Parliament is dissolved. If a person's intention to become a candidate is not expressed until after dissolution, they will become a candidate on the date this intention is declared or the date of the person's nomination, whichever is earlier.⁵⁰²

9.2.3.4 Transparency Requirements for Third-Party Campaigners

a) *Attribution*

Under *PPERA*, published election material is required to contain the names and addresses of the printer, promoter, and person on whose behalf it is published.⁵⁰³ The "promoter" is defined as "the person causing the material to be published."⁵⁰⁴ "Election material" is defined as "material which can reasonably be regarded as intended to promote or procure electoral success"⁵⁰⁵ for a registered party, for a category of registered parties or for a category of candidates. For example, if a company causes material to be published in support of a registered party, the company's name and address is required to appear on the material.

b) *Reporting Requirements*

(i) *PPERA*

Unregistered third parties have no disclosure obligations. However, recognised third parties are required to prepare a return if they incur any controlled expenditures during the 365 days before polling day.⁵⁰⁶ The return is required to include a statement of payments made in respect of controlled expenditures and a statement of donations received for the purpose of controlled expenditures for the relevant election.⁵⁰⁷ For donations from permissible donors with a value of more than £7,500, the return is required to state the amount or nature of the donation, the date it was received, and information about the donor.⁵⁰⁸ The total value of all donations worth more than £500 and that do not exceed £7,500 is also required to be

⁴⁹⁸ *Ibid*, s 94(5ZA).

⁴⁹⁹ *Ibid*, s 94.

⁵⁰⁰ *RPA*, *supra* note 398, ss 75(1),(1ZZB),(1ZA).

⁵⁰¹ *Ibid*, s 75(8).

⁵⁰² *Ibid*, s 118A(2); Electoral Commission, *Guidance for Candidates and Agents*, *supra* note 419 at 6.

⁵⁰³ *PPERA*, *supra* note 397, s 143.

⁵⁰⁴ *Ibid*, s 143(11).

⁵⁰⁵ *Ibid*, s 143A.

⁵⁰⁶ *Ibid*, s 96(1).

⁵⁰⁷ *Ibid*, s 96(2).

⁵⁰⁸ *Ibid*, Schedule 11, paras 10(1)–(2).

reported.⁵⁰⁹ If a recognised third party incurs more than £250,000 for controlled expenditures during the 365 days before polling day, they are required to also submit an auditor's report with their return.⁵¹⁰

(ii) The RPA

If a third-party campaigner incurs expenses that require authorization by a candidate's election agent, such as expenses totalling over £700, the third party is required to submit a return stating the amount of the expenses and the candidate for whom they were incurred.⁵¹¹ The return is required to be submitted within 21 days after the election results are declared.⁵¹² If the expenses are under £700, meaning the candidate's election agent need not authorize the expenses, the Electoral Commission may nonetheless require the third party to submit a return that either shows the expenses incurred or contains a statement that the expenses were £200 or less.⁵¹³

9.2.3.5 Rules Governing Specific Types of Third Parties

a) Companies

Companies are required to obtain a resolution from their members authorizing political donations or expenditures in advance.⁵¹⁴ A resolution is not required unless the donation exceeds £5,000 by itself or in combination with other political donations made in the 12-month period leading up to the donation.⁵¹⁵ The resolution "must be expressed in general terms ... and must not purport to authorize particular donations or expenditure."⁵¹⁶ The resolution is in effect for four years.⁵¹⁷

b) Trade Unions

Trade unions are required to ballot their members to establish a separate political fund for political donations and expenditures.⁵¹⁸ Members are required to opt in to contribute to the union's political fund and may withdraw their opt-in notice at any time.⁵¹⁹ Further, the trade union is required to take all reasonable steps to notify members of their right to withdraw from contributing to the political fund.⁵²⁰

⁵⁰⁹ *Ibid*, Schedule 11, para 10(3).

⁵¹⁰ *Ibid*, s 97.

⁵¹¹ *RPA*, *supra* note 398, s 75(2).

⁵¹² *Ibid*, s 75(2)(a).

⁵¹³ *Ibid*, s 75ZA.

⁵¹⁴ *Companies Act 2006*, *supra* note 151, s 366.

⁵¹⁵ *Ibid*, s 378(1).

⁵¹⁶ *Ibid*, s 367(5).

⁵¹⁷ *Ibid*, s 368.

⁵¹⁸ *Trade Union and Labour Relations (Consolidation Act) 1992 (UK)*, c 52, s 71.

⁵¹⁹ *Ibid*, s 84(1).

⁵²⁰ *Ibid*, s 84A(1).

Trade unions are required to provide detailed information in annual returns regarding payments out of their political fund if those payments exceed £2,000 in a calendar year.⁵²¹ For example, if a union contributes to a third-party campaigning organisation, the union's annual return is required to include the name of the organisation, the amount paid to that organisation, the names of the political parties or candidates that the union hoped to support through the expenditure, and the amount of the expenditure spent in relation to each political party or candidate.⁵²²

c) Unincorporated Associations

If an unincorporated association donates or lends over £25,000 in a year to a registered party or recognised third party, the association is required to report to the Electoral Commission any gifts over £7,500 received by the association before and after the association makes the political contribution.⁵²³ The Electoral Commission is required to maintain a register of gifts reported to them by unincorporated associations.⁵²⁴

9.2.4 Role of the Electoral Commission

The Electoral Commission supervises compliance with *PPERA* and other electoral law statutes, such as the *RPA*.⁵²⁵ It has the power to demand the production of documents or records of income and expenditure, copy those documents and records, and enter the premises of an individual or organization to retrieve those documents and records.⁵²⁶ Failure to deliver documents to the Electoral Commission can lead to civil penalties.⁵²⁷ The police, however, are responsible for initiating enforcement actions for criminal offences under *PPERA*.⁵²⁸

Since 2009, four out of nine commissioners on the Electoral Commission have been nominated by the political parties.⁵²⁹ This was introduced in response to criticisms that the commissioners, who formerly could not be members of parties or have held political office in the last ten years, were too apolitical and did not understand the "practical workings of political parties."⁵³⁰

⁵²¹ *Ibid*, s 32ZB.

⁵²² *Ibid*, s 32ZB(6).

⁵²³ *PPERA*, *supra* note 397, Schedule 19A, para 2.

⁵²⁴ *Ibid*, Schedule 19A, para 7.

⁵²⁵ Ghaleigh, "Expenditure, Donations and Public Funding", *supra* note 26 at 42; *PPERA*, *supra* note 397, s 145.

⁵²⁶ *PPERA*, *supra* note 397, s 146.

⁵²⁷ *Ibid*, s 147; Navraj Singh Ghaleigh, "The Regulator: The First Decade of the Electoral Commission" in Ewing, Rowbottom & Tham, *supra* note 3, 153 [Ghaleigh, "The Regulator"] at 157.

⁵²⁸ *Ibid* at 157.

⁵²⁹ *Ibid* at 158.

⁵³⁰ *Ibid*.

9.3 Criticisms of Campaign Finance Regulation

A heavily criticized aspect of the UK's campaign finance regime is the absence of donation caps.⁵³¹ Even though most campaign finance scandals in the UK involve donations, only spending is capped.⁵³² Uncapped donations allow reliance on a small number of large donors, which raises concerns regarding corruption, equality, fairness, and public confidence.⁵³³ Admittedly, the UK's spending limits might relieve the need for big donations to some extent by reducing the demand for money. In addition, transparency requirements supposedly deter large donations through negative press attention. For example, after the disclosure requirements in *PPERA* came into force in 2000, the media seized on instances in which large donors to the Labour Party obtained some benefit from the government around the same time they made donations.⁵³⁴ The resulting scandal may have deterred future large donors.⁵³⁵ However, Fisher notes this deterrence did not appear to be at work in the 2008 and 2010 elections.⁵³⁶ Fisher argues further that, in spite of *PPERA*'s spending limits, the demand for money among parties has continued unabated, especially after the devolution of power to Scotland, Wales, and Northern Ireland and associated extra elections.⁵³⁷ The major parties' reliance on large donations could also be exacerbated by "the decline of other forms of party income."⁵³⁸

Others criticize *PPERA*'s spending limits for leaving out local, constituency-level party branches.⁵³⁹ As noted by Ron Johnston and Charles Pattie, candidates are subject to stricter regulation than parties at the constituency level.⁵⁴⁰ They argue in favour of stricter regulation for local party units, particularly in light of the importance of local party branches in campaigning for marginal seats and the apparent effectiveness of local campaigning.⁵⁴¹ Fisher adds that spending at the constituency level will only become more important as volunteer campaigning drops with falling party membership.⁵⁴²

⁵³¹ According to Fisher, one reason for the UK's failure to impose a donation ceiling is the Labour Party's structure of affiliated trade unions: see Fisher, *supra* note 372 at 161.

⁵³² Ewing & Rowbottom, *supra* note 103 at 77.

⁵³³ For example, in the Brexit referendum, which was subject to similar rules as general elections, ten donors were responsible for over half of donations to the campaigns and 100 donors were responsible for 95% of all reported donations: Steve Goodrich, *Take Back Control: How Big Money Undermines Trust in Politics*, ed by Duncan Hames (London: Transparency International UK, 2016) at 1.

⁵³⁴ Ewing, *supra* note 165 at 63.

⁵³⁵ The scandals also led the Labour Party to set up extra "safeguards," for example, the party instituted a requirement that donors sign a statement declaring that they are not seeking personal or commercial benefits: *ibid* at 67.

⁵³⁶ Fisher, *supra* note 372 at 167.

⁵³⁷ *Ibid* at 153.

⁵³⁸ *Ibid*.

⁵³⁹ However, expenses incurred by local party branches to promote the party as a whole count toward the national party's spending limits. See Section 9.2.1.1.

⁵⁴⁰ Johnston & Pattie, *supra* note 614 at 92.

⁵⁴¹ *Ibid*.

⁵⁴² Justin Fisher, "Legal Regulation and Political Activity at the Local Level in Britain" in Ewing, Rowbottom & Tham, *supra* note 3, at 121.

Criticism has also been directed toward the source restrictions and transparency requirements for political donations. Rowbottom argues that the permissible donor scheme can be circumvented through the use of corporate vehicles.⁵⁴³ For example, a foreign national could effectively make a political donation through a company carrying on business in the UK, as long as the company did not act as an agent for the foreign national.⁵⁴⁴ Lesser transparency requirements in Northern Ireland, where donors need not be disclosed, may also allow circumvention of PPERA's transparency rules. For example, the Democratic Unionist Party of Northern Ireland caused controversy after accepting a £425,000 donation for the purpose of pro-Brexit advertising in England and Scotland.⁵⁴⁵ The party was not required by the law of Northern Ireland to disclose the source of the donation, even though the advertising took place outside of Northern Ireland.

Complexity is another problem plaguing the UK's campaign finance regime. Navraj Ghaleigh observes that PPERA's labyrinthine intricacy "impose[s] a regulatory burden that risks unintended consequences."⁵⁴⁶ Volunteers at the local party level are unlikely to fully understand the requirements of PPERA's "heavily amended" provisions, which could lead to fears of liability and a chilling effect.⁵⁴⁷ Gauja and Orr also note that the introduction of stricter third-party campaigning regulations in 2014 could hinder the ability of voluntary organizations to "speak on issues of concern," creating a "chilling effect on democracy."⁵⁴⁸ Some organizations may be unable to pay for independent legal advice to sort out the complex third-party rules, although the Electoral Commission releases guidance for third-party campaigners under section 3 of the *Transparency of Non-Party Campaigning Act*.⁵⁴⁹ Small political parties may also lack the resources to meet reporting requirements, although the Electoral Commission may provide some assistance.⁵⁵⁰

⁵⁴³ Rowbottom, *supra* note 138 at 18.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ Peter Geoghegan & Adam Ramsay, "The Strange Link Between the DUP Brexit Donation and a Notorious Indian Gun Running Trial", *Open Democracy* (28 February 2017), online: <<https://www.opendemocracy.net/uk/peter-geoghegan-adam-ramsay/mysterious-dup-brexit-donation-plot-thickens>>; "DUP Confirms £435,000 Brexit Donation", *BBC News* (24 February 2017), online: <<http://www.bbc.com/news/uk-northern-ireland-39075502>>; Fintan O'Toole, "What Connects Brexit, the DUP, Dark Money and a Saudi Prince?", *The Irish Times* (16 May 2017), online: <<https://www.irishtimes.com/opinion/what-connects-brexit-the-dup-dark-money-and-a-saudi-prince-1.3083586>>; Ian Johnston "The strange tale of the DUP, Brexit, a Mysterious £425,000 Donation and a Saudi Prince", *The Independent* (9 June 2017), online: <<http://www.independent.co.uk/news/uk/politics/election-dup-brexit-donations-saudi-arabia-tale-tories-theresa-may-a7782681.html>>. Facing political pressure, the DUP eventually revealed the source of the donation to be an organization called the Constitutional Research Council. However, the ultimate source of the donation remains unclear. Even under PPERA's disclosure requirements, the ultimate source of this type of donation could remain murky. As discussed in Section 9.2.1.2(b), under PPERA, parties may, under certain circumstances, accept donations from an unincorporated association without inquiring into the identities of the individuals funding the unincorporated association.

⁵⁴⁶ Ghaleigh, "Expenditure, Donations and Public Funding", *supra* note 26 at 167.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ Gauja & Orr, *supra* note 9 at 250.

⁵⁴⁹ *Ibid* at 259; *Transparency of Non-Party Campaigning Act*, *supra* note 401, s 3.

⁵⁵⁰ Gauja, *supra* note 16 at 179.

The UK's ban on paid political advertising on broadcast media has drawn criticism for its impact on freedom of expression, particularly in relation to public interest organizations.⁵⁵¹ Critics argue the ban is overbroad since it captures "not just political parties but social advocacy groups seeking to take part in debate about matters of controversy."⁵⁵² Using Amnesty International as an example, Barendt explains that the ban may preclude charities from running short advertisements on radio or television.⁵⁵³ To Barendt, this constitutes "a monstrous and unjustifiable infringement of freedom of expression."⁵⁵⁴ The case of *Animal Defenders*, which involved advertisements funded by an animal welfare organization, arguably provided an example of overbreadth. As noted by three of the dissenting justices in that case, nobody was suggesting that Animal Defenders International "was a financially powerful body with the aim or possibility of ... unduly distorting the public debate."⁵⁵⁵ Five other dissenting justices in *Animal Defenders* argued further that "the prohibition applied to the most protected form of expression (public interest speech), by one of the most important actors in the democratic process (an NGO) and on one of the most influential media (broadcasting)."⁵⁵⁶

Critics also observe that the ban on paid political advertising prevents public interest groups from responding to commercial advertising on broadcast media. As Lewis points out, "under the current state of affairs a car manufacturer may advertise its SUVs on television without limit (finances permitting), but an NGO wishing to publicize the impact of such vehicles on the environment is prohibited, by law, from doing so."⁵⁵⁷ Similarly, in Barendt's view:

It can make no sense to allow commercial ads for automobiles and gas and other products associated with driving, or to allow the government to insert public service adverts ... but not to allow groups to pay for political adverts to make the opposite case.⁵⁵⁸

⁵⁵¹ The ban's impact on political parties is less extreme, since broadcasters are required to provide parties with airtime for party political broadcasts. See *Animal Defenders* ECHR, *supra* note 385, dissenting judgement of Tulkens J at para 14.

⁵⁵² Tom Lewis, "*Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?*" (2014) 77:3 Mod L Rev 460 at 462.

⁵⁵³ Joint Committee on The Draft Communications Bill, *Minutes of Evidence*, Sess 2001-02 (17 June 2002) 478–502 (Professor Eric Barendt) [Minutes of Evidence], online:

<<https://publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/2061701.htm>>.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Animal Defenders* ECHR, *supra* note 385, dissenting judgement of Tulkens J at para 19.

⁵⁵⁶ *Ibid.*, dissenting judgement of Ziemele J et al at para 2. Ziemele J also argued that the majority's decision was inconsistent with *VgT Verein gegen Tierfabriken v Switzerland*, No 32772/02, [2001] VI ECHR 243, in which the ECtHR held that a similar prohibition on political advertising in Switzerland contravened the European Convention on Human Rights because it violated freedom of expression and was not necessary in a democratic society.

⁵⁵⁷ Lewis, *supra* note 552 at 473.

⁵⁵⁸ Minutes of Evidence, *supra* note 553.

Critics of the ban on paid political advertising maintain that less restrictive options exist to level the playing field of public debate.⁵⁵⁹ Barendt argues that lawmakers can prevent “the domination of politics by ultra rich … groups” through spending limits on advertising and restrictions on “the number of spots which could be purchased.”⁵⁶⁰ Both supporters and critics of the ban also question why it applies only to broadcast media.⁵⁶¹ Television and radio are declining in importance, while digital advertising, particularly on social media websites, is growing in importance. As a result, the goal of promoting a level playing field is undermined by the lack of regulation governing digital political advertisements, leading some commentators to argue that regulation should be extended to non-broadcast media.⁵⁶²

Other criticisms of UK campaign finance law include the parsimoniousness of the public funding regime, which derives partly from public hostility toward the public funding of election campaigns.⁵⁶³ Keith Ewing and Jacob Rowbottom also point to holes in the reporting requirements for third parties. Regulations do not cover internal communications between organizations and their members, while some third parties, like newspaper companies, are excluded altogether.⁵⁶⁴ In addition, Ghaleigh criticizes the lack of sanctioning options for contraventions of *PPERA*. The Electoral Commission may either issue a reprimand, which is essentially “nothing,” or refer the matter to the criminal prosecution authorities, which may be overly heavy-handed in some cases.⁵⁶⁵ Finally, because of the Electoral Commission’s “broad range of duties,” some critics warn against the “risk of overburdening.”⁵⁶⁶

10. CANADA

Canada’s federal campaign finance regime is more extensive than the regulatory regime in the US or the UK. In Canada, both contributions and expenditures are capped. A “remarkable degree of consensus”⁵⁶⁷ exists regarding the need for campaign expenditure ceilings for parties and candidates, with no constitutional challenges or significant legislative proposals targeting caps. Third-party spending limits have been challenged but upheld by the Supreme Court of Canada (SCC).⁵⁶⁸ Further, in 2003, Parliament introduced

⁵⁵⁹ Andrew Scott, “‘A Monstrous and Unjustifiable Infringement’?: Political Expression and the Broadcasting Ban on Advocacy Advertising” (2003) 66:2 Mod L Rev 224; Sarah Sackman, “Debating ‘Democracy’ and the Ban on Political Advertising” (2009) 72:3 Mod L Rev 475; Minutes of Evidence, *supra* note 553.

⁵⁶⁰ Minutes of Evidence, *supra* note 553. See also Sackman, *supra* note 559 at 482. Barendt also suggests that radio and television can be distinguished from each other in designing a regulatory regime, as the price of advertising on radio “would not be extortionate.” Thus, the potential for distortion by the wealthy is smaller in the context of radio advertising: Minutes of Evidence, *supra* note 553.

⁵⁶¹ See e.g. Sackman, *supra* note 559 at 484.

⁵⁶² Tambini et al, *supra* note 108 at 4, 8, 21.

⁵⁶³ Fisher, *supra* note 372 at 165.

⁵⁶⁴ Ewing & Rowbottom, *supra* note 103 at 82.

⁵⁶⁵ Ghaleigh, “The Regulator”, *supra* note 527 at 157.

⁵⁶⁶ Ghaleigh, “Expenditure, Donations and Public Funding”, *supra* note 26 at 43.

⁵⁶⁷ Young, *supra* note 6 at 121.

⁵⁶⁸ Harper, *supra* note 52.

“one of the most generous schemes for public funding of political parties that has been seen in a liberal democracy,”⁵⁶⁹ although an important element of that scheme was repealed in 2014.

10.1 Constitutional Rights and Campaign Finance Regulation

10.1.1 Freedom of Expression

Freedom of expression is enshrined in section 2(b) of the Canadian *Charter of Rights and Freedoms* (the *Charter*). In *R v Keegstra*,⁵⁷⁰ the SCC stated that “[t]he connection between freedom of expression and the political process is perhaps the linchpin of the section 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy.” The test for determining whether legislation infringes section 2(b) is found in *Irwin Toy Ltd v Quebec*.⁵⁷¹ First, a court will ask whether the activity in question fits within the sphere of activities protected by freedom of expression. This first step is established easily in regards to election-related communications, as political expression “lies at the core of the guarantee of free expression.”⁵⁷² Second, a court will ask whether the legislation’s purpose or effect is to restrict freedom of expression.

Freedom of association is protected under section 2(d) of the *Charter*. According to the SCC, section 2(d) facilitates the exercise of other freedoms and guarantees the ability to exercise *Charter* rights collectively.⁵⁷³ The right to vote is protected under section 3 of the *Charter*.

Once an infringement of a *Charter* right is established, courts consider section 1 of the *Charter*. Section 1 allows the impugned law to stand if the limit on the right in question is reasonable and demonstrably justifiable in a free and democratic society. At the section 1 stage of the analysis, courts ask whether the objective of the impugned law is pressing and substantial and whether the means chosen by the legislature are proportionate to its ends. In considering proportionality, the courts ask whether the means are rationally connected to the law’s objectives, whether the impairment of *Charter* rights is as little as is reasonably possible and whether the deleterious and salutary effects of the law are proportionate.⁵⁷⁴

10.1.2 Constitutional Validity of Campaign Finance Regulation

10.1.2.1 *Canada v Somerville*

Spending limits for third-party campaigners (individuals, businesses, unions, and other organizations) have been challenged several times in Canada. Although the SCC upheld limits in *Harper*,⁵⁷⁵ discussed further below, the Alberta Court of Appeal earlier struck down

⁵⁶⁹ Young, *supra* note 6 at 107.

⁵⁷⁰ *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1.

⁵⁷¹ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

⁵⁷² *Harper*, *supra* note 52 at para 66.

⁵⁷³ *Libman*, *supra* note 56 at para 36.

⁵⁷⁴ *R v Oakes*, [1986] 1 SCR 103; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 94.

⁵⁷⁵ *Harper*, *supra* note 52.

a CDN\$1,000 cap on third-party spending on election advertising in *Somerville*.⁵⁷⁶ According to the Alberta Court of Appeal in *Somerville*, third-party spending limits “severely limit[ed]” the communicative power of third parties, thus violating their right to freedom of expression.⁵⁷⁷ The spending limits also constituted a limit on freedom of association since they prevented people from combining “resources to pursue common goals, influence others, exchange ideas and effect change.”⁵⁷⁸ Further, the Alberta Court of Appeal found that the impugned provisions violated the right to vote under section 3 of the *Charter*. In the Court’s view, the limits had “the effect of obstructing citizens’ access to information to such an extent that the right to cast an ‘informed vote’ is breached.”⁵⁷⁹

The Court held that the impugned provisions could not be justified under section 1 of the *Charter*. Without effective third-party advertising, citizens would only be as informed “as the news media, the parties and the candidates themselves want the citizens to be.”⁵⁸⁰ The Court rejected the government’s argument that the law was intended to prevent distortion of the political process. Rather, in the Court’s view, the spending limits had the unacceptable objective of preserving the preferential position of political parties by preventing third parties from being “heard in any effective way.”⁵⁸¹

10.1.2.2 *Libman v Quebec*

In *Libman*, the SCC struck down a provision in the province of Quebec that restricted third-party campaigning in referendums.⁵⁸² The statutory provisions at issue in the *Libman* case allowed only minimal spending by individuals or groups that did not become affiliated organizations of the official, registered committees in a referendum. These restrictions led the SCC to conclude that the entire law was unconstitutional as it did much more than “minimally impair” the freedom of expression of these individuals and groups, and therefore failed that part of the section 1 *Charter* analysis.⁵⁸³

However, in *Libman*, the SCC accepted in principle the constitutionality of third-party spending limits in referendums and elections. The SCC found that the three objectives of the legislation were pressing and substantial. The first objective was the egalitarian goal of ensuring the wealthy do not have a “dis-proportionate influence by dominating the referendum debate.”⁵⁸⁴ Second, the spending limits aimed to facilitate informed voting “by ensuring some positions are not buried by others.”⁵⁸⁵ The third objective was to encourage

⁵⁷⁶ *Somerville*, *supra* note 72.

⁵⁷⁷ *Ibid* at para 48.

⁵⁷⁸ *Ibid* at para 26.

⁵⁷⁹ *Ibid* at para 48.

⁵⁸⁰ *Ibid*.

⁵⁸¹ *Ibid* at para 76.

⁵⁸² *Libman*, *supra* note 56.

⁵⁸³ *Ibid* at paras 74–77.

⁵⁸⁴ *Ibid* at para 41.

⁵⁸⁵ *Ibid*.

public confidence by demonstrating that the political process is not “dominated by the power of money.”⁵⁸⁶

Moving to the next stage of the section 1 analysis, the SCC found that the third-party spending limits were rationally connected to their three objectives.⁵⁸⁷ Based on the report of the Lortie Commission,⁵⁸⁸ the SCC remarked that third-party spending must be limited to ensure the effectiveness of party and candidate spending limits, which are, in turn, key to electoral fairness.⁵⁸⁹ The SCC also accepted that third-party spending limits must be lower than limits for candidates and parties because private resources are unlikely to be spread equally across candidates and policy positions.⁵⁹⁰ If limits are too high, third-party spending could produce “disproportionate” and unfair advantages for certain candidates.⁵⁹¹

The SCC stated in *Libman* that it was up to the legislature to decide what larger amount non-affiliated groups and individuals should be allowed to spend on paid advertising during a referendum. However, it strongly suggested that it agreed with the Lortie Commission’s proposal of a CDN\$1,000 limit at the national level and a proportionally lower amount at a provincial level.⁵⁹² In doing so, the SCC explicitly rejected the Alberta Court of Appeal’s ruling in *Somerville* that found a limit of CDN\$1,000 on ad spending by a third party during a federal election (along with a requirement to disclose the sponsor of each ad and a prohibition on colluding with anyone else to exceed the limit) to be unconstitutional because it was much lower than the spending limit for parties and candidates.⁵⁹³

10.1.2.3 *Harper v Canada*

Despite the *Libman* precedent, in the subsequent *Harper* case filed in the fall of 2000, the courts in Alberta continued to reject a limit on third-party advertising spending even though the limit had been increased by the federal government significantly, leading through appeals to the SCC’s 2004 ruling in the case. *Libman* set the stage for *Harper*, in which the SCC upheld third-party spending limits and accepted that Parliament may choose an “egalitarian model of elections.”⁵⁹⁴ The impugned provisions of the *Canada Elections Act* (the CEA) limited third-party spending on “election advertising” to CDN\$150,000, of which only CDN\$3,000 could be spent in a given electoral district.⁵⁹⁵ Election advertising includes taking a position on an issue with which a candidate is associated, otherwise known as issue advertising. The SCC also upheld registration and disclosure requirements for third parties.

Although the impugned spending limits infringed freedom of expression, the majority of the SCC found the infringement was justified. The spending limits had the pressing and

⁵⁸⁶ *Ibid.*

⁵⁸⁷ *Ibid* at para 57.

⁵⁸⁸ Royal Commission on Electoral Reform and Party Financing, *supra* note 119.

⁵⁸⁹ *Libman*, *supra* note 56 at paras 43–54.

⁵⁹⁰ *Ibid* at para 50.

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid* at paras 80–81.

⁵⁹³ *Ibid* at paras 55, 79.

⁵⁹⁴ *Harper*, *supra* note 52 at para 62.

⁵⁹⁵ See Section 10.2.3.1(b) for the definition of “election advertising” and the current third-party spending limits under the CEA.

substantial objectives of reducing the domination of political discourse by the wealthy, preventing circumvention of candidate and party spending limits, and enhancing public confidence in the electoral system.⁵⁹⁶ The spending limits also satisfied the proportionality test under section 1 of the *Charter*. At this stage of the analysis, the majority emphasized the need for “deference to the balance Parliament has struck between political expression and meaningful participation.”⁵⁹⁷

The challenger, Stephen Harper, who would later win the 2006 election and become Prime Minister of Canada, led a third-party group called the National Citizens Coalition. Harper argued that the impugned third-party spending limits unjustifiably infringed the right to vote in section 3 of the *Charter* by hindering electoral debate. However, the majority of the SCC held that the impugned provisions actually enhanced the right to vote. Section 3 imports the “right to play a meaningful role in the electoral process,”⁵⁹⁸ but this does not confer the right “to mount a media campaign capable of determining the outcome”⁵⁹⁹ of an election. Rather, the right to “play a meaningful role in the electoral process” encompasses the right to an informed vote. Since “unequal dissemination of points of view undermines the voter’s ability to be informed,” measures that promote “equality in the political discourse,”⁶⁰⁰ such as the impugned spending limits, facilitate informed voting and meaningful participation.

The majority of the SCC framed *Harper* as a clash between the right to meaningful participation under section 3 and the right to freedom of expression under section 2(b).⁶⁰¹ In this case, the right to meaningful participation prevailed. The majority warned, however, that spending limits must not be so low that conveying information becomes impossible, as this could jeopardize the “informational component of the right to vote.”⁶⁰² Parliament must therefore find a middle road between overly stringent restrictions on the dissemination of information and overly permissive spending ceilings that allow some speakers to drown out others.

The dissent disagreed on the location of this middle road, but did not explicitly reject the constitutionality of all third-party spending limits. In light of the expense involved in mass communication, the dissent viewed the impugned spending ceiling as so low that it “effectively denies the right of an ordinary citizen to give meaningful and effective expression to [their] political views during a federal election campaign.”⁶⁰³ As a result, “effective communication” during elections was “confined to registered political parties and their candidates.”⁶⁰⁴ This could lead to inadequate coverage of viewpoints and issues

⁵⁹⁶ *Harper*, *supra* note 52 at para 92.

⁵⁹⁷ *Ibid* at para 111. Dawood argues that, in light of the risk of “partisan self-dealing” in the design of campaign finance laws, courts “should not automatically defer to Parliament when reviewing laws that govern the democratic process”: Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62:4 UTLJ 499 at 505.

⁵⁹⁸ *Harper*, *supra* note 52 at para 70.

⁵⁹⁹ *Ibid* at para 74.

⁶⁰⁰ *Ibid* at paras 71-72.

⁶⁰¹ *Ibid* at para 50.

⁶⁰² *Ibid* at para 73.

⁶⁰³ *Ibid* at para 1.

⁶⁰⁴ *Ibid* at para 2.

unpopular with parties and candidates.⁶⁰⁵ The spending caps, therefore, undermine “the right to listen” and “curtail the diversity of perspectives heard.”⁶⁰⁶

Feasby notes that the CEA’s third-party spending limits could be vulnerable to a fresh *Charter* challenge. In *Harper*, the majority held that evidence of a reasoned apprehension of harm is sufficient to justify an infringement of freedom of expression in cases involving “inconclusive or conflicting social science evidence of harm.”⁶⁰⁷ However, since *Harper*, more evidence on third-party spending has become available owing to the accumulation of data from third-party disclosure requirements.⁶⁰⁸ The disclosed information suggests there is little “appetite amongst third parties for big money campaigns.”⁶⁰⁹

10.1.2.4 Reference re Election Act (BC)

Advertising spending limits for third parties between elections have been set in a few jurisdictions in Canada, but only for 40-60 days before a fixed date election campaign period begins. In the only two rulings on a pre-election limit, both by the Court of Appeal in the province of British Columbia (BC), the limit was rejected as unconstitutional based on the overbroad definition of advertising in the statutory provision.⁶¹⁰ The definition covered not only advertising that promoted or opposed a candidate or party, but also advertising about issues. As a result, the limit did not minimally impair freedom of expression. In the first case, the provision was also ruled unconstitutional because the advertising restriction period overlapped with the sitting of the legislature which, the court concluded, is an important time period for allowing third parties to advocate their views.⁶¹¹

In November 2017, the BC legislature again amended its provincial election law to limit third-party ad spending (including on canvassing by phone or in person and on mailings) during the 60-day period before the election campaign period and during election campaigns. However, for the pre-election period, the law attempts to address the concerns expressed in the court rulings with a more specific limit that only applies to advertising that “directly promotes or opposes”⁶¹² a party or candidate (during the election campaign period,

⁶⁰⁵ *Ibid* at para 14.

⁶⁰⁶ *Ibid* at para 19. The dissenting justices on the US Supreme Court have also turned to the idea that free speech protects both a right to speak and a right to hear. However, they have used this idea in support of spending limits. See e.g. *Citizens United*, *supra* note 29 at 473.

⁶⁰⁷ *Harper*, *supra* note 52 at para 77.

⁶⁰⁸ Feasby, *supra* note 90 at 211.

⁶⁰⁹ *Ibid* at 211–12.

⁶¹⁰ *Reference re Election Act (BC)*, 2012 BCCA 394; *British Columbia Teachers’ Federation v British Columbia (Attorney General)*, 2011 BCCA 408 [BC Teachers’ Federation].

⁶¹¹ *Reference re Election Act (BC)*, *supra* note 610 at paras 36–37, refers back to the ruling in *BC Teachers’ Federation*, *supra* note 611. See discussions of this issue in: Tom Flanagan, “Political Communication and the ‘Permanent Campaign,’” in David Taras & Christopher Waddell, eds, *How Canadians Communicate IV: Media and Politics* (Edmonton: Athabasca Press, 2012).

⁶¹² *Election Act*, RSBC 1996, c. 106, ss 1(1)–(3), Part 11. In the province of Manitoba, *The Election Financing Act*, CCSM 2012, c E27, ss 115 and 82–83 limit ad spending by third parties to CDN\$100,000 during the 90 days before the election campaign period and to CDN\$25,000 during the campaign.

issue-related advertising is also limited). The new BC statutory provisions have not, as of spring 2021, been challenged in court.

10.2 Regulatory Regime

This section describes the campaign financing regime for federal parliamentary elections in Canada. Federal campaign financing is governed by the *CEA*,⁶¹³ which was most recently amended by Bill C-50⁶¹⁴ and Bill C-76, in ways that affect the political finance system.⁶¹⁵ Both bills were enacted in December 2018, with some provisions of Bill C-76 coming into effect in spring 2019. Each province has also enacted its own regime in relation to campaign financing for elections to the provincial legislative assemblies.

The primary features of the federal regime are:

- a) contribution limits for political parties and candidates, including nomination contest candidates and political party leadership candidates;
- b) source restrictions on contributions to political parties and candidates, and to third-parties only in terms of a prohibition on foreign funding;
- c) spending limits for third-parties, political parties, and candidates, including nomination race contestants, but not party leadership contestants as a party is allowed to set its own limit for its leadership race;
- d) transparency requirements for third-parties, political parties, and all types of candidates; and
- e) a public funding scheme involving reimbursements and tax credits and free broadcast advertising time.

Unlike regulatory regimes in the UK and the US, the federal regime in Canada limits both the supply of and demand for money in elections, as politicians are subject to limits on the size of donations they may receive and the amount of money they may spend on election campaigns. By contrast, the federal regime in the US imposes caps only on political contributions, not spending. The UK, on the other hand, imposes spending caps on politicians and third-party campaigners, but has no contribution ceilings.

⁶¹³ *CEA*, *supra* note 10.

⁶¹⁴ Bill C-50, *An Act to Amend the Canada Elections Act (political financing)*, 1st Sess, 42 Parl, 2018, online: <<https://www.parl.ca/LegisInfo/en/bill/42-1/C-50>>.

⁶¹⁵ Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments*, 1st Sess, 42 Parl, 2018, online: <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9808070>>.

10.2.1 Campaign Financing

10.2.1.1 Spending Limits

The provisions discussed in this section apply to expenditures by candidates, registered political parties, registered electoral district associations, nomination contestants, and leadership contestants.

a) Expenses Captured by Spending Limits

The spending limits in the CEA apply to “election expenses,” which are defined in section 376(1). Election expenses include any costs incurred or non-monetary contributions received by a registered party or candidate for goods or services used to directly promote or oppose a party, its leader, or a candidate during an election period. The definition also expressly includes some specific types of expenses, such as costs incurred or non-monetary contributions provided for the production of promotional material and for the publication or broadcast of that material.⁶¹⁶ Other specific types of expenses include: expenses to make campaign activities and materials accessible to people with disabilities, travel and living expenses for the candidate, personal expenses of the candidate, and some litigation expenses.⁶¹⁷ “Expenses” are defined in section 349 to include the commercial value of products (property) or services that are donated or provided, other than volunteer labour.⁶¹⁸ The “election period” begins when the writ is issued and ends on polling day.⁶¹⁹ Expenses outside of this period are not included in the definition of election expenses. Given their campaigns are different from general elections, with often a more extended campaign period, slightly different definitions of “expenses” apply to nomination race contestants⁶²⁰ and party leadership race contestants.⁶²¹ Still, the categories of exclusions are the same other than the exclusion for accessibility expenses.

Bill C-76, established a new, pre-election period. If an election is held on the fixed date (the third day in October every four years) the pre-election period begins June 30th and ends the day the election period begins.⁶²² During this period, spending by parties on partisan advertising⁶²³ is limited.⁶²⁴ However, the limit is so high that it is essentially meaningless as

⁶¹⁶ CEA, *supra* note 10, s 376(3).

⁶¹⁷ *Ibid*, ss 376(3.1), 377.2, 378(1), 377.1.

⁶¹⁸ *Ibid*, s 349. See also Canada, *Elections Canada, Political Financing Handbook for Nomination Contestants and Financial Agents*, (Guideline) OGI 2018-08 at 21, online:

<https://www.elections.ca/res/gui/app/2018-07/2018-07_e.pdf>.

⁶¹⁹ CEA, *supra* note 10, s 2(1).

⁶²⁰ *Ibid*, ss 374.1–374.4.

⁶²¹ *Ibid*, ss 379.1–379.4.

⁶²² *Ibid*, s 2(1).

⁶²³ Partisan advertising is defined as advertising that promotes or opposes a party, nomination contestant, candidate, or party leadership contestant (if a party happens to be having a leadership race at that time).

⁶²⁴ *Ibid*, s 429.1, 429.2.

no party will likely spend that much on advertising during the pre-election period.⁶²⁵ In 2019, the limit was slightly more than CDN\$2 million and it increases annually at the rate of inflation. If the election is not held on the fixed election date, then the provisions concerning the pre-election period are not in force.

b) Spending Limits

(i) Registered Parties

A registered party's election expenses limit is calculated by multiplying an amount of money per registered voter (CDN\$1.06 in 2019, increased annually at the rate of inflation) by the number of voters in all electoral districts in which the party has candidates.⁶²⁶ If the election period lasts longer than 36 days, the limit is increased by a certain amount for each day beyond the 36 day period. Typically, the election period is between 36–42 days. For example, in the 40 day pre-election period of the 2019 election, expense limits for parties with candidates in every district was a typical amount of approximately CDN\$29 million. However, in the 2015 general election that lasted 78 days, parties that had candidates in every electoral district had spending limits of approximately CDN\$54.9 million.⁶²⁷ Bill C-76 amended the CEA to limit the election period to 50 days maximum.⁶²⁸ Transfers of funds from a registered party to its candidates do not count toward the spending limit under the CEA.⁶²⁹ The CEA also expressly prohibits a registered party and a third party from colluding to circumvent the spending limit⁶³⁰ and from sharing information to coordinate campaign activities.⁶³¹

(ii) Candidates

The election expense limit for each candidate in each electoral district is calculated by multiplying the number of voters in the district by amounts of money per registered voter (with higher amounts for the initial 15,000, and then 10,000, voters in the district). Amounts increase annually at the rate of inflation.⁶³² The expense limit is higher in districts with low population density because of increased costs of travel to reach voters.⁶³³

⁶²⁵ "Partisan Advertising Expenses Limit for Registered Political Parties" (last visited 31 October 2021) online: *Elections Canada*

<https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limpol_partisan&lang=e>.

⁶²⁶ CEA, *supra* note 10, s 430(1).

⁶²⁷ "Final Election Expenses Limits for Registered Political Parties: 42nd General Election October 19 2015" (last visited 31 October 2021) online: *Elections Canada*

<<http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/pollim&lang=e>>.

⁶²⁸ CEA, *supra* note 10, s 57(1.2)(c).

⁶²⁹ *Ibid*, s 430(3). See also Elections Canada, *Irregular Transfers Between Affiliated Political Entities*, (Interpretation Note), OGI 2020-07, online (pdf): <https://www.elections.ca/res/gui/app/2020-07/2020-07_e.pdf>.

⁶³⁰ CEA, *supra* note 10, s 431(2).

⁶³¹ *Ibid*, s 351.01(1).

⁶³² *Ibid*, ss 477.49(1), 477.5.

⁶³³ *Ibid*, s 477.5(6).

For example, in the 2019 election, the approximate limits for districts across Canada varied from a low of CDN\$86,000 to a high of CDN\$145,000, with an average of CDN\$110,000.⁶³⁴ The limit is increased if the election period lasts longer than 36 days up to the maximum election period of 50 days.⁶³⁵ Like registered parties, candidates, and their agents and associates are prohibited from colluding with third parties to circumvent the spending limit⁶³⁶ and from sharing information to coordinate campaign activities.⁶³⁷ The Chief Electoral Officer may also establish categories of personal expenses and fix maximum amounts that may be incurred by election candidates.⁶³⁸ However, at the time of writing, no personal expense limits appear to exist.

For a contestant in a nomination contest to become an election candidate, the expense limit is 20% of the limit for a candidate in the previous election in that district (unless the district boundaries have changed since the last election).⁶³⁹

As noted above, spending limits for political party leadership contests are set by the party's governing body. A party is required to give the Chief Electoral Officer (CEO) notice of when the contest will begin and end.⁶⁴⁰

(iii) Electoral District Associations

During the election period, electoral district associations of registered parties are prohibited from transmitting election advertising or incurring any expenses for election advertising.⁶⁴¹ Associations are only permitted to produce and place partisan advertising messages during the pre-election period (if the pre-election period provisions apply) if they are limited substantially to the district or if they are provided or sold to the association's party.⁶⁴²

10.2.1.2 Contributions

The provisions discussed in this section apply to contributions to candidates, registered political parties, registered electoral district associations, nomination contestants, and leadership contestants.

⁶³⁴ "Final Election Expenses Limits for Candidates, 43rd General Election October 21, 2019" (last visited 31 October 2021), online: *Elections Canada* <<https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limitcan&lang=e>>.

⁶³⁵ CEA, *supra* note 10, s 477.49(2).

⁶³⁶ *Ibid*, s 477.52(2).

⁶³⁷ *Ibid*, s 351.01(2)–(3).

⁶³⁸ *Ibid*, s 378(2). "Personal expenses" are defined in section 378 of the CEA.

⁶³⁹ *Ibid*, s 476.67. See "Limits on Nomination Contest Expenses: Nomination Contests Held to Select a Candidate after the October 21, 2019, General Election," (last visited 31 October 2021), online: *Elections Canada* <<https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limitnom&lang=e>>.

⁶⁴⁰ CEA, *supra* note 10, s 478.1.

⁶⁴¹ *Ibid*, s 450(1). Election advertising is defined in section 319 of the CEA. The definition of election advertising is discussed in Section 10.2.3.1, in the context of third-party campaigners.

⁶⁴² CEA, *supra* note 10, ss 449.1–449.2.

a) Definition of "Contribution"

Under the CEA, a “contribution” can be monetary or non-monetary (property, use of property, and services) and includes money from a candidate’s own funds.⁶⁴³ Non-monetary transactions or contributions are required to be at fair market value.⁶⁴⁴ Loans are only allowed from registered financial institutions and individuals, and the outstanding amount of a loan from an individual cannot exceed an individual’s contribution limit when combined with any other contributions made by that individual.⁶⁴⁵ Transfers and loans between the party, its electoral district associations, and its candidates are not included under the definition of contribution.⁶⁴⁶ Thus, the CEA targets “money being transferred from the private to the political domain,”⁶⁴⁷ not transfers within the political domain. Other exclusions from the definition of contribution include annual party membership fees of CDN\$25 or less.⁶⁴⁸ However, the CEA expressly includes fees for party and leadership conventions within the definition of contribution.⁶⁴⁹ The CEA also clarifies that, if a candidate or party sells tickets to a campaign fundraising event, the amount of the contribution will be the difference between the price of the ticket and its fair market value.⁶⁵⁰

b) Source Restrictions

Contributions are only permitted from individuals who are Canadian citizens or permanent residents.⁶⁵¹ Similarly, loans are permitted only from certain financial institutions or from individuals who are Canadian citizens or permanent residents.⁶⁵² This means corporations (other than financial institutions), unions, and other non-natural legal persons cannot donate or make loans to a political party or candidate. However, these entities can make contributions to third parties for the purpose of election advertising, as discussed further below, or engage as a third party in campaigning themselves.

Members of Parliament (MPs) are prohibited by various provisions and Elections Canada’s enforcement policy from using the MP resources or staff time to contribute in support of their own campaign during the pre-election period (if they are running for re-election) or to support nomination or party leadership contestants when those contests occur.⁶⁵³

⁶⁴³ *Ibid*, ss 2(1), 364(1).

⁶⁴⁴ Elections Canada, *Contributions and Commercial Transactions*, (Interpretation Note), OGI 2017-06, online (pdf): <https://www.elections.ca/res/gui/app/2017-06/2017-06_e.pdf>.

⁶⁴⁵ CEA, *supra* note 10, s 373.

⁶⁴⁶ *Ibid*, ss 364(2)–(4), 373(5).

⁶⁴⁷ Feasby, *supra* note 90 at 208. Although some transfers within the political domain are prohibited, see Elections Canada, *Irregular Transfers Between Affiliated Political Entities*, (Interpretation Note), OGI 2020-07, online (pdf): <https://www.elections.ca/res/gui/app/2020-07/2020-07_e.pdf>.

⁶⁴⁸ CEA, *supra* note 10, s 364(7).

⁶⁴⁹ *Ibid*, s 364(8).

⁶⁵⁰ *Ibid*, s 377.

⁶⁵¹ *Ibid*, s 363(1).

⁶⁵² *Ibid*, ss 373(3)–(4).

⁶⁵³ Elections Canada, *The Use of Member of Parliament Resources Outside of an Election Period*, (Interpretation Note), OGI 2020-04, online (pdf): <https://www.elections.ca/res/gui/app/2020-04/2020-04_e.pdf>.

Attempts to conceal the identity of the source of a contribution are prohibited by section 368 of the *CEA*. Indirect contributions and loans are also prohibited, as source restrictions and contribution limits could otherwise be circumvented.⁶⁵⁴ This means an individual cannot make a contribution using money from another person or entity that was provided for the purpose of making a contribution.⁶⁵⁵

c) Contribution Limits

In 2021, individuals may contribute (in money, property, use of property and/or services the individual would usually charge for) no more than a total of CDN\$1,650 per calendar year to a particular registered party and no more than CDN\$1,650 per calendar year as an overall combined total to the registered electoral district associations, candidates, and nomination contestants of a registered party.⁶⁵⁶ The limit automatically increases by \$25 annually.⁶⁵⁷ The same limit applies to contributions to political party leadership contestants.⁶⁵⁸

As mentioned above, the outstanding amount of any loans made by an individual counts toward their contribution limit.⁶⁵⁹ However, banks and other federally regulated financial institutions are allowed to loan an unlimited amount of money to district associations, candidates, contestants, and political parties. This is, arguably, one of the most unethical aspects of Canada's system. Since, usually, every party has a bank loan to finance its election campaign, MPs may have a conflict of interest when addressing proposals concerning financial institutions and financial services issues.⁶⁶⁰

Candidates are allowed to contribute up to CDN\$5,000 to their own campaign, and leadership contestants are allowed to contribute up to CDN\$25,000 to their own campaign.⁶⁶¹ Section 368(1) of the *CEA* prohibits attempts to circumvent contribution limits.

10.2.1.3 Transparency Requirements

a) Registered Parties

Registered parties are required to submit an election expenses return to the Chief Electoral Officer after a general election, along with an auditor's report and a declaration by the party's chief agent that the return is complete and accurate.⁶⁶² The return is required to set out all election expenses incurred and non-monetary-contributions used as election expenses.⁶⁶³ Aside from this election-expense reporting requirement, registered parties are

⁶⁵⁴ *Canada Elections Act*, SC 2000, c 9, ss 370, 373.

⁶⁵⁵ *Ibid*, s 370(1).

⁶⁵⁶ *Ibid*, ss 367(1)–(1.1). “Limits on Contributions: Limits on Contributions, Loans and Loan Guarantees” (last visited 31 October 2021) [Limits on Contributions], online: *Elections Canada* <<https://www.elections.ca/content.aspx?section=pol&dir=lim&document=index&lang=e>>.

⁶⁵⁷ *Ibid*, ss 367(1)–(1.1); Limits on Contributions, *supra* note 656.

⁶⁵⁸ *CEA*, *supra* note 10, s 367(1)(d).

⁶⁵⁹ *Ibid*, s 373.

⁶⁶⁰ *Ibid*, s 373(3).

⁶⁶¹ *Ibid*, ss 367(6)–(7).

⁶⁶² *Ibid*, s 437(1).

⁶⁶³ *Ibid*, s 437(2).

also subject to ongoing reporting requirements. Each quarter, and annually by July 1st of each year covering the previous calendar year, the party's chief agent is required to provide the Chief Electoral Officer with a financial transactions return, along with an auditor's report and a declaration by the chief agent that the return is complete and accurate.⁶⁶⁴ The financial transactions return is required to set out contributions received by the party during the quarter or year; the number of contributors; the name and address of contributors who gave more than CDN\$200; the value of goods, services, or funds transferred by the registered party to a candidate or electoral district association (and vice versa); and a statement of election expenses incurred in by-elections during the fiscal period, among other things.⁶⁶⁵

Parties are also required to disclose in or on an election advertising message that the message has been authorized by the official agent of the party.⁶⁶⁶

Bill C-50 in 2018 added a new disclosure requirement for parties in-between election periods. The requirement applies to a fundraising event that will be attended by a Cabinet minister or the leader, interim leader or leadership contestant of a registered party and an event that is organized by a party or anyone or any entity to raise money for the party, an electoral district registered association, nomination contestant, candidate or leadership contestant of a registered party.⁶⁶⁷ The requirement does not apply to events that are held during an election period at a party leadership race debate or events at a party convention with a ticket price that amounts to a contribution of less than CDN\$200 or that are to "express appreciation" for individuals who have made a contribution to the party.⁶⁶⁸

Events that meet the disclosure requirement must be published "in a prominent location" on the parties website prior to the event. The publication is required to include: the date, time, and location of the event; who or what entity it is benefitting; which leader and/or minister(s) are attending; the ticket price (and amount of the price that is a contribution); and the event contact person.⁶⁶⁹ Within 30 days after the event, the party is required to file a report with the Chief Electoral Officer (CEO) containing all the same information, as well as the name and municipality of all attendees (subject to named exceptions) and a list of every person or entity "that organized the event or any part of it."⁶⁷⁰ The CEO maintains a registry of the events on Elections Canada's website.⁶⁷¹

For all such fundraising events that are held during an election period, a party is required, within 90 days after election day, to file with the CEO one report covering all the events and containing the required information listed above.⁶⁷²

⁶⁶⁴ *Ibid*, s 432(1).

⁶⁶⁵ *Ibid*, s 432(2).

⁶⁶⁶ *Ibid*, s 320.

⁶⁶⁷ *Ibid*, s 384.1(1).

⁶⁶⁸ *Ibid*, ss 384.1(2)–(4).

⁶⁶⁹ *Ibid*, s 384.2.

⁶⁷⁰ *Ibid*, ss 384.3(1)–(7). See "Regulated Fundraising Events Registry" (last visited 31 October 2021) [Regulated Fundraising], online: *Elections Canada* <<https://www.elections.ca/content.aspx?section=fin&dir=reg&document=index&lang=e>>.

⁶⁷¹ *Ibid*, ss 384.3(1)–(7). Regulated Fundraising, *supra* note 670.

⁶⁷² *Ibid*, ss 384.4(8)–(12).

b) Candidates

Election candidates are required to disclose in or on an election advertising message that the message has been authorized by the official agent of the candidate.⁶⁷³ A candidate's official agent is also required to provide the CEO with an electoral campaign finance return within four months of election day, along with an auditor's report and declaration by both the official agent and the candidate that the return is complete and accurate.⁶⁷⁴ The return is required to set out the candidate's election expenses, loans, contributions, and the identity of contributors who gave more than CDN\$200, among other things.⁶⁷⁵ The return is also required to state any "electoral campaign expenses" not already reported as election expenses.⁶⁷⁶ Electoral campaign expenses are defined as any "expense reasonably incurred as an incidence of the election,"⁶⁷⁷ including personal expenses, travel and living expenses, accessibility expenses, and litigation expenses. Further, the candidate is required to send their official agent a written statement setting out personal expenses paid by the candidate.⁶⁷⁸

For a nomination contest to select a party's election candidate in an electoral district, a party or the district association is required to file a report with the CEO within 30 days after the selection vote date. The report is required to set out the date of the selection vote, the contestants' names and addresses, and the name of the winner.⁶⁷⁹ A person is considered to be a contestant as soon as they accept a contribution, incur an expense, or borrow money, and is required at that time to appoint a financial agent for opening and maintaining a dedicated campaign bank account to accept contributions and make payments.⁶⁸⁰ Nomination race contestants who accept more than CDN\$1,000 in contributions or spend more than CDN\$1,000 on their campaign are also required to file with the CEO, within four months after the conclusion of the selection vote day, a campaign return that lists all campaign expenses (including personal expenses), loans, contributions, and the identity of contributors who gave more than CDN\$200, among other things.⁶⁸¹

Party leadership race contestants are required to register with the CEO as soon as they receive a contribution or incur a campaign expense, including appointing and identifying their financial agent for opening and maintaining a dedicated campaign bank account to accept contributions and make payments, and their auditor for the campaign account.⁶⁸² Unlike nomination contest and election candidates, leadership contestants who accept more than CDN\$10,000 in contributions or spend more than CDN\$10,000 on their campaign are required to file a return with the CEO covering the period from the start of their campaign up to four weeks before the leadership voting day, and a second return one week before

⁶⁷³ *Ibid*, s 320.

⁶⁷⁴ *Ibid*, s 477.59(1).

⁶⁷⁵ *Ibid*, s 477.59(2).

⁶⁷⁶ *Ibid*, ss 477.59(2)(b), 477.64.

⁶⁷⁷ *Ibid*, s 375.

⁶⁷⁸ *Ibid*, s 477.64(1).

⁶⁷⁹ *Ibid*, s 476.1.

⁶⁸⁰ *Ibid*, ss 476.2–476.66.

⁶⁸¹ *Ibid*, s 476.75(1).

⁶⁸² *Ibid*, ss 478.2–478.3, 478.5–478.66, 478.71–478.73, 478.83, 478.85.

voting day that covers the three-week period after the first report. Both reports are required to list loans, contributions, and the identity of contributors who gave more than CDN\$200, among other things.⁶⁸³ Leadership contestants are also required to file with the CEO, within six months after the leadership voting day, an audited campaign return that lists all campaign expenses (including personal expenses), loans, contributions, and the identity of contributors who gave more than CDN\$200, among other things.⁶⁸⁴

c) *Electoral District Associations*

Electoral district associations are subject to annual reporting requirements, not election-specific reporting requirements. This is because they are not allowed to spend money during election periods other than transferring money to the campaign account of the association's registered candidate. Associations are required to submit a financial transactions return to the CEO by June 1st of each year for transactions during the previous calendar year. The return is required to state contributions, the identity of donors who give more than CDN\$200, expenses, loans, and other items.⁶⁸⁵ The report is required to be accompanied by an auditor's report and a declaration by the association's financial agent that the return is complete and accurate.⁶⁸⁶

10.2.2 Public Funding

10.2.2.1 Quarterly Allowances

Quarterly allowances for registered parties, based on the number of votes received by a party in the previous election (the amount in 2014 was approximately CDN\$2 per vote) were phased out by the Conservative federal government beginning in 2014. The phasing-out process ended in 2016.⁶⁸⁷

10.2.2.2 Reimbursement of Election Expenses

In the 2015 general election (which lasted 78 days) reimbursements of election expenses for all registered parties and candidates totalled approximately CDN\$104 million.⁶⁸⁸ On the other hand, in the 2019 general election, reimbursements totaled CDN\$64.4 million.⁶⁸⁹ Registered parties are reimbursed for 50% of their election expenses if the candidates endorsed by the party receive at least 2% of the votes cast in the election or 5% of the votes

⁶⁸³ *Ibid*, s 478.81.

⁶⁸⁴ *Ibid*, ss 478.8, 478.86–478.93.

⁶⁸⁵ *Ibid*, s 475.2(1).

⁶⁸⁶ *Ibid*, s 475.4(1).

⁶⁸⁷ *Ibid*, s 445(2). A private member's bill was proposed to reintroduce quarterly allowances, but was not enacted. See Sess Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments*, 1st Sess, 42 Parl, 2018.

⁶⁸⁸ "Remarks of the Chief Electoral Officer of Canada Before the Committee on General Government: July 26, 2016" (last visited 31 October 2021) [CEO Remarks], online: *Elections Canada* <<http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>>.

⁶⁸⁹ "Estimated Cost of the 43rd General Election" (last visited 31 October 2021, online: *Elections Canada* <<https://www.elections.ca/content.aspx?section=res&dir=rep/off/cou&document=index43&lang=e>>.

cast in electoral districts in which the party ran candidates.⁶⁹⁰ If a candidate gets at least 10% of the vote but only spends 30% or less of their total spending limit, they will be reimbursed for 15% of the total amount they were permitted to spend under section 477.49 of the CEA.⁶⁹¹ If a candidate receives at least 10% of the vote and incurred more than 30% of the total amount they were allowed to spend, they will be reimbursed for 60% of their paid election expenses or 60% of the total amount they were allowed to spend, whichever is less.⁶⁹² Electoral district associations may also be reimbursed up to CDN\$1,500 for auditing expenses incurred to meet the requirements of the CEA.⁶⁹³

10.2.2.3 Tax Deductions

Monetary contributions to registered parties, registered electoral district associations, and candidates entitle the donor to a tax credit under the *Income Tax Act*.⁶⁹⁴ The amount of the credit is based on the size of the donation. Donations up to CDN\$400 entitle the donor to a 75% tax credit. Donations over CDN\$400 entitle the donor to a CDN\$300 tax credit plus 50% of the amount by which the donation exceeds CDN\$400. The tax credit is decreased further for donations over CDN\$750.⁶⁹⁵ This scheme is intended to encourage small contributions from a broad range of donors.⁶⁹⁶

10.2.2.4 Free Broadcasting Time

Free broadcasting time is reserved and allocated to political parties for political broadcasts during elections.⁶⁹⁷ The allocation is based on performance in the last election, but the Broadcasting Arbitrator can modify the allocation if necessary for fairness or the public interest.⁶⁹⁸ The allocation scheme was challenged in *Reform Party of Canada v Canada* on the basis that it entrenched incumbents and therefore breached the rights of smaller parties to freedom of expression and equality.⁶⁹⁹ However, the allocation system was upheld, although the Broadcast Arbitrator subsequently adopted a practice of allocating one-third of the available time equally among all registered parties.⁷⁰⁰ The Court also held that a prohibition on the purchase of additional broadcasting time by political parties was an unjustifiable limit on freedom of expression. This can be contrasted with the UK, in which the House of Lords and the European Court of Human Rights have upheld a blanket ban on paid political advertising.⁷⁰¹

⁶⁹⁰ CEA, *supra* note 10, s 444.

⁶⁹¹ *Ibid*, s 477.73(1).

⁶⁹² *Ibid*, s 477.74.

⁶⁹³ *Ibid*, s 475.8.

⁶⁹⁴ *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 127(3).

⁶⁹⁵ “The Electoral System of Canada: Political Financing” (last visited 31 October 2021), online: *Elections Canada* <<http://www.elections.ca/content.aspx?section=res&dir=ces&document=part6&lang=e>>.

⁶⁹⁶ Gauja, *supra* note 16 at 157.

⁶⁹⁷ CEA, *supra* note 10, s 345.

⁶⁹⁸ *Ibid*, ss 345, 338(1),(5); Feasby, *supra* note 90 at 200.

⁶⁹⁹ *Reform Party of Canada v Canada (Attorney General)* (1995), 123 DLR (4th) 366 (Alta CA).

⁷⁰⁰ Feasby, *supra* note 90 at 213–14.

⁷⁰¹ *Animal Defenders HL*, *supra* note 55; *Animal Defenders ECHR*, *supra* note 385.

10.2.3 Regulation of Third-Party Campaign Financing

Canada's federal campaign finance regime subscribes to the idea that political parties are the "principal vehicles for communal political organization and expression,"⁷⁰² which is reflected in spending limits for third-party campaigners under the CEA. The Supreme Court of Canada has echoed this idea, stating in *Libman* that, although third parties have an important contribution to make, "it is the candidates and political parties that are running for election."⁷⁰³

10.2.3.1 Activities Captured by Third-Party Campaign Regulations

a) Definition of "third party"

"Third party" is defined in section 349 of the *CEA* as "a person or a group, other than a candidate, registered party or electoral district association of a registered party." Thus, a third-party campaigner could be any individual, corporation, or other organization that promotes or opposes a candidate or political party during a pre-election or election period, promotes an election-related issue or promotes or opposes a candidate or party.⁷⁰⁴

b) Definition of "election advertising," "partisan advertising," "partisan activity," and "election surveys"

If a third party engages in "election advertising" as defined in the *CEA*, they will be subject to the *CEA*'s requirements in regard to spending limits, contributions received by the third party, and transparency. The components of the election advertising include:

- transmission to the public by any means
- during an election period
- of an advertising message that promotes or opposes a registered party or the election of a candidate.⁷⁰⁵

The definition includes an advertising message "that takes a position on an issue with which a registered party or candidate is associated,"⁷⁰⁶ also known as issue advertising. The election period begins when the writ is issued and ends on polling day.⁷⁰⁷

Various communications are excluded. For example, election advertising does *not* include:

⁷⁰² Feasby, *supra* note 90 at 207.

⁷⁰³ *Libman*, *supra* note 56 at para 50.

⁷⁰⁴ See Elections Canada, *Political Financing Handbook for Third Parties, Financial Agents and Auditors*, (Guidebook), EC 20227 [Political Financing Handbook], online (pdf):

<https://www.elections.ca/pol/thi/ec20227/ec20227_e.pdf>.

⁷⁰⁵ *CEA*, *supra* note 10, s 2(1), definition of "election advertising."

⁷⁰⁶ *Ibid.*

⁷⁰⁷ *Ibid.*, s 2(1), definition of "election period."

- news releases, editorials, debates, interviews, columns and books that were to be published even if an election was not held;⁷⁰⁸
- the transmission of documents by an organization to its members, employees, or shareholders;
- the transmission of an individual's personal political views on a non-commercial basis on the Internet; and
- the making of phone calls to encourage people to vote.⁷⁰⁹

During the pre-election period, the spending limit, contribution and transparency requirements apply to third-party “partisan advertising” and other activities described below.⁷¹⁰ If a snap election is called (i.e., no third party is notified in advance that an election is going to occur), the provisions concerning the pre-election period are not in force.

Elections Canada has clarified that communications on the Internet will only be considered election advertising or partisan advertising if they have, or normally would have, a placement cost.⁷¹¹ Elections Canada explains this requirement by pointing out that such communications give the well-resourced an unfair advantage, while communications without a placement cost do not. However, this means that the cost of producing Internet material will not be considered an advertising expense unless there is a placement cost for the material, even if production is costly and the communication meets all other criteria of advertising.

In addition, Bill C-76 added two other new categories of regulated third-party activity called “partisan activity” and “election survey.” Partisan activity is defined similarly to partisan advertising but includes non-advertising activities like door-knocking, telephone calls, and events. An election survey is a survey conducted by a third party in order to plan and undertake partisan activities.⁷¹²

c) Definition of expenses for election advertising, partisan advertising, partisan activity, and election survey

An “election advertising expense” is incurred to produce an election advertising message during the election or to acquire the means of transmitting that message and a “partisan advertising expense” has the same meaning for such advertising during the pre-election period.⁷¹³ “Partisan activity expense” is defined as an expense of a third party in undertaking a partisan activity. An “election survey expense” is defined as an expense incurred in conducting the survey.⁷¹⁴ “Expenses” are defined in section 349 of the CEA to include the

⁷⁰⁸ *Ibid*, s 2(1), definition of “election advertising; *Ibid*, s 319(a).

⁷⁰⁹ *Ibid*, s 2(1), definition of “election advertising.”

⁷¹⁰ *Ibid*, definition of “partisan advertising.” See also Political Financing Handbook, *supra* note 704 at 9–16.

⁷¹¹ Elections Canada, *Partisan and Election Advertising on the Internet*, (Interpretation Note), OGI 2020-05, online (pdf): <https://www.elections.ca/res/gui/app/2020-05/2020-05_e.pdf>.

⁷¹² CEA, *supra* note 10, s 349, definition of “partisan activity” and “election survey.”

⁷¹³ *Ibid*, s 2(1) definition of “election advertising expense” and “partisan advertising expense.”

⁷¹⁴ *Ibid*, s 349 definition of “partisan activity expense” and “election survey expense.”

commercial value of property or services that are donated or provided, other than volunteer labour.

10.2.3.2 Contributions to Third-Party Campaigners

Contributions to third parties of money, property, use of property, or services are subject to source restrictions, but not limits. Third parties can accept contributions of any amount from anyone or any entity for the purpose of partisan advertising, partisan activities, or election surveys during the pre-election or election period. However, they are prohibited from accepting contributions for these activities from foreign nationals, corporations that do not carry on business in Canada, unions that do not have bargaining rights in Canada, foreign political parties, or foreign governments or their agents.⁷¹⁵ Further, third parties cannot use a contribution from an anonymous donor for the purpose of these activities.⁷¹⁶

If a third party is a union, corporation, or other entity with a governing body it is not permitted to undertake the above activities if they involve spending more than CDN\$500 in either of the periods. An exception to this prohibition is if its governing body passes a resolution authorizing it to undertake the activities in either or both of the periods. It is required to include a copy of the resolution in the third-party registration forms it submits to Elections Canada.⁷¹⁷

10.2.3.3 Spending on Partisan Advertising, Partisan Activities, Election Surveys, and Election Advertising

During the pre-election period, combined total spending by third parties on partisan advertising, partisan activities, and election surveys is limited. However, the base limit of CDN\$700,000, plus inflation since 2004, is so high (surpassing CDN\$1 million in 2019)⁷¹⁸ that it is essentially meaningless. It is unlikely that a third party will reach that limit in the pre-election period. Bill C-76 also set a CDN\$7,000 limit (CDN\$10,234 in 2019 due to inflation) for combined total spending on these pre-election period activities in a single district.⁷¹⁹ However, if an election is called before the fixed election date the provisions concerning the pre-election period are not in force.

The spending limit on election advertising also covers partisan activities and election surveys undertaken during the election period. Individuals who are not citizens or permanent residents who do not reside in Canada and corporations that do not carry on business in Canada are not permitted to spend on these activities during the pre-election⁷²⁰ or the election period.⁷²¹

⁷¹⁵ *Ibid*, ss 349.01–349.03.

⁷¹⁶ *Ibid*, ss 349.94, 357.1.

⁷¹⁷ *Ibid*, ss 349.6(5) (pre-election period), 352(5) (election period).

⁷¹⁸ *Ibid*, ss 349.1(1)–(4). See also “Limits on Expenses Incurred by Third Parties – 43rd General Election” (last visited 31 October 2021), online: *Elections Canada* <<https://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/43ge/thilim&lang=e>>.

⁷¹⁹ CEA, *supra* note 10, s 349.1(2)–(4).

⁷²⁰ *Ibid*, s 349.4.

⁷²¹ *Ibid*, s 351.1.

Since Bill C-76 extended the spending limit for the election period to a wider range of third-party activities, the federal government increased the combined total limit for national spending from CDN\$150,000 to CDN\$350,000, multiplied by an inflation adjustment factor with the baseline year of 2004.⁷²² This meant that the election period spending limit for a third party in the 2019 election was CDN\$511,700. The bill did not increase the third-party spending limit of CDN\$3,000 (CDN\$4,386 in 2019 with inflation) for activities that promote or oppose the election of candidates in a single electoral district, an amount that counts towards the national limit if a third party undertakes both national and local campaign activities (the same CDN\$3,000 limit, adjusted for inflation, also applies for by-elections).⁷²³ Unlike for parties and candidates, there is no provision in the statute to increase the spending limit for third parties if the election period lasts longer than 36 days.

Third parties are prohibited from attempting to circumvent spending limits by splitting themselves into multiple third parties or by acting in collusion with other third parties or with parties' potential candidates/candidate or their agents or associates, during both the pre-election⁷²⁴ and election periods.⁷²⁵ Anti-collusion rules also prohibit sharing information in order to coordinate activities, including organizing events.⁷²⁶

10.2.3.4 Transparency Requirements for Third-Party Campaigners

a) Registration

Third parties are required to register once their incurred expenses on partisan advertising, election advertising, partisan activities, and election surveys reach a combined total of CDN\$500 during the pre-election and/or election period.⁷²⁷ The CEO is required to publish registered third parties' names and addresses as they are registered.⁷²⁸

Registered third parties have several notable obligations. First, they are required to set up a separate bank account to accept contributions and pay for the expenses for all of pre-election and election period activities.⁷²⁹ Second, they are required to appoint a financial agent to accept contributions for activities during the pre-election and/or election period.⁷³⁰ Third, parties that spend more than CDN\$10,000 during the pre-election period are required to appoint an auditor and provide the auditor's name and contact information to the CEO.⁷³¹

⁷²² *Ibid*, s 350(1).

⁷²³ *Ibid*, ss 350(2)–(4). Unlike the overall limit, the limit for each electoral district does not use the term “election advertising expenses.”

⁷²⁴ *CEA*, *supra* note 10, s 349.2.

⁷²⁵ *Ibid*, s 351.

⁷²⁶ *Ibid*, ss 349.3 (pre-election period), 351.01 (election period). See also Elections Canada, *Participating in Third Party Campaign-Style Events During Pre-Election and Election Periods*, (Interpretation Note), OGI 2021-01, online (pdf): <https://www.elections.ca/res/gui/app/2021-01/2021-01_e.pdf>.

⁷²⁷ *CEA*, *supra* note 10, s 349.6.

⁷²⁸ *Ibid*, s 362(a).

⁷²⁹ *Ibid*, s 358.1.

⁷³⁰ *Ibid*, ss 349.6(3)–(4), 349.7, 349.9, 354(1), 357(1). The third party is required to identify its financial agent in its application for registration, which is submitted to the CEO: *ibid*, s 353(2).

⁷³¹ *Ibid*, s 349.8 (the pre-election period), s 355 (the election period).

b) Attribution

Third parties are required to identify themselves in any partisan and election advertising that they produce and to indicate they have authorized the advertisement during the pre-election or election periods.⁷³²

c) Reporting

Third parties may be required to file several interim expense returns with the CEO during the pre-election and election period, depending upon whether their contributions or spending amounts exceed specified thresholds at certain times. A third party is required to file a return:

- 1) within five days of registration if it receives contributions over CDN\$10,000 specifically for pre-election period activities or spends over CDN\$10,000 on pre-election activities since the previous election;⁷³³
- 2) on September 15th if it receives contributions over CDN\$10,000 specifically for pre-election period activities or spends over \$10,000 on pre-election period activities between the previous election day and either September 14th or the end of the pre-election period, whichever is earlier;⁷³⁴
- 3) 21 days before the general election day if it receives contributions over CDN\$10,000 specifically for election period activities or spends CDN\$10,000 on election activities between the previous election day and 23 days before the election day;⁷³⁵ and
- 4) seven days before the general election day if it receives contributions over CDN\$10,000 specifically for election period activities or spends over CDN\$10,000 on election activities between the previous election day and nine days before the election day.⁷³⁶

Interim expense returns are required to include:

- Partisan activity expenses by the date and location of the activity;
- Partisan and/or election advertising expenses by the date and location they were placed/transmitted;
- Election survey expenses by the date each survey was conducted;
- The amount by class of contributor (individual, corporation, government, union, non-profit, citizen association) of donations and loans;

⁷³² *Ibid*, s 349.5 (partisan advertising), s 352 (election advertising).

⁷³³ *Ibid*, s 349.91.

⁷³⁴ *Ibid*, s 349.92(1).

⁷³⁵ *Ibid*, s 357.01.

⁷³⁶ *Ibid*, s 357.02.

- For each contributor who made contribution(s) or loan(s) totalling more than CDN\$200, their name, address (including president or CEO of any numbered company) and class, and the amount and date of each contribution;
- The amount of the third-party's own funds that were used to pay for the activities.⁷³⁷

If a third party cannot identify which contributions (donations and loans) it has received for the pre-election period activities, it is required to identify in the return all of its contributors since the previous election day.⁷³⁸ Third parties that file multiple interim returns are not required to repeat information already filed in a previous return.⁷³⁹

Third parties are also required to file final third party expense returns four months after the election day. These returns are required to include the same information as interim expense returns. However, unlike interim returns, previously filed information is not omitted.⁷⁴⁰ The third party's auditor is required to confirm that the return is a fair reflection of the third party's accounting records.⁷⁴¹

The CEO is required to publish all pre-election third party interim expense reports as soon as feasible and all post-election third party expense reports within one year of the start of the election period.⁷⁴² If the information is not released until a year after the writ drops, the delay could undercut the anti-corruption goals of disclosure, as the potential for undue influence may not be discovered until irrevocable decisions have been made by lawmakers. The public and the media could therefore be temporarily deprived of potentially relevant information in evaluating lawmakers' proposals and decisions.

10.2.4 Role of the Chief Electoral Officer and the Commissioner of Canada Elections

The CEO directs and supervises elections and elections officers; issues guidelines, interpretation notes, and advisory opinions on the application and interpretation of the statute and regulations; may undertake voter education initiatives and voting studies; and assists other countries with election processes.⁷⁴³ The CEO also publishes disclosed information on political financing in searchable online databases.⁷⁴⁴

The Commissioner of Canada Elections is responsible for compliance with the requirements of the statute and regulations, including investigating non-compliance and prosecuting,

⁷³⁷ *Ibid*, ss 349.91, 349.93, 357.01(2), 357.02(2). See also *Political Financing Handbook*, *supra* note 704 at 9–16.

⁷³⁸ *Ibid*, ss 349.91(8), 349.92(2), 357.01(8), 357.02(2), 359(7).

⁷³⁹ *Ibid*, ss 349.92(3), 357.01(5), 357.02(2).

⁷⁴⁰ *Ibid*, s 359, 359(4.1) (exceptions).

⁷⁴¹ *Ibid*, ss 349(8), 355, 360.

⁷⁴² *Ibid*, s 362.

⁷⁴³ *Ibid*, ss 16–18.1.

⁷⁴⁴ For disclosed information see “Political Financing” (last visited 31 October 2021), online: *Elections Canada* <<http://www.elections.ca/content.aspx?section=fin&&document=index&lang=e>>.

imposing fines or entering into compliance agreements (which can include fines).⁷⁴⁵ Bill C-76 amended the *CEA* to give the Commissioner the power to require the production of evidence when investigating election expenses or seek a court order.⁷⁴⁶

10.3 Criticisms of Campaign Finance Regulation

The Canadian political finance regime has apparently had some success in reducing reliance on large donors. Before the regulations limiting contributions were introduced in 2004, 2% of donors were responsible for 54% of funds raised annually by politicians.⁷⁴⁷ From 2004 to 2008, when the individual donation limit was CDN\$5,000, the 1% of donors who gave more than CDN\$1,200 per year accounted for only 17% of the total amount contributed to all parties (parties only, not including donations to their candidates or electoral district associations).⁷⁴⁸ However, several issues raise serious questions of how much the Canadian federal political finance system fulfills egalitarian principles.

Recent donation figures show that federal parties continue to rely on a relatively small number of donors for a significant percentage of their annual funding. For example, in 2015, only 4.37% of donors donated CDN\$1,100 or more to the federal Liberal Party, but they provided 22.87% of the Party's total funds that year.⁷⁴⁹

One concern is the increased access to Party leaders and top party officials that are offered in exchange for donations. For example, the Liberal Party offers donors who donate the maximum annual amount entry into its Laurier Club, which offers events and special access to the Party's leader and top party officials. (who, since November 2015, have been the Prime Minister and Cabinet ministers). Only 0.85% of donors donated the maximum in 2015, 790 people out of the 93,429 people who donated to the Party that year.⁷⁵⁰ In spring 2016, the Liberal Party also launched a new "Leader's Circle" for donors that both donated the maximum annual amount and recruited ten other people who each donated the maximum amount. The Leader's Circle provided even greater access to the Prime Minister and Cabinet ministers, although the scheme was cancelled after media coverage and public criticism.⁷⁵¹

⁷⁴⁵ *CEA*, *supra* note 10, ss 509–509.2, 511. See also "Commissioner of Canada Elections (last visited 31 October 2021), online: *Commissioner of Canada Elections*<<https://www.cef-cce.ca>>.

⁷⁴⁶ *Ibid*, ss 510.001, 510.01.

⁷⁴⁷ CEO Remarks, *supra* note 688.

⁷⁴⁸ *Ibid*.

⁷⁴⁹ Democracy Watch, News Release, "Trudeau Liberals' Political Finance Bill a Charade That Doesn't Stop Cash-For-Access" (5 October 2017), online: <<https://democracywatch.ca/trudeau-liberals-political-finance-bill-a-charade/>>.

⁷⁵⁰ Robert Fife & Steven Chase, "Donation Stats Indicate Liberal Fundraisers are Exclusive Events", *The Globe and Mail* (31 October 2016), online:

<<https://www.theglobeandmail.com/news/politics/donation-stats-indicate-liberal-fundraisers-are-exclusive-events/article32588273/>>.

⁷⁵¹ Democracy Watch, News Release, "DWatch Files Complaints with Ethics Commissioner and Lobbying Commissioner About Trudeau Cabinet Giving Preferential Access to 'Bundler' Fundraisers, Especially Lobbyists" (28 November 2018), online:

Several other Liberal Party fundraising events from 2014 to 2017 offered top donors access to top Party officials or were hosted by business executives whose business has lobbied the federal government, with significant amounts of money raised for the Party at each event.⁷⁵²

In addition, there is evidence from Canada's federal system, and from several provincial systems across Canada, that banning corporate and union donations and limiting individual donations result in executives and their families, mainly from businesses who lobby the government, begin to donate the maximum individual amount allowed.⁷⁵³ Questions remain whether some of these donations were from business funds illegally funneled through executives and their families.

A key problem inhibiting the analysis of donation patterns such as these is that donations to nomination race contestants, election candidates, parties, and third parties made during elections are not required to be disclosed before election day. However, as noted above, third parties are often required to file interim returns before election day listing their donors, contestants for party leadership are required to disclose details concerning their donors and donations during and just before the contest vote, and parties are required to disclose that information quarterly. If this is possible, and given that many donations are now made electronically, it should be possible to require parties, electoral district associations, candidates, and third parties to disclose details of donors and donations soon after they are received, instead of months later.

Inequality continues to exist in spending limits in Canada. It is questionable whether the spending limit that applies to single voters who become third parties and closely held private corporations should apply to citizen groups with tens of thousands of supporters. This allows wealthy individuals and corporate executives to spend as much on trying to influence issues, candidates, and parties as tens of thousands of voters spend together. As well, election candidates are allowed to donate CDN\$5,000 to their own campaign, and party leadership contestants are allowed to donate CDN\$25,000 to their own campaign. These amounts, which are much higher than the current CDN\$1,650 donation limit (as of spring 2021) that applies to all other donations from individuals, favour wealthy candidates who can afford to make these donations.

In 2011, the Canadian province of Quebec implemented several reforms after a corruption scandal revealed similar donation patterns. In response, Quebec decreased the limit on individual donations from CDN\$2,000 annually down to CDN\$100 annually⁷⁵⁴ and created a requirement that a donation of more than CDN\$50 to a party be routed through the

<<https://democracywatch.ca/dwatch-files-complaints-with-ethics-commissioner-and-lobbying-commissioner-about-trudeau-cabinet-giving-preferential-access-to-bundler-fundraisers-especially-lobbyists/>>.

⁷⁵² Democracy Watch, News Release, "New Report on Possibly Funneled Donations to Trudeau Liberals Shows Need to Lower Donation Limit to \$100, as Quebec Did" (12 June 2019), online: <<https://democracywatch.ca/new-report-on-possibly-funneled-donations-to-trudeau-liberals-shows-need-to-lower-donation-limit-to-100-as-quebec-did/>>.

⁷⁵³ "List of Sham Political Donation Systems" (last visited 9 December 2021), online (pdf): *Democracy Watch* <<https://democracywatch.ca/wp-content/uploads/ListOfShamCanPoliticalDonationSystems-1-1.pdf>>.

⁷⁵⁴ See details in note 38.

provincial elections agency, Elections Quebec, to verify whether the money is legitimately coming from the individual donor, rather than a corporation, union, or other organization.⁷⁵⁵

There have also been criticisms of the phasing out of quarterly per-vote funding allowances for registered political parties.⁷⁵⁶ Before the quarterly allowances were eliminated, the public funding regime adequately offset losses to party income caused by contribution caps.⁷⁵⁷ Without the quarterly allowance system, the CEO has warned that contribution caps may lead parties to resort to “illicit and undisclosed funding strategies.”⁷⁵⁸ The CEO has also argued that combining contribution caps with inadequate public funding may produce a state of perpetual campaigning, as parties attempt to inspire more contributions from more donors.⁷⁵⁹ Permanent campaigning could negatively impact “the overall tone of political discourse and the level of public cynicism.”⁷⁶⁰ On the other hand, some point out that less public funding might have the “merciful consequence” of reducing attack ads and restricting campaign advertising to the actual election period.⁷⁶¹

In contrast to the cancellation of direct public funding of parties at the federal level in Canada, Quebec⁷⁶² also provides annual public funding to match the amounts that parties raise in between elections and the matching amounts are based on donations made to parties during election campaigns.⁷⁶³ The funding is weighted to match the first CDN\$20,000 of contributions at a higher rate (CDN\$2.50 per dollar raised) than contributions above that amount up to CDN\$200,000 (at rate of CDN\$1.00 per dollar raised), which increases the equalization effect of the funding.⁷⁶⁴ It is important to note, however, that despite its egalitarian characteristics, Quebec disadvantages independent members of the legislature and independent candidates, as it offers them only the relatively small amount of up to

⁷⁵⁵ Quebec’s provincial law allows an additional CDN\$100 to be donated to each party and independent candidate during each election campaign. Donations above CDN\$50 annually must be routed through Elections Quebec. See “Contributions” (last visited 31 October 2021), online: *Elections Quebec* <<http://www.electionsquebec.qc.ca/english/provincial/financing-and-election-expenses/contributions.php>>.

⁷⁵⁶ See Section 10.2.2.1.

⁷⁵⁷ CEO Remarks, *supra* note 688.

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

⁷⁶⁰ *Ibid.*

⁷⁶¹ Young, *supra* note 6 at 123.

⁷⁶² The annual amount started in 2013 at CDN\$1.58 per vote obtained in the last general election, and is adjusted annually based on the Consumer Price Index rate: “Allowance to Political Parties” (last visited 31 October 2021), online: *Elections Quebec* <<https://www.electionsquebec.qc.ca/english/provincial/financing-and-election-expenses/allowance-paid-to-political-parties.php>>.

⁷⁶³ “Matching Sums” (last visited 31 October 2021) [“Matching Sums”], online: *Elections Quebec* <<https://www.electionsquebec.qc.ca/english/provincial/financing-and-election-expenses/matching-sums.php>>.

⁷⁶⁴ For example, if donations were matched dollar for dollar, and one party raised CDN\$10,000 and the other CDN\$30,000, the first party would end up with CDN\$20,000 while the second ended up with CDN\$60,000 (six times as much). Under Quebec’s system, however, the first ends up with CDN\$35,000 while the second ends up with CND\$60,000 (less than twice as much).

CDN\$800 in matching funding annually and, for a candidate, up to CDN\$800 during the election campaign period.⁷⁶⁵

An additional area of Canada's federal political finance system that raises questions is enforcement. After one actual illegal funneling scheme was revealed in 2016, the Commissioner of Canada Elections reached compliance agreements with involved parties, instead of prosecuting.⁷⁶⁶ The single individual charged pleaded guilty, ending the possibility of disclosing others involved in the scheme, although a media outlet revealed a confidential document that listed many of the donors involved.⁷⁶⁷

In 2013, Elections Canada promised a full audit to determine the extent of top donations from businesses and organizations and their families, and whether donations from businesses and other organizations were being funneled through their executives and family members. However, Elections Canada never undertook the audit and further refused to undertake the audit when requested to do so by an advocacy group in May 2019.⁷⁶⁸ In addition, the Commissioner allowed a third-party citizen group to violate the provisions that prohibit collusion between third parties and candidates in the 2019 election without imposing any penalty.⁷⁶⁹ The Commissioner is yet to rule on another alleged collusion situation from the 2019 election involving several third parties.⁷⁷⁰

Bill C-76 amended the statute to allow the federal Commissioner of Canada Elections to fine violators up to CDN\$1,500 for persons and CDN\$5,000 for entities instead of prosecuting,

⁷⁶⁵ "Matching Sums," *supra* note 763.

⁷⁶⁶ "SNC-Lavalin Violated Election Rules With Campaign Donations, Commissioner Rules", *The Canadian Press* (9 September 2016), online: <<https://www.cbc.ca/news/business/snc-lavalin-campaign-donations-1.3752869>>.

⁷⁶⁷ Elizabeth Thompson, "Key Figure in Illegal Election Financing Scheme Quietly Pleads Guilty", *CBC* (19 January 2019), online: <<https://www.cbc.ca/news/politics/election-financing-snc-lavalin-charbonneau-1.4984823>>; Harvey Cashore & Frédéric Zalac, "Names of SNC Employees, Executives Behind Thousands of Dollars in Illegal Liberal Party Donations Revealed", *CBC* (30 April 2019), online: <<https://www.cbc.ca/news/politics/snc-lavalin-liberal-donors-list-canada-elections-1.5114537>>. See also "Charges/Outcomes" (last visited 31 October 2021), online: *Commissioner of Canada Elections* <<https://www.cef-cce.ca/content.asp?section=charg&document=index&lang=e>>.

⁷⁶⁸ Democracy Watch, News Release, "DWatch Calls on Elections Canada, Commissioner of Elections and Commissioner of Lobbying to Audit Political Donations to Find Illegal Funneling and Unethical Donation Bundlers" (1 May 2019), online: <<https://democracywatch.ca/dwatch-calls-on-elections-canada-commissioner-of-elections-and-commissioner-of-lobbying-to-audit-political-donations-to-find-illegal-funneling-and-unethical-donation-bundlers/>>.

⁷⁶⁹ Democracy Watch, News Release, "Commissioner of Canada Elections Rolls Over and Lets RightNow Anti-abortion Group off for Election Law Violations" (27 April 2021), online: <<https://democracywatch.ca/commissioner-of-canada-elections-rolls-over-and-lets-rightnow-anti-abortion-group-off-for-election-law-violations/>>.

⁷⁷⁰ Democracy Watch, News Release, "Democracy Watch Calls on Commissioner of Canada Elections to Investigate Manning Centre and Five 'Proud' Groups it Funded for Possible Third Party Election Disclosure and Collusion Violations" (17 October 2019), online: <<https://democracywatch.ca/democracy-watch-calls-on-commissioner-of-canada-elections-to-investigate-manning-centre-and-five-proud-groups-it-funded-for-possible-third-party-election-disclosure-and-collusion-vio/>>.

and also to include payments as part of a negotiated compliance agreement.⁷⁷¹ In August 2019, instead of prosecuting, as part of a compliance agreement the Commissioner used this new power to fine two companies involved in an illegal donation funneling scheme. The fine was three times the amount of the illegal donations made, and the Commissioner stated that “Canadians should expect to see us make full use of this new tool from this point on”⁷⁷² which will hopefully act as a warning to those planning to violate the law and encourage compliance.

While the above ruling may be a sign of stronger enforcement of the federal election law, another problem area is that the full enforcement record of Elections Canada and the Commissioner remains largely hidden. The Commissioner is permitted to release any information about an investigation if, in the Commissioner’s opinion, it is in the public interest.⁷⁷³ However, Elections Canada and the Commissioner have resisted disclosure in the past, including the ruling in more than 3,000 complaints filed from 1997 to 2011.⁷⁷⁴ Without this information, it is impossible to determine whether the Commissioner is enforcing the provisions fairly, impartially, or effectively.

In contrast, when questionable donation patterns like those revealed at the federal Canadian level were revealed in Quebec in 2011, Elections Quebec undertook an audit within months. The audit examined donations made to provincial parties between 2006 and 2011 and found CDN\$12.8 million in likely funnelled donations.⁷⁷⁵ As well, an extensive public inquiry was undertaken⁷⁷⁶ and dozens of people were subsequently prosecuted and convicted for participating in illegal donation and bribery schemes.⁷⁷⁷ While these enforcement actions

⁷⁷¹ CEA, *supra* note 10, ss 508.4–508.6, 517(2), 521.11–521.34. See also, “Penalties (AMP)” (last visited 30 November 2021), online: *Commissioner of Canada Elections* <<https://www.cefcce.ca/content.asp?section=amp&document=index&lang=e>>.

⁷⁷² Peter Zimonjic, “2 Montreal Companies Admit to Making \$115,000 in Illegal Donations to Liberals, Conservatives”, CBC (29 August 2019), online: <<https://www.cbc.ca/news/politics/axor-liberals-conservatives-donations-1.5263576>>. See also: *Commissioner of Canada Elections, Compliance Agreements*, online: <<https://www.cefcce.ca/content.asp?section=agr&dir=ca&document=index&lang=e>>.

⁷⁷³ CEA, *supra* note 10, ss 510.1(2)(g), (3).

⁷⁷⁴ Democracy Watch, News Release, “DWatch Calls on Elections Canada, Commissioner of Elections and Commissioner of Lobbying to Audit Political Donations to Find Illegal Funneling and Unethical Donation Bundlers” (12 January 2019), online: <<https://democracywatch.ca/elections-canada-decides-to-keep-its-rulings-secret-on-more-than-3000-complaints-because-the-rulings-may-make-commissioner-of-elections-look-bad-group-complains-to-information-commissioner/>>.

⁷⁷⁵ “Sectoral Financing of Political Parties in the Amount of Nearly \$13M” (13 April 2013), online: *Elections Quebec* <<https://www.electionsquebec.qc.ca/english/news-detail.php?id=5387>>.

⁷⁷⁶ Melinda Dalton, “Charbonneau Commission Report: A Deeper Look at the Recommendations”, CBC (25 November 2015), online: <<https://www.cbc.ca/news/canada/montreal/charbonneau-commission-report-recommendations-1.3335460>>.

⁷⁷⁷ Les Perreux, “Quebec’s Anti-Corruption Crusade Has Resulted in Many Arrests but Few Convictions. Here’s What has Happened So Far”, *The Globe and Mail* (4 July 2018), online: <<https://www.theglobeandmail.com/canada/article-quebecs-anti-corruption-crusaders-have-been-swift-to-arrest-but-slow/>>. However, delays resulted in many charges being dropped. For example, see: Jason Magder & Linda Gyulai, “High-Ranking Liberals, Including Nathalie Normandeau, Arrested by UPAC on Fraud Charges” *Montreal Gazette* (12 July 2020), online:

undertaken in Quebec, along with the changes summarized above, made Quebec one of the most egalitarian political finance systems in the world, it should be noted that the province's government has only implemented half of the public inquiry's 60 recommendations for preventing corruption.⁷⁷⁸

11. CONCLUSION

Campaign finance is a high-profile issue, and scandals break out regularly.⁷⁷⁹ Frustration and cynicism arise when wealthy individuals, corporations, unions, or other organizations support a candidate's election campaign and benefit from favourable policies after the candidate is elected. Even when it is impossible to determine whether policies and decisions result from a politician's own principles or from the need to maintain future financial support by rewarding past support, the relationship between politicians and their financial backers can be toxic for public confidence.⁷⁸⁰ Further, aside from the risk of corruption of elected officials, many argue that unregulated campaign finance may corrupt the electoral

<<https://montrealgazette.com/news/local-news/high-ranking-liberal-including-nathalie-normandeau-arrested-by-upac-on-fraud-charges>>.

⁷⁷⁸ "Quebec Implements Less Than Half of Corruption-Busting Solutions", *CTV Montreal* (23 November 2016), online: <<https://montreal.ctvnews.ca/charbonneau-commission/quebec-implements-less-than-half-of-corruption-busting-solutions-1.3173405>>.

⁷⁷⁹ For examples, see Tony Paterson, "Bought by BMW? German Chancellor Angela Merkel Forced on to Defensive Over €700,000 donation from Carmaker to her Christian Democratic Party", *The Independent* (16 October 2013), online: <<http://www.independent.co.uk/news/world/europe/bought-by-bmw-german-chancellor-angela-merkel-forced-on-to-defensive-over-700000-donation-from-8884777.html>> (Angela Merkel's party accepted a large donation from BMW shortly before European environment ministers caved "to German demands to scrap an agreement to cap car emissions after Berlin argued that the measure would adversely affect its car industry and create job losses"); Alice Walton & David Zahniser, "Politicians and Activists Demand Answers on Mystery Donations Tied to 'Sea Breeze' Developer", *Los Angeles Times* (31 October 2016), online:

<<http://www.latimes.com/local/lanow/la-me-ln-seabreeze-reaction-20161030-story.html>> (the authors discuss the corrosive effects of campaign finance at the municipal level in Los Angeles, noting that "[c]ritics have long accused city leaders of being too willing to change local planning rules for well-connected developers, particularly those who make campaign donations"); Dom Phillips, "Brazil President Michel Temer Accused of Soliciting Millions in Illegal Donations", *The Guardian* (12 December 2016), online: <<https://www.theguardian.com/world/2016/dec/12/brazil-president-michel-temer-illegal-campaign-donations>> (in a plea bargain, a former executive at construction company Odebrecht "alleged in colourful detail how leading lawmakers from Temer's and other parties across the political spectrum were paid millions in bribes and both legal and illegal campaign donations to defend the company's interest in Congress"); Dan Levin, "British Columbia: The 'Wild West' of Canadian Political Cash", *The New York Times* (13 January 2017), online:

<<https://www.nytimes.com/2017/01/13/world/canada/british-columbia-christy-clark.html>> (Levin discusses allegations that British Columbia's provincial government headed by former premier Christy Clark rewarded generous campaign donors, turning government "into a lucrative business, dominated by special interests that trade donations for political favors"; as an example, the author notes that, in the interim between the provincial government's public opposition to the Trans Mountain pipeline project in 2016 and its subsequent approval of the pipeline in 2017, Ms. Clark's party received \$718,000 in donations from the company proposing the pipeline).

⁷⁸⁰ See e.g. McCormick, *supra* note 36.

process itself by allowing the wealthy to set the electoral debate agenda and exert disproportionate influence over the outcome of elections.⁷⁸¹ This influence arguably undermines the foundational principle of “one person, one vote.”⁷⁸²

Tension exists between the goal of alleviating the potentially poisonous effects of wealth in politics and the goal of facilitating free and open debate. This tension is often framed as a clash between equality and freedom, and it makes campaign finance regulation a controversial and partisan issue, particularly in the US.

The jurisprudence in this chapter demonstrates that the US, UK, and Canada each have different approaches to resolving this tension. Courts and governments in all three countries strive to construct a middle path between the goals of freedom and equality, accepting political finance regulations with equality-related objectives as long as open debate is not overly restricted. However, parts of the systems in all three countries tilt either towards freedom of expression or equality. The US system overall tilts more in favour of freedom of expression for wealthy individuals, businesses, and organizations. The UK’s ban on paid political advertising by parties or third parties during election campaign periods provides an example of a tilt towards equality, but its lack of donation limits, which favours wealthy donors, is a tilt towards freedom of expression.

Meanwhile, in Canada individuals and private corporations controlled by a few people, as third parties, are allowed to spend or donate disproportionate amounts and some election candidates and party leadership candidates are allowed to donate a disproportionate amount to their own campaign. Both of these measures greatly favour wealthy individuals.

Different cultural, political, and judicial approaches to campaign finance regulations have led to the divergent regulatory regimes in the three countries. Criticisms of each regime demonstrate that lawmakers and courts continue to grapple with the ongoing challenge of developing and evaluating political finance regulations that effectively constrain unethical influence of excessive donations and spending on parties, politicians, and governments, without unduly constraining participation in public and elections debate in all sectors of society.

⁷⁸¹ See e.g. Hiebert, *supra* note 54 at 269.

⁷⁸² La Raja, *supra* note 57 at 3.

CHAPTER 15

COLLECTIVE ACTION

**JOE WEILER, PAUL TOWNSEND, JOHN RITCHIE, ALEXANDER
KOMAROV, AND MARK BAKHET**

CONTENTS

- 1. INTRODUCTION**
- 2. GROWTH OF COLLECTIVE ACTION IN THE PRIVATE SECTOR**
- 3. PUBLIC EDUCATION AND AWARENESS RAISING**
- 4. DEVELOPMENT AND PROMOTION OF ANTI-CORRUPTION TOOLS**
- 5. A SECTOR-WIDE INITIATIVE TO REFRAIN FROM CORRUPTION**
- 6. SAFEGUARDING INTEGRITY IN MAJOR SPORT EVENTS**
- 7. INTEGRITY PACTS AND MONITORS**
- 8. ACTIVE PARTICIPATION BY CIVIL SOCIETY IN GOVERNMENT PROCUREMENT**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

Taking “collective action” against corruption is considered by many to be the optimal approach to combatting corruption in a variety of contexts, especially where corruption is pervasive at a systemic level. The leading anti-corruption NGO, Transparency International, asserts that:

[T]o root out corruption, we need to hold those entrusted with power to account using both prevention and punishment mechanisms. The key to making prevention and punishment more effective is to work with people, as individuals and as part of collective action, to take part in anti-corruption efforts. Increasingly there must be a popular rejection of corruption – a refusal to bribe, vote for the corrupt or turn a blind eye to corruption – if we are to create sustained public pressure for change.¹

Collective action can be initiated in any location by any group of motivated stakeholders, rather than depending solely on the actions of government or law enforcement to combat corruption. Instead, collective action can be used to attract support from governments and law enforcement and exert pressure on them to play their part more effectively.

The World Bank describes collective action as “a collaborative and sustained process of cooperation amongst stakeholders. It increases the impact and credibility of individual action, brings vulnerable individual players into an alliance of like-minded organizations and levels the playing field between competitors.”²

After examining the current rise in the use of collective action in the private sector, this chapter surveys five broad categories in the field, ranging from relatively passive public education and awareness raising to activities that are intended to have a direct impact on corruption in specific circumstances. A group of interested stakeholders can begin at the ‘passive’ level and move towards a more ‘active’ level of collective action. The suggested five broad categories are:

1. **Education and awareness raising programs**—from local to international. The example provided in this chapter is the Vancouver, BC based Anti-Corruption Law Program (ACLP);
2. **Development and promotion of anti-corruption tools** that can be adopted by ‘bribe payers’ (the supply side of corruption). The example provided in this chapter is the International Federation of Consulting Engineers (FIDIC) Integrity Management System;

¹ “Strategy 2020: Together Against Corruption” (15 December 2015), online: *Transparency International* (TI) <<https://www.transparency.org/en/strategy-2020>>.

² World Bank Institute, *Fighting Corruption and Fraud through Collective Action: A Guide for Business*, (Washington, DC: The International Bank for Reconstruction and Development/The World Bank, 2008) at 4, online: <<https://baselgovernance.org/publications/fighting-corruption-and-fraud-through-collective-action-guide-business>>.

3. **Agreement among ‘bribe payers’ to refrain from participating in corruption.** The example provided in this chapter is the Maritime Anti-Corruption Network (MACN);
4. **Actions by International Organizations, Financiers, and/or Event Sponsors** to establish integrity frameworks for their projects. The example provided in this chapter is the International Olympic Committee (IOC); and
5. **Active participation by civil society in government procurement** and monitoring of infrastructure project construction. The example provided in this chapter is The CoST Infrastructure Transparency Initiative.

This chapter provides examples of each of the above types of collective action, citing the contributing factors to their success and also identifying the critical factors for sustainability. The concluding section of this chapter presents lessons learned and recommendations for success.

2. GROWTH OF COLLECTIVE ACTION IN THE PRIVATE SECTOR

Through collective action—a process of cooperation between various stakeholders with the aim of jointly countering corruption—companies can together take concrete steps to scale-up efforts and strengthen good business practices.³

The UN Global Compact outlines a variety of incentives or reasons for companies to take part in collective action in the fight against corruption. Collective action will enable them to:

- a) create a deeper understanding of corruption issues;
- b) consolidate knowledge and financial and technical resources to achieve greater impact;
- c) create solutions that are perceived as more credible, acceptable and are more sustainable;
- d) help ensure fair competition and a level playing field for all stakeholders;
- e) create a more stable and enabling business environment; and
- f) complement existing anti-corruption efforts in vulnerable regions and sectors, where industry or government-led regulations are not robust.⁴

³ UN Global Compact Office, *Promoting Anti-Corruption Collective Action through Global Compact Local Networks*, (New York: UN Global Compact Office, September 2013) [UN Global Compact Office], online (pdf): <www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/AC_CAP.pdf>.

⁴ “Anti-Corruption Collective Action” (last visited 20 October 2021), online: *United Nations Global Compact* <<https://www.unglobalcompact.org/take-action/action/anti-corruption-collective-action>>.

Similarly, Mark Pieth, the world's leading scholar on collective action, asserts that "there could be a strong *business case* for collectively combating corruption" as "collective risk management is always, at least in part, expectation management: with similar levels of regulation amongst all competitors, companies are also better able to limit costs."⁵ This points to the need to establish a level playing field as a way of overcoming the dilemma often faced by many well-intentioned corporations—that is, "even large companies are uneasy about 'going it alone'. They are uncertain whether their competitors are following the same virtuous path and they are aware they may be sidelined by ministers 'on the take' and replaced by less scrupulous suppliers."⁶ Of course, the success of such collective action will depend on the genuine effort made by individual players to enforce a particular agreement that has been reached in the industry. And while some remain skeptical as to the true potential of such agreements being reached, research has shown that the private sector is becoming much more active in combatting corruption:

First, it [i.e., the private sector] is very much interested in extending the anti-corruption standards to other exporting nations, especially Brazil, Russia, India, and China (the BRIC countries). Here, the G20 format is proving very handy. Second, the private sector has become even more insistent than the peer countries that anti-corruption standards are applied equally. Third, companies have acknowledged that they are dependent on the evolution of a reliable body of common standards.⁷

Similar findings in support of a collective action approach to fighting corruption are also noted by Elizabeth Dávid-Barret:

[T]here are indications that the G20's goals [of engaging the private sector in the fight against corruption] are not so pie-in-the-sky. A recent flurry of corporate activity to start and join anti-corruption clubs signals a major shift in norms about bribery in business. Collective action initiatives, in which companies make voluntary commitments above and beyond the legal requirements for anti-bribery compliance, have proliferated in recent years. Everybody seems to want to be part of an anti-corruption club.⁸

As the author of this article suggests, it is likely that this changing behaviour is a response to rapid change in norms about bribery in international business: "bribery is no longer 'business as usual.'"⁹

⁵ Mark Pieth, "Collective Action and Corruption" (2012) Basel Institute on Governance Working Paper No 13 at 8, online (pdf): <https://baselgovernance.org/sites/default/files/2018-12/biog_working_paper_13.pdf>.

⁶ *Ibid* at 6.

⁷ *Ibid* at 8.

⁸ Elizabeth Dávid-Barret, "Anti-Corruption Clubs: How the Private Sector is Leading the Way in the Fight against Bribery" (6 April 2017), online (blog): *German Development Institute* <<https://blogs.die-gdi.de/2017/04/06/anti-corruption-clubs-how-the-private-sector-is-leading-the-way-in-the-fight-against-bribery/>>.

⁹ *Ibid*.

In spite of this upward trend in private sector engagement in the fight against corruption, it remains true that companies rarely end up cooperating on their own: “competitors usually trust each other little and they usually fear being perceived as ‘trusting’ each other too much. In other words, many companies are wary of anti-corruption compacts lest they be regarded as engaging in anti-competitive behavior.”¹⁰ As a result, collective action has repeatedly been promoted first by “an ad hoc group of representatives from one or more non-governmental organizations (NGOs), together with select private sector protagonists.”¹¹ The following excerpt outlines in greater detail the process by which collective action initiatives will most likely take hold—though the author also cautions that there is no set model for these initiatives:

These consortia [an ad hoc group of representatives from one or more non-governmental organizations (NGOs), together with select private sector protagonists] perform a crucial task in the early days of a Collective Action initiative by bringing together a group of industry representatives that is able to generate its own momentum. Together, they attempt to convince other major players to participate. At the outset, the participants avoid committing to anything beyond a preliminary exchange of views. It takes time to convince the participants of the benefits of the initiative, and much depends on the subtlety of the mediators. Once the initiative has taken off, however, the collaboration is publicized and corporate exponents take their share of the responsibility. In the meantime, it is also the task of the NGO representatives to ensure that the members of the group do not embark on anti-competitive behavior. Thus, in starting a particular Collective Action initiative, the key factor is not (simply) the size of the group, as frequently suggested in academic debates about the conditions for overcoming Collective Action problems. It is assumed that a few, especially strong, players achieve more than a multitude of small actors—the larger the number, the greater the risk of truancy.¹²

This demonstrates that there remains an important role to be played by many actors in industry-wide anti-corruption initiatives which require a *collective* effort. In this context, NGOs and not-for-profits can also provide guidance: “[t]here can be great advantage in hearing those messages from an organization that stands to gain nothing in terms of business or revenues. Likewise, regulators have a proven interest in hearing what independent anti-bribery and corruption experts view as best practice standards and what best works in tackling corruption.”¹³ Moreover, because “the anti-corruption field is moving fast across the world, with new corruption trends, new legislation, changing enforcement patterns, and

¹⁰ Pieth, *supra* note 5 at 11.

¹¹ *Ibid.*

¹² *Ibid* at 12.

¹³ Robert Barrington, “Yes, Not-For-Profits Have a Big Role in Compliance” (22 June 2017), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2017/6/22/robert-barrington-yes-not-for-profits-have-a-big-role-in-com.html>.

the emergence of tech-related challenges and solutions,”¹⁴ an emphasis on raising awareness and education industry-wide is increasingly critical.

As noted, education and training initiatives are an important part of collective action, and companies are increasingly turning to these mechanisms to ensure more robust internal compliance in order to prevent individual actors from engaging in corrupt practices. While much work remains to be done, this is a promising step, and one that should prove feasible for many corporations.

When asked in June 2017 about the biggest change in the compliance landscape, Joe Spinelli, who has been involved in *FCPA* enforcement and compliance for over 30 years, replied “it’s the deep engagement of boards and senior management. Today they understand the risks of reputational damage and want to stay a step ahead of the compliance process.”¹⁵ In a similar vein, companies are increasingly looking for ways of facilitating this compliance and internal awareness of potential corrupt practices. Richard Bistrong, a contributor to the *FCPA Blog* notes:

Companies often ask me to record video for internal training. They want real-world stories of corruption and commerce which they can embed into an existing on-line anti-bribery compliance training.”¹⁶ Karen Griffin, executive vice president and chief compliance officer at Mastercard [which was involved in the production of the video], said: “we recognized the need to move beyond the traditional classroom exercise to help our teams understand the potential impact of bribery and compliance events.”¹⁷

3. PUBLIC EDUCATION AND AWARENESS RAISING

The Vancouver, Canada-based Anti-Corruption Law Program (ACLP)¹⁸ (the Program) is an ongoing series of public education events—including keynote public lectures, seminars, partial-day and full-day invited conferences, and colloquium format sessions—open to lawyers, business-people, law enforcement officials, government representatives and bureaucrats, students, and academics alike. These public education events are designed to provide a fertile setting for learning and informed discussion among participant panelists and registrants regarding the law’s role in the global fight against corrupt business practices.

¹⁴ *Ibid.*

¹⁵ Richard L Cassin, “Joe Spinelli: Boards, C-Suites Now Want Daily Compliance Reports” (21 June 2017), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2017/6/21/joe-spinelli-boards-c-suites-now-want-daily-compliance-repor.html>.

¹⁶ Richard Bistrong, “Resource Alert: New Real-World Compliance Training Video” (20 June 2017), online (blog): *The FCPA Blog* <www.fcpablog.com/blog/2017/6/20/resource-alert-new-real-world-compliance-training-video.html>.

¹⁷ *Ibid.*

¹⁸ “Anti-Corruption Law Program” (last visited 18 September 2021): online: *Peter A Allard School of Law* <<https://allard.ubc.ca/research/research-centres-and-programs/centre-business-law/anti-corruption-law-program>>.

The Program is a collaborative effort founded by three organizations: The Peter A. Allard School of Law (Allard School of Law) at the University of British Columbia (UBC), Transparency International Canada (TI Canada), and the International Centre for Criminal Law Reform and Criminal Justice Policy at UBC (ICCLR). In 2016, these stakeholders combined forces and engaged in collective action to bring together anti-corruption experts. The Program focused on having such experts teach each other (and registrants) about best practices, policies, and enforcement strategies to fight corruption. The three founding organizations each had core competencies and experiences in research and scholarship, teaching, raising awareness, and advocating in the fight against corruption, both within Canada and abroad. Rather than combatting corruption as individual organizations, these three founding partners of the ACLP combined resources to work together, providing a clear example of the power of collective action in advancing the anti-corruption movement in Canada. The Program attracted support from a number of public and private organizations, including law firms, accounting/consulting firms, engineering firms, resource extraction companies, NGOs, government organizations, and interdisciplinary academic units at UBC, as well as other universities in Canada and abroad.

The need for robust and easily accessible public education, applied research, and scholarship in the area of anti-corruption was evident; sophisticated ongoing professional education in this area was underdeveloped in Canada, and rigorous applied research in anti-corruption in the Canadian context was severely lacking. In order to be effective in the fight against corruption, legal practitioners, public policy-makers, and business-people alike needed an accessible learning forum in which to cultivate a deeper understanding of the potential use of law; the Program set out to fulfill this unmet need.

3.1 Anti-Corruption Law Program Outcomes

The key intended outcomes of the Program include:

- (1) Forming and nurturing collaborative relationships, including working partnerships among the Peter A. Allard School of Law, the legal profession, leading organizations in the business community, credible and respected NGOs (such as TI Canada), research institutions (such as ICCLR), and other academic units at UBC and other universities in Canada;
- (2) Providing new support for collaborative learning opportunities for leading academic scholars, legal practitioners, business-people, and J.D. and MBA students;
- (3) Creating enhanced opportunities for future applied collaborative and interdisciplinary research and academic scholarship; and
- (4) Attracting additional funding and support for research and learning opportunities from Program partners and other organizations who wish to

participate in and support the goals and objectives of the Program, as well as its interdisciplinary, collaborative, and interactive pedagogical approach.¹⁹

3.2 Anti-Corruption Law Program: Public Education Events

The Program ran as a ‘pilot project’ in its first year (from fall of 2016 to the fall of 2017). This pilot project consisted of nine professional education events that were organized in collaboration with various partner organizations between September 2016 and December 2017. Several of these professional education sessions were designed to recur on an annual or semi-annual basis, providing informed and inspired yearly-updated content to reflect current developments in this rapidly evolving and dynamic area of law reform. The Program’s content has been vetted, critiqued, and revised on an ongoing basis by the very audience of business-people, lawyers, lawmakers, and regulators who are the drivers and architects of the anti-corruption legal systems at play.

Prior to the educational sessions in the Program, attendees were provided with current reading materials from leading experts in the field which reflect the latest developments and insights in each subject area. These materials help prepare participants in advance of each session, better equipping participants to engage in an interactive dialogue. This participatory component helps foster a learning environment where participants learn from one another in an iterative, real-time process.

By the end of 2019, 20 educational events had been organized and hosted by the Program. The COVID-19 pandemic prevented face-to-face meetings, resulting in the suspension of the Program in 2020. The Program was relaunched in 2021 as monthly online webinars that are archived on the websites of the three partner founding organizations for future reference by registrants and other interested parties.²⁰

The range of topic areas presented in the Program include (among other areas):

- Government procurement;
- Money laundering in the casino industry, real estate industry, and luxury vehicle industry;
- Internal corporate compliance systems;
- Enhanced law enforcement strategies and resources;

¹⁹ See *The Anti-Corruption Law Program*, (2016), online (pdf), <<https://cityhallwatch.files.wordpress.com/2016/09/anti-corruption-law-program-brief-description-2016-17.pdf>> as linked on Urbanzta, “Follow the Money: Corruption, Money Laundering & Organized Crime” (Oct 28) Among Topics of New Anti-Corruption Law Program” (6 September 2016), online (blog): *CityHallWatch* <<https://cityhallwatch.wordpress.com/2016/09/06/anti-corruption-law-program/>>.

²⁰ See for example, “The Anti-Corruption Law Program: Integrity and Anti-Corruption for Small and Medium Enterprises - Getting it Right” (29 January 2021), online: *Peter A Allard School of Law* <<https://allard.ubc.ca/about-us/events-calendar/anti-corruption-law-program-integrity-and-anti-corruption-small-and-medium-enterprises-getting-it>>.

- Financing of P3 infrastructure projects;
- Mandatory reporting of payments to government by companies in the extractive industry;
- Whistle-blower systems for the public and private sectors;
- The Maritime Industry Anti-Corruption Network (MACN) (further discussed below); and
- The role of the Integrity Vice Presidency of the World Bank in global development financing.

The emergence of virtual meeting technology has enabled the Program to tap into both expert panelists and audiences from around the globe. The Program provides an excellent example of how like-minded organizations and individuals can take collective action to raise awareness and teach one another best practices in fighting corruption.

4. DEVELOPMENT AND PROMOTION OF ANTI-CORRUPTION TOOLS

The engineering and construction industries were singled out in the TI 2005 *Global Corruption Report*.²¹ The introduction to this report, written by Peter Eigen, founder of Transparency International, included the following important statements:

Nowhere is corruption more ingrained than in the construction sector.... [T]ransparency in public contracting is arguably the single most important factor in determining the success of donor support in sustainable development. Corrupt contracting processes leave developing countries saddled with sub-standard infrastructure and excessive debt.²²

Although they are over 15 years old, these comments remain valid.

The International Federation of Consulting Engineers (FIDIC),²³ founded in Europe in 1913, has since grown to become “[t]he global representative body for national associations of consulting engineers.”²⁴ FIDIC is unlike many global organizations, in that it is an “association of associations” and its members are national associations of consulting engineers. Individual engineering firms are typically members of their national association, and so they are not direct members of the global organization. FIDIC now indirectly represents 40,000 engineering firms that employ about 1 million engineers and other

²¹ TI, *Global Corruption Report 2005: Corruption in Construction and Post-Conflict Construction*, (London; Ann Arbor; Berlin: Pluto Press/TI, 2005), online (pdf):

<https://images.transparencycdn.org/images/2005_GCR_Construction_EN.pdf>.

²² *Ibid* at 1.

²³ The acronym is based on the French language name of the Federation. “History” (last visited 18 September 2021), online: International Federation of Consulting Engineers (FIDIC)

<<https://fidic.org/history>>.

²⁴ “About Us” (last visited 18 September 2021), online: FIDIC <<https://fidic.org/about-us>>.

professional and support staff.²⁵ The national associations of 102 countries—from Albania to Zimbabwe—are members of FIDIC, and elect representatives to the Board of Directors at each annual meeting.²⁶

Since 1957, FIDIC has published model contracts that have been adopted in many countries for use on international infrastructure projects. FIDIC model contracts all follow a standard format, using a standard set of General Conditions, which are only to be modified using customized clauses called Particular Conditions.

Current FIDIC contracts include:

- *Red Book – Construction – Design by Owner;*
- *Yellow Book – Plant and Design Build;*
- *Silver Book – EPC/Turnkey Contracts;*
- *White Book – Client/Consultant Model Services Agreement;*
- *Sub-Consultancy Agreement; and*
- *Model Representative Agreement.*²⁷

Several Multilateral Development Banks (MDBs—also known as International Lending Agencies or IFIs), including the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank and the World Bank, have created in cooperation with FIDIC, a special version of the *Red Book* for use on MDB-financed projects called the *MDB Harmonised Edition*.²⁸ This illustrates the importance of the relationship between FIDIC and the MDBs, particularly in the area of contract management on major infrastructure projects.

The consulting engineering industry has grown dramatically in importance over the past 50 years, particularly in emerging countries. There are many examples of cooperative working relationships between firms based in developed countries and smaller and newer firms based in developing countries. Furthermore, the MDBs have emphasized the importance of allowing developing country firms to have a fair level of access to consulting opportunities in their own country and in the broader region in which they are located. Barriers to entry

²⁵ *Ibid.*

²⁶ “Member Associations” (last visited 18 September 2021), online: FIDIC <https://fidic.org/membership/membership_associations>.

²⁷ “Publications” (last visited 18 September 2021), online: FIDIC <<https://fidic.org/bookshop>>. See also “Why Use FIDIC Contracts?” (last visited 18 September 2021), online: FIDIC <<https://fidic.org/node/7089>>.

²⁸ “FIDIC MDB Harmonised Construction Contract” (last visited 18 September 2021), online: FIDIC <https://fidic.org/MDB_Harmonised_Construction_Contract>; FIDIC, *Conditions of Contract for Construction for Building and Engineering Works Designed by Employer: MDB Harmonized Edition*, (Geneva: FIDIC, 2010), online (pdf): <https://fidic.org/sites/default/files/cons_mdb_gc_v3_unprotected.pdf>. Note also that this may be referred to as the “Pink Book”: Frederic Gillion, *FIDIC Pink Book: The MDB Harmonised Edition of the Red Book*, (Fenwick Elliott, Reproduced from Practical Law Company), online (pdf): <<https://www.fenwickelliott.com/sites/default/files/FIDIC%20Pink%20Book%20The%20MDB%20Harmonised%20Edition%20of%20the%20Red%20Book.pdf>>.

to the consulting engineering industry can be low in many developing countries. While this encourages innovation and opportunities for engineers and related professionals, it can also encourage corrupt behavior if firms are able to dissolve and reform upon allegations of corruption.

Maintaining a strong and cooperative working relationship between the global consulting engineering industry, the World Bank, and other MDBs is important to FIDIC, its member associations and firms, and the MDBs. In 1996, following the World Bank's establishment of an internal system in the mid-1990s to combat corruption on World Bank projects, FIDIC issued its first formal policy statement on corruption.²⁹ For the first time FIDIC, as a leading international organization, identified corruption as a serious issue affecting the global consulting engineering industry. This led to further actions to develop a "Business Integrity Management System" (BIMS) that would address the needs and business practices of consulting engineering firms, modeled on the established format of quality management systems and incorporating many of the features of corporate anti-corruption compliance systems.³⁰ The term "integrity management" was deliberately chosen to emphasize the positive aspects of behaving with integrity, and is seen as a logical complement to the development of strong and ethical relationships between consulting engineering firms and their clients, based on the aspiration of serving as a "trusted advisor" to the client.³¹

BIMS, the FIDIC approach to integrity management, was outlined in 1997-98 and presented to the International Lending Agencies (ILAs) at the 1999 Biennial Meeting of International Lending Agencies and the Consulting Industry (BIMILACI).³² The FIDIC approach to integrity management was assessed in a paper prepared by Georg Engeli and Mark Pieth—two well-known authorities on this topic.³³ This paper was reviewed at the FIDIC 2000 conference, and led to the issue of three important FIDIC documents:

- *Guidelines for Business Integrity Management in the Consulting Industry* (2001);³⁴
- *Business Integrity Management System Training Manual* (2002);³⁵ and

²⁹ J M Boyd & J D Padilla, "FIDIC and Integrity; A Status Report" (2009) 9:3 Leadership & Mgmt Engineering 125 at 125. See also *Handbook for Curbing Corruption in Public Procurement*, (Berlin: TI, 2006) at 72, online: <<https://www.transparency.org/en/publications/handbook-for-curbing-corruption-in-public-procurement>>.

³⁰ Boyd & Padilla, *ibid*. See also UN, UNESCO Report: Engineering: Issues, Challenges and Opportunities for Development, (Paris: UNESCO, 2010) at 195-196, online (pdf): <<https://www.acofi.edu.co/wp-content/uploads/2013/08/Issues-challenges.pdf>>.

³¹ Boyd & Padilla, *ibid* at 125-126.

³² Ahmed Haj Stifi, *Development of an Anti-Corruption Toolkit with Components from Lean Construction* (PhD Dissertation, Karlsruhe Institute of Technology, 2017) at 105, online (pdf): <<https://publikationen.bibliothek.kit.edu/1000070740/4202707>>.

³³ Georg Engeli & Mark Pieth, "Developing an Integrity Programme for FIDIC: A Private Sector Initiative to Prevent Corruption in IFI-Funded Public Procurement" (Background Paper prepared for the Annual Meeting of FIDIC, Honolulu, 2000) [unpublished].

³⁴ FIDIC, *Guidelines for Business Integrity Management in the Consulting Industry*, (Lausanne, Switzerland: FIDIC, 2001).

³⁵ FIDIC, *Business Integrity Management System Training Manual*, (Geneva: FIDIC, 2002).

- *Model Representative Agreement – Test Edition* (2004).³⁶

Since 2010, FIDIC has replaced the acronym BIMS with FIMS (FIDIC Integrity Management System) to eliminate confusion with unrelated systems that use the acronym BIMS. New documents to describe FIMS and the recommended approach to implementing a flexible and scalable FIMS within a consulting engineering firm have been issued since 2010:

- *Guidelines for Integrity Management in the Consulting Industry – Part I – Policies and Principles* (2011);³⁷
- *Guidelines for Integrity Management in the Consulting Industry – Part II – FIMS Procedures* (2015);³⁸
- *Model Representative Agreement – First Edition* (2013);³⁹ and
- *Guidelines for Integrity Management in the Consulting Industry – Part III – FIMS and ISO 37001* (2019) (FIMS III).⁴⁰

The FIDIC *Model Representative Agreement* deserves special emphasis, as experience has shown that actions by “third parties” often constitute the greatest integrity risk to any firm, including a consulting engineering firm that is operating in a country outside of its home jurisdiction.⁴¹ The use of a “Representative” or an “Agent” by consulting engineering firms operating in foreign countries is relatively common. While the use of a Representative is often justified by the firm’s lack of understanding of local business practices and legal requirements, bribery by Representatives can often occur without the knowledge or participation of the firm’s own staff. However, numerous court cases have shown that third party actions will create liability for the firm that retains a Representative who acts in a corrupt manner.⁴² In the past, Representatives were often engaged with agreements that contained very limited information regarding scope of work, basis of remuneration, and any limits to their duties and obligations. The common practice of paying the Representative on the basis of a percentage of the fees paid by the client created opportunities for the Representative to pay bribes with a portion of the commission income.

³⁶ FIDIC, *Model Representative Agreement*, Test ed (Geneva: FIDIC, 2004).

³⁷ FIDIC, *Integrity Management System (FIMS) Guidelines - Part I - Policies and Principles*, 1st ed (Geneva: FIDIC, 2011).

³⁸ FIDIC, *Integrity Management System (FIMS) Guidelines - Part I - FIMS Procedures*, 1st ed (Geneva: FIDIC, 2011).

³⁹ FIDIC, *Model Representative Agreement*, 1st ed (Geneva: FIDIC, 2013) [*Model Representative Agreement*].

⁴⁰ FIDIC, *Guidelines for Integrity Management System in the Consulting Industry - Part III - FIMS and ISO 37001 Procedures*, 1st ed (Geneva: FIDIC, 2019) [FIMS III].

⁴¹ See “Managing Third Party Corruption Risk” (last visited 18 September 2021), online: Norton Rose Fulbright <<https://www.nortonrosefulbright.com/en-ca/knowledge/publications/8d332cdc/managing-third-party-corruption-risk>> and “Managing Third Parties” (last visited 18 September 2021), online: Transparency International UK <<https://www.antibriberyguidance.org/guidance/13-managing-third-parties/guidance>>.

⁴² For more on the impacts of third party actions and related court cases, see the discussions on jurisdiction and agents in Chapter 3.

The *Model Representative Agreement*,⁴³ which follows the established format of FIDIC contracts (standard General Conditions, Particular Conditions to name the Parties and countries of operation, etc.), spells out the Representative's anti-corruption obligations, training and reporting requirements, and the limits to the Representative's scope of work and authority. The *Model Representative Agreement* is available to all FIDIC member firms at low cost, in either digital or hard copy form.

The most recent document, known as *FIMS III*,⁴⁴ compares and contrasts the provisions of a typical FIMS and the requirements of the ISO 37001 anti-bribery standard. *FIMS III* explains how a firm's FIMS can be expanded to allow eventual certification of an anti-bribery system in accordance with the requirements of ISO 37001. This standard is narrowly focused on bribery activities; a FIMS provides the consulting firm with a broader framework for protection against corrupt acts.

Following the publication of these resource documents and the adoption of FIMS or similar systems by some engineering firms, FIDIC, acting primarily through its Integrity Management Committee (IMC), has continued to explain and promote its recommended approach to integrity management within consulting engineering firms. FIDIC has also encouraged pilot projects within a variety of international engineering firms, both large and small.

The indirect nature of firm representation by FIDIC has made it difficult to track the adoption of FIMS or related integrity management systems by engineering firms. Most large, multinational engineering firms typically maintain in-house legal resources. Many such firms have developed and adopted relatively rigorous compliance-type systems to suit their needs. However, small to medium sized firms have appeared to be reluctant to commit to the overhead cost resources needed to implement a comprehensive FIMS. Therefore, FIDIC initiated a pilot program in 2010 involving six member firms, to test the FIMS concepts and identify the strengths and weaknesses of the FIMS approach to integrity management.⁴⁵ The pilot program concluded that:

1. Firm size can be a challenge—smaller firms may believe that they lack the resources and understanding of the key issues. In response, the pilot program recommended that smaller firms begin with a well-worded Code of Conduct and expand their FIMS over time.
2. Endemic corruption, if present in the home market, often leads to fear of losing business and business failure. In response, the pilot program recommended that firms review their business, their aspirations to operate ethically, and their clients—it may be necessary to “fire a client.”
3. Employees may see the proposed FIMS as a threat from management—“you don’t

⁴³ *Model Representative Agreement*, *supra* note 39.

⁴⁴ *FIMS III*, *supra* note 40.

⁴⁵ Norman Baldwin et al, “Integrity and Anti-Corruption for Small and Medium Enterprises - Getting it Right” (Panel at the Anti-Corruption Law Program, Peter A Allard School of Law, 29 January 2021) at Part 7, online (pdf): <<https://allard.ubc.ca/sites/default/files/2021-02/January%20Anti-Corruption%20Law%20Program%20Presentation%20for%20Distribution.pdf>>.

trust us.” In response, the pilot program recommended the involvement of employees in the design and implementation of the firm’s FIMS, to avoid establishing a top-down “them and us” atmosphere within the firm.

4. A firm (especially a larger firm) may already have a compliance system, and may argue that it is unnecessary to adopt a FIMS. The pilot program noted that a FIMS can be used to expand into integrity areas not covered by a typical compliance system (e.g., corporate and personal conflict of interest). ISO 37001 certification may also be a desirable outcome of a robust compliance system; *FIMS III* provides a roadmap for that process.
5. The need for high level support (known as “tone from the top”) may mean that a leadership change can cause the FIMS to be abandoned or to fail. The pilot program acknowledged that all such initiatives require continuous top level support, which can spell the end of an ambitious program if this support is ever withdrawn.⁴⁶

The FIDIC Integrity Management Committee continues to promote the adoption of FIMS and related anti-corruption measures by member firms. The following near-term initiatives to expand adoption are under consideration:

- Aggressive promotion of integrity management through the FIDIC Member Associations, which would allow more direct access to member firm key decision-makers;
- Integration of integrity management measures into other FIDIC programs that are intended to assist firms to improve their businesses by targeting higher value-added services;
- Development of a searchable database that would allow interested parties (existing and potential clients, ILAs, existing and potential employees) to determine which engineering firms have established a FIMS, other type of compliance system, or an ISO 37001 anti-bribery system; and
- Development of targeted integrity guidance documents to assist smaller and medium-sized consulting firms with moving forward in the creation and management of their own FIMS.

5. A SECTOR-WIDE INITIATIVE TO REFRAIN FROM CORRUPTION

The Maritime Anti-Corruption Network (MACN)⁴⁷ is a global success story in how industries may effectively employ collective action to safeguard against corruption. The MACN’s origins root partially in response to the UK’s 2011 enactment of the *Bribery Act*,⁴⁸ a piece of legislation which codified the illegality of facilitation payments. The shipping

⁴⁶ *Ibid.*

⁴⁷ “MACN” (last visited 20 July 2021), online: *Maritime Anti-Corruption Network* [MACN] <www.macn.dk>.

⁴⁸ *Bribery Act 2010* (UK), c 23.

industry had battled such forms of corruption for many decades, with facilitation payments becoming so embedded in the industry that most considered it near impossible to effectively conduct maritime business without them. A small group of committed maritime companies, primarily operating out of Northern Europe, banded together to discuss how the industry could protect itself against such perverse sector-wide corruption concerns. While such facilitation payments were typically small in monetary value, such as requiring cartons of cigarettes (the Suez Canal was termed the 'Marlboro Canal' by many ship captains), these payments had become so pervasive that ships would regularly carry hundreds of cartons of cigarettes to ensure they would not be unfairly treated by port authorities; ships who refused to comply with facilitation payment demands could find themselves stuck in ports for an extended period of time or be forced to negotiate their way through a canal without a pilot—a significant safety issue.⁴⁹

The success of this group relied largely on their system of detecting and reporting bribery. The MACN employed Chatham House Rules,⁵⁰ allowing members to speak more openly about corruption issues and risks. MACN also launched an anonymous reporting mechanism to collect corrupt demands globally. By ensuring anonymity, the MACN was able to ask their members and non-members to report any demands for bribery which they encountered throughout the course of their business. The anonymous reporting mechanisms decreased companies' concerns and ultimately increased their level of reporting. The MACN was able to collect significant data on problematic ports, allowing the collective to tailor projects to those areas which faced the highest corruption risks. The MACN's practical and non-judgemental approach led to phenomenal growth; starting with 12 shipping companies in 2012, the MACN now has over 150 members reporting over 45,000 anonymous incidents of facilitation demands since 2012.⁵¹ The reporting system enabled the MACN to target those areas suffering the most abuse, putting pressure on these ports to cease corrupt maritime practices.

As Cecilia Müller Torbrand, CEO of MACN, puts it:

It doesn't matter how rigorous a company's ABC compliance program is – if they are the only company that says no – bad practices will continue, and the company will face a competitive disadvantage in many markets. The change comes when companies are adhering to the same standards and when governments, business and civil society address corruption risks together. Collective action is all about working together and identifying incentives for everyone in order to create ownership, implement solutions and finally achieve a sustainable change.⁵²

Nigeria was one port identified as a significant corruption risk to maritime trade. MACN members put intense pressure on the Nigerian port authority to help rid the sector of corrupt

⁴⁹ "From Marlboro [sic] Canal to Zero-Tolerance Transits" (9 December 2017), online: MACN <<https://macn.dk/from-marlboro-canal-to-zero-tolerance-transits/>>.

⁵⁰ MACN, *MACN Anti-Trust Compliance Policy*, (Paris: MACN, 2012) at 3, online (pdf): <<https://macn.dk/wp-content/uploads/2021/02/MACNAnti-TrustCompliancePolicy-2021.pdf>>.

⁵¹ "MACN", *supra* note 47 at "MACN in Numbers".

⁵² Cecilia Müller Torbrand shared this comment specifically for this publication.

practices, lest they continue to face increased pressure from shipping companies. Today, the situation is much improved; the Nigerian government actively participates in helping shipping companies effectively respond to requests for facilitation payments and levies fines against corrupt officials (this case study is further explored at Section 5.1).⁵³

Another project was initiated in Argentina, where data from MACN member companies highlighted a systemic issue regarding demands for payments for unclean grain holds. Inspectors tended to have broad discretion, thereby vesting in them the power to accept or reject shipments based on their categorization. Once the issue was brought to the attention of senior government officials, they worked with the MACN to remove bad actors from positions of authority, establishing an adequate system of procedural controls. Through this collaborative effort, government officials and the MACN reduced corruption at the Argentinean port by approximately 90%. The true catalyst behind this effort was the senior government officials' willingness to rid the port of corruption. Until this matter was brought to light, shipping companies had largely assumed that senior government officials were either themselves profiting from these corrupt practices, or were simply uninterested in becoming involved in these matters. Yet, as MACN members have repeatedly seen over the years, local governments in these high-risk nations have an interest in cleaning up their ports and establishing a reputation of clean and ethical conduct to encourage increased trade.⁵⁴

The MACN screens its members to ensure that they have a sincere desire to improve internal control mechanisms and increase compliance with the UK *Bribery Act* and the US *FCPA*. Members are not immediately removed from the MACN or shamed if they are implicated in issues of non-compliance; rather, the MACN views such incidents as opportunities for members to reaffirm their intentions and refocus their efforts. The MACN engages in a concerted effort to ensure all members are provided with industry-leading compliance tools. Recently, an online anti-corruption and bribery training program was made available to all MACN members free of charge.⁵⁵ Member meetings are also held free of charge to MACN members, encouraging strong attendance; MACN member meetings typically attract in excess of 100-200 participants, and include breakout sessions where members are provided with actionable tools to combat corruption.⁵⁶

The three main pillars of the MACN are the three C's: capacity building, collective action, and collaboration.⁵⁷ Each member is asked to make progress on its anti-bribery and corruption program. In order to achieve these goals, members are provided with free tools

⁵³ MACN Secretariat, Nigeria Collective Action: MACN Impact Report, (Copenhagen: MACN, 2018), online (pdf): <<https://static1.squarespace.com/static/53a158d0e4b06c9050b65db1/t/5d088f2423ffb700019ff12b/1560842037151/macn-annual-report-2018.pdf>>.

⁵⁴ "The Maritime Anti-Corruption Network: Argentina Collective Action" (27 February 2018), online: Business for Social Responsibility <<https://www.bsr.org/en/our-insights/case-study-view/maritime-anticorruption-network-argentina-collective-action>>.

⁵⁵ "MACN Launches Anti-Corruption E-Learning Initiative" (7 June 2020), online: *The Digital Ship* <<https://thedigitalship.com/news/item/6641-macn-launches-anti-corruption-e-learning-initiative>>.

⁵⁶ For more information on the MACN member meetings, see: "Events Archives - MACN" (last visited 20 October 2021), online: MACN <<https://macn.dk/category/events/>>.

⁵⁷ "MACN's Pillars: The Three C's" (last visited 30 July 2021), online: MACN <<https://macn.dk/our-work/>>.

on the MACN website, and also given detailed expert and peer advice at member meetings (held bi-annually around the globe).

A major contributing factor for the MACN's success is that the group is made up of businesses involved in the maritime industry; as such, the MACN understands the nuances of the sector and can appreciate the real-world challenges member companies face in their dealings. Additionally, the extra days a vessel is forced to remain in a port can cost tens of thousands of dollars. A company with over 100 vessels is therefore looking at corruption costs well into the millions of dollars. The ports themselves also have an interest in rooting out corruption; poorer economies may well go bankrupt if they can no longer import or export goods out of their ports, increasing domestic efforts in rooting out corrupt practices. With MACN member companies approaching 50% of world tonnage,⁵⁸ the MACN wields a massive amount of economic power to influence systemic issues in ports around the globe.

The MACN launched the Port Integrity Campaign in India with the full support of the Ministry of Shipping and the Indian National Shipowners' Association.⁵⁹ The pilot program was successfully launched in the Mumbai ports, and is now being rolled out to other ports in surrounding regions. In the Suez Canal, the MACN launched a collective "Say No" campaign which has resulted in significant improvement in the port's compliance efforts.⁶⁰ Through further collaborative efforts, the MACN has created onboard communication toolkits for captains and port agents.⁶¹ With several shipping companies working in tandem with one another, it has become nearly impossible for pilots to refuse service or provide subpar service to ships who refuse to engage in corrupt practices. This frontline material has also been further developed to support captains in ports globally.

The growth of the MACN and the network's impact is impossible to ignore. As the program continues to grow, so too does the influence of displaying the MACN logo on ships. Ports who see the MACN logo are now significantly less likely to attempt to acquire facilitation payments from these ships, as the MACN's growing network of companies have continually refused to engage in these corrupt practices. The MACN's influence has grown to include other industries that rely on shipping, such as the oil and gas sector, where companies rely on clean supply chains to ensure their reputations remain intact. Collective action has even turned into a business opportunity for MACN members, as some companies have opted to only use ships adorned with the MACN logo when transporting their goods. Today, major corporations such as BP, Shell, and BHP have begun seeking out ships displaying the MACN logo to carry their cargo.

⁵⁸ "The Lloyd's List Podcast: Shipping's Quiet Corruption Revolution" (21 May 2021), online (podcast): *Lloyd's List* <<https://lloydslist.maritimeintelligence.informa.com/LL1136860/The-Lloyds-List-Podcast-Shippings-quiet-corruption-revolution>>.

⁵⁹ MACN, *2019 Impact Report*, (MACN, June 2020) at 24 [2019 MACN *Impact Report*], online (pdf): <<https://macn.dk/wp-content/uploads/2020/11/MACN-2019-impact-report-1.pdf>>.

⁶⁰ *Ibid* at 16.

⁶¹ *Ibid*.

5.1 Case Study: The Nigerian Port Industry and the MACN

The Nigerian Port case study illustrates the powerful potential of collective action undertaken at the industry level. A 2017 study on sector-specific coordinated governance initiatives in curbing corruption surveyed MACN members who commented:

As a large group, we also started a pilot project in Nigeria and we got a lot of credits for tackling Nigerian ports. Nigeria is such a difficult country to work in and many of MACN members are not even doing ports calls in Nigeria but we consider this a learning journey and we worked with UNDP on identifying key challenges, risks in six Nigerian ports ... our reporting program shows in 2013 members reported 50 incidents of bribes being requested at a certain port. We have a collective action, three years later, members show only two incidents.⁶²

However, the long-term sustenance of collective action changes require effort from the local government and authorities. In this light, the following excerpt illustrates a promising development:

Plans are in the pipeline by the Federal Government to deploy its anti-corruption mechanisms to significantly reduce the menace of fraudulent and criminal activities at the Nigerian ports.

This comes as the Nigerian Ports Authority (NPA), is currently studying the various tariffs across ports in West Africa, with a view to determining how competitive Nigerian ports are compared to its neighbours.

An October 2016 report identified corruption, which is closely linked to the inefficiencies at the ports, as costing Nigeria the loss of about N\$1trillion annually.

These corruptive tendencies also contribute in making the Nigerian ports among the most expensive in the world due to the legion of charges ports users are being subjected [to] daily.

If these multi-challenges are resolved, experts believe Nigeria will be on the path to becoming the maritime hub in West Africa, as being clamoured for.

Already, the Managing Director, Nigerian Ports Authority (NPA), Hadiza Bala Usman, has confirmed that the Presidential Advisory Committee on Anti-Corruption will soon open an office in the NPA in line with a report submitted by the Independent Corrupt Practices Commission (ICPC) on the corruption index in ports administration.

⁶² Berta Van Schoor, *Fighting Corruption Collectively: How Successful Are Sector-Specific Coordinated Governance Initiatives in Curbing Corruption?* (Berlin: Springer Vieweg, 2017) at 151, online (pdf): <https://link.springer.com/content/pdf/10.1007%2F978-3-658-17838-3_4.pdf>.

Usman, who is also a member of the Presidential Advisory Committee on Anti-Corruption, affirmed that the Authority will embark on strong anti-corruption measures in 2017.

The move will further sanitise the sector and enhance smooth operations and clearance of cargo at the ports. Many illegal payments that contribute to making Nigerian ports charges non-competitive in [the] West African region would be eradicated and enhance the ease of doing business at the ports.

The NPA boss, who visited major customs agents and freight forwarders last weekend, also assured that the Authority will interact more with stakeholders in 2017, in order to keep abreast with happenings at the various ports.

To this end, she said the NPA would introduce quarterly stakeholders meetings to know what is on ground at the ports, and be better informed on the plight of operators.

...

To this end, she said there was the need for government to look into corruption at the ports and how to plug the leakages.⁶³

The MACN's 2019 *Impact Report* provides further information regarding the Nigerian Port case study, as well as other MACN initiatives.⁶⁴

6. SAFEGUARDING INTEGRITY IN MAJOR SPORT EVENTS

The International Olympic Committee (IOC), like other International Sport Organizations (ISOs), has traditionally operated in a relatively independent manner free of domestic and/or international governmental control pursuant to ISOs' "principle of autonomy" in sports governance.⁶⁵ Over the past decade however, the world of Major Sport Events (MSEs) has evolved towards a much more collaborative relationship between ISOs. This sea change in the model of governance of MSEs largely arose following allegations of bribery influencing the selection process for the hosts of the FIFA World Cup in 2006 (Germany), 2010 (South Africa), and 2022 (Qatar), as well as the Rio 2016 Olympic Games. In addition, the value proposition for hosting these MSEs was called into question due to concerns of perceived

⁶³ Sulaimon Salau, "Government Moves to Tackle Corruption At Nigerian Ports" (18 January 2017), *The Guardian*, online: <<https://guardian.ng/business-services/government-moves-to-tackle-corruption-at-nigerian-ports/>>.

⁶⁴ 2019 MACN *Impact Report*, *supra* note 59.

⁶⁵ See, for example, the emphasis on autonomy in the Olympic Charter: International Olympic Committee (IOC), *Olympic Charter*, (Lausanne, Switzerland: IOC, 2020) at 11, 16, 55, 60 (entered into force 17 July 2020), online (pdf):

<<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>>.

gigantism and the failures of Sochi 2014 and Rio 2016 to deliver the promised legacies of the Olympic Games.⁶⁶

These developments lead to independent ISO actors, such as the IOC, to increasingly enter into more collaborative working relationships with host governments and other key stakeholders in the sports industry. While remaining separate in their areas of specific expertise, these public and private entities moved to a more intimate, inclusive and collaborative institutional model for the planning, delivery, and oversight of MSEs. By working together, these entities became more equipped to ensure better sustainability and integrity outcomes for host communities.

This process of moving towards closer working relationships between the IOC and host communities was facilitated by the IOC undergoing strategic reforms in two fundamental areas: (i) the IOC reimagined the appropriate scale of the Games project and the efficiencies, cost control measures, and delivery systems that should be applied to the awarding criteria, allowing for the “New Norm” of Host City Selection and Games Delivery that focused on producing optimal Games sustainability outcomes; and (ii) the measures taken by the IOC to improve its internal systems to ensure greater transparency, accountability, and integrity in its own operations.⁶⁷

6.1 Olympic Agenda 2020: “New Norm” of Host City Selection and Games Delivery

In September 2013, the IOC introduced the “Olympic Agenda 2020.”⁶⁸ This was an open, inclusive, and wide-ranging consultation involving multiple Olympic Movement stakeholders as well as interested civil society organizations. The consultation aimed to produce a new strategic roadmap for the future of the Olympic Movement that would increase the IOC’s capacity to leverage the Games to bring about positive change globally. Through strengthening its own internal governance systems, the IOC increased the level of transparency and ethical practices in its operations and outreach. The Olympic Agenda 2020 process ultimately developed 40 recommendations that were approved by the IOC Session in December 2014.⁶⁹

Importantly, the IOC intensified its efforts in the following years to continue renewing its process of awarding future Games. A collaborative working process involving the IOC’s partners, industry experts, and the Olympic Games Delivery Executive Steering Committee

⁶⁶ See for example, the discussions in Simona Azzali, “Challenges and Key Factors in Planning Legacies of Mega Sporting Events Learned from London, Sochi, and Rio de Janeiro” (2020) 14:2 *Intl J Architectural Research* 203.

⁶⁷ “What is the New Norm” (last visited 30 July 2021), online: *International Olympic Committee* <<https://olympics.com/ioc/faq/roles-and-responsibilities-of-the-ioc-and-its-partners/what-is-the-new-norm>>; “Olympic Agenda 2020” (last visited 30 July 2021) [Olympic Agenda 2020], online: *International Olympic Committee* <<https://www.olympic.org/olympic-agenda-2020>>. See also James McBride, “The Economics of Hosting the Olympic Games” (last updated 19 January 2018), online: *Council on Foreign Relations* <<https://www.cfr.org/backgrounder/economics-hosting-olympic-games>>.

⁶⁸ Olympic Agenda 2020, *supra* note 67.

⁶⁹ *Ibid.*

analysed every function of the Games operations, including venues, energy, broadcasting accommodation, transport and technology, to determine how the Games could be made more affordable, beneficial, and sustainable for future host cities.

This renewal process produced the “New Norm”—a set of 118 reforms pursuant to six recommendations of Olympic Agenda 2020, adopted by the IOC at its 132nd Session in 2018.⁷⁰ These reforms are designed to produce maximum cost savings (upwards of hundreds of millions of dollars) in the delivery of the Games without compromising the Olympic Games experience. The plan invites opportunities to reduce venue sizes, rethink transport options in favour of public transit, optimise the use of pre-existing infrastructure, and reuse the field of play of competition venues for various sports.⁷¹

The expanded Invitation Phase process communicated in Olympic Agenda 2020 and the New Norm would apply immediately to the 2026 Olympic Winter Games Bid Process.⁷² But the new collaborative approach to Games delivery and the rescaled model of the Games contemplated in the new Candidature Phase would apply immediately to the process of selecting the Paris 2024 and Los Angeles 2028 Summer Olympic Games.⁷³ Both cities previously hosted the Games; as such, their existing civic assets would obviate the need for new large capital investments, such as those undertaken in relation to the Sochi 2014 Winter Games and the Rio 2016 Summer Games.

6.2 Transparency and Accountability in IOC Operations and the Chief Ethics and Compliance Officer

The IOC enhanced the transparency of its operations by requiring the IOC financial statements be prepared and audited pursuant to the global benchmark International Financial Reporting Standards (IFRS).⁷⁴ A dedicated IOC Audit Committee oversees risk

⁷⁰ “The New Norm: It’s a Games Changer” (6 February 2018), online: IOC <<https://olympics.com/ioc/news/the-new-norm-it-s-a-games-changer>>; and IOC, Executive Steering Committee for Olympic Games Delivery, *Olympic Agenda 2020 – Olympic Games: The New Norm*, (Lausanne, Switzerland: IOC, 2018) [118 Reforms], online (pdf): <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/2018/02/2018-02-06-Olympic-Games-the-New-Norm-Report.pdf#_ga=2.253318729.1937900192.1527605308-1040588004.1527505901>.

⁷¹ 118 Reforms, *supra* note 70.

⁷² IOC Working Group, *Olympic Winter Games 2026 IOC Working Group Report*, (September 2018), online (pdf): <<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Winter-Games/Games-2026-Winter-Olympic-Games/18-029-IOC-ANG-LO-RES.pdf>>.

⁷³ See, for example, “New Era of Games Embraced as Updated Paris 2024 Venue Concept Approved” (17 December 2020), online: IOC <<https://olympics.com/ioc/news/new-era-of-games-embraced-as-updated-paris-2024-venue-concept-approved>>; and Newsroom, “IOC Coordination Commission and Paris 2024 Agree to Examine New Games Delivery Opportunities”, *Around the Rings* (19 September 2021), online: <<https://www.infobae.com/aroundtherings/ioc/2021/07/12/ioc-coordination-commission-and-paris-2024-agree-to-examine-new-games-delivery-opportunities/>>.

⁷⁴ “International Olympic Committee Publishes 2020 Annual Report and Financial Statements” (20 July 2021), online: IOC <<https://olympics.com/ioc/news/international-olympic-committee-publishes-2020-annual-report-and-financial-statements>>.

management, financial reporting, compliance, internal controls, and governance within the IOC.⁷⁵ The IOC ultimately began requiring the publishing of an annual activity and financial report, including the allowance policy for the expenses of IOC members which reaffirms the volunteer status of IOC members. In doing so, the IOC demonstrated increased accountability of its operations and greater transparency for the raising and spending of revenue.

As a result of Olympic Agenda 2020, the Rules of Conduct for the Bid Process⁷⁶ underwent two significant changes designed to help promote transparency and integrity in the Bid Process: (i) the new IOC Rules required consultants advising bidding cities to register with a publicly listed IOC services (thus avoiding undisclosed conflicts of interest in the consultancy sector); and (ii) the Host City Contract would henceforth be made public.⁷⁷

Olympic Agenda 2020 also recommended the creation of the Chief Ethics and Compliance Officer (CECO) position, which the IOC introduced in 2015.⁷⁸ The function of the Ethics and Compliance Office is primarily preventative, providing information and education on the ethical principles guiding the IOC. The Office further provides an educational and advisory role for the entire Olympic Movement, helping participants understand and apply ethical rules and principles. For example, the work of the CECO includes protecting IOC Members from the risk of being unwitting targets of ‘extreme promotion’ by bid cities through an iterative process, whereby the CECO answers questions regarding acceptable conduct in promotional efforts by bid cities.

6.3 Collective Action in the MSEs Industry

The integrity of sports competitions is essential to attract the attention of fans and participants; no one sport organization, regulator of the sports betting industry or law enforcement entity can successfully address the issue of match fixing alone. Each organization plays an important role in recognizing possible synergies in their joint efforts and applying their resources to collectively address such issues; these interested parties must work together in a coherent and synchronized way. Collective action among all these organizations is required to provide the education and awareness, clear prohibitions against

⁷⁵ See the subheading “Mission” in “Audit Committee” (last visited 18 September 2021), online: IOC <<https://olympics.com/ioc/audit-committee#tab-da04fbe3-e2f4-4a60-8b1a-dd782d7b3794-0>>.

⁷⁶ See the documents under “Future Olympic Hosts” (last visited 18 September 2021), online: IOC <<https://olympics.com/ioc/documents/olympic-games/future-olympic-hosts>>.

⁷⁷ IOC, Olympic Agenda 2020 — 20+20 Recommendations, (Lausanne: IOC, 2014) [Olympic Agenda 2020 Recommendations] at 9, 11, online (pdf): <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/Documents/Olympic-Agenda-2020/Olympic-Agenda-2020-20-20-Recommendations.pdf?_ga=2.193689577.573903206.1634784951-2058394911.1634784951>.

⁷⁸ *Ibid* at 4, 22. See also Thomas Bach, “Speech by IOC President Thomas Bach on the Occasion of the Opening Ceremony” (Speech delivered at the 127th IOC Session, Monaco, 7 December 2014), *Olympic Agenda 2020 — Context and Background* (Lausanne: IOC, 2014) at 6, online (pdf): <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/Documents/Olympic-Agenda-2020/Olympic-Agenda-2020-Context-and-Background.pdf?_ga=2.243904525.961419715.1632024516-183013384.1632024516>.

betting on Olympic events, monitoring of betting patterns, safe reporting systems, and the well-resourced investigation and sanctioning systems that are needed to tackle this existential reputational problem for sport.

In Olympic Agenda 2020, IOC President Thomas Bach stated “we have first and foremost to protect the clean athletes … from doping, match-fixing, manipulation and corruption. We have to change our way of thinking. We have to consider every single cent in the fight against these evils not as an expense but as an investment in the future of Olympic Sport.”⁷⁹

6.3.1 Integrity Betting Intelligence System

To mitigate the risk of competition manipulation, the IOC entered into a collaborative working partnership with the stakeholders of the Olympic Movement and other interested international organizations involved in safeguarding the integrity of sports competitions. An early step to address this threat was the launch of the IOC’s Integrity Betting Intelligence System (IBIS)⁸⁰ in 2014. IBIS is a centralized mechanism for the exchange of information and intelligence that enables the sport movement to allocate and analyse information and intelligence about potential match fixing. Once potential match fixing is identified by an IBIS stakeholder, relevant entities (both from the licensed betting industry as well as government regulatory agencies) are contacted. IBIS is a useful tool that enables closer cooperation among sports organizations, sports betting operators and law enforcement who are aligned in their goals to remove match fixing in sports competitions.

6.3.2 International Forum on Sports Integrity

In 2015 the IOC hosted the first International Forum on Sports Integrity (the Forum).⁸¹ The meeting included representatives from world governments, the Council of Europe, the European Union, INTERPOL, Europol, United Nations agencies, sports betting operators, Olympic Movement stakeholders, among other interested parties. The Forum is fully supported by the Association of National Olympic Committees (ANOC), Association of Summer Olympic International Federations (ASOIF), and Association of International Olympic Winter Sports Federations (AIOWF).

The Forum was chaired by IOC President Thomas Bach who in his Opening Remarks stated:

In Olympic Agenda 2020 we stressed the need to protect clean athletes from match-fixing, manipulation of competitions and related corruption.... Today's forum has brought all key players around the table to address this need and coordinate our action. We are pleased with the support we have received so far in this regard, in particular from the Council of Europe. We

⁷⁹ Olympic Agenda 2020 Recommendations, *supra* note 77 at 4.

⁸⁰ IOC, *Factsheet: The Integrity Betting Intelligence System (IBIS)*, (Lausanne: IOC, 2021), online (pdf): <https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/Factsheets-Reference-Documents/IBIS/Factsheet-IOC-Integrity-Betting-Intelligence-System-IBIS.pdf?_ga=2.41393450.961419715.1632024516-183013384.1632024516>.

⁸¹ IOC, Press Release, “First International Forum for Sports Integrity Adopts Roadmap for Future Action to Protect Clean Athletes” (13 April 2015), online: <<https://www.olympic.org/news/first-international-forum-for-sports-integrity-adopts-roadmap-for-future-action-to-protect-clean-athletes>>.

are intensifying our efforts to protect the integrity of sport and we ask that European and non-European governments sign the Council of Europe's Convention on the Manipulation of Sports Competitions and continue to work hand-in-hand with us.⁸²

The Forum created a roadmap for future action aimed at strengthening and coordinating all activities to protect clean athletes from match fixing, manipulation of competitions, and related corruption. The Forum called on European and non-European governments alike to sign the Council of Europe Convention on the Manipulation of Sports Competitions, which ensures that domestic laws enable criminal investigations and sanctioning of the manipulation of sports competitions when it involves coercive, corrupt and/or fraudulent practices.

The ongoing work of the Forum focuses on themes such as education and information, intelligence and investigation, and legislation and regulation. The Forum's collaborative research lead to reports of strategies to combat match fixing, including the *Resource Guide on Good Practices in the Investigation of Match-Fixing* (the UNODC and the ICSS),⁸³ and a *Handbook on Protecting Sport from Competition Manipulation* (the IOC and Interpol).⁸⁴ Europol also produced a Situation Report entitled *The Involvement of Organized Crime Groups in Sports Corruption*.⁸⁵ The Forum allows these entities to work together to implement the strategies identified in these top-level reports.

The IOC launched its new Integrity and Compliance Hotline⁸⁶ at the Forum. The hotline is a new reporting mechanism intended to bring to light potential cases of competition manipulation as well as other violations of the integrity of sport. The web-based hotline is open to athletes, coaches, referees, and the public, while guaranteeing 100% anonymity. Anyone can report suspicious approaches or activities related to competition manipulation and/or infringements of the IOC *Code of Ethics*⁸⁷ or other matters—including financial misconduct or other legal, regulatory, and ethical breaches—over which the IOC has jurisdiction.

⁸² *Ibid.*

⁸³ United Nations Office on Drugs and Crime [UNODC] & the International Centre for Sport Security, *Resource Guide on Good Practices in the Investigation of Match-Fixing*, (Vienna: UNODC, 2016), online (pdf): <http://www.unodc.org/documents/corruption/Publications/2016/V1602591-RESOURCE_GUIDE_ON_GOOD_PRACTICES_IN_THE_INVESTIGATION_OF_MATCH-FIXING.pdf>.

⁸⁴ Interpol & IOC, *Handbook on Protecting Sport from Competition Manipulation*, (Lausanne: IOC, 2016), online (pdf): <<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Betting/Education-Awareness-raising/Interpol-IOC-Handbook-on-Protecting-Sport-from-Competition-Manipulation.pdf>>.

⁸⁵ Europol, *The Involvement of Organised Crime Groups in Sports Corruption: Situation Report*, (Europol, 2020), online: <<https://www.europol.europa.eu/publications-documents/involvement-of-organised-crime-groups-in-sports-corruption>>.

⁸⁶ "Welcome to the International Olympic Committee's Integrity and Compliance Hotline" (last visited 30 July 2021), online: IOC <<https://ioc.integrityline.org/>>.

⁸⁷ "Code of Ethics" (last visited 30 July 2021), online: IOC <<https://olympics.com/ioc/code-of-ethics>>.

6.3.3 International Partnership Against Corruption in Sport

The International Forum on Sport Integrity was also the occasion for the launch of the International Partnership Against Corruption in Sport (IPACS).⁸⁸ IPACS is a multi-stakeholder platform, including government and inter-governmental organizations, such as the United Nations, the European Union, the Council of Europe, Interpol, the United Nations Office of Drugs and Crime (UNODC), and UNESCO, who joined forces in order to “bring together international sports organisations, governments, inter-governmental organisations, and other relevant stakeholders to strengthen and support efforts to eliminate corruption and promote a culture of good governance in and around sport.”⁸⁹

The IOC, the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the UNODC, and the government of the United Kingdom coordinate the work of IPACS. An important operating assumption informing these new working partnerships is the recognition that no single organization can effectively address the multiple corruption challenges facing sports on its own. Collective action among the major public and private stakeholders in the sports world is needed. IPACS accomplishes its work through expert task forces overseen by an IPACS Steering Committee and regular high-level meetings among the IPACS organizations.

IPACS ultimately established four distinct working groups, focused upon:

- **Task Force 1:** reducing the risk of corruption in procurement relating to sporting events and infrastructure;⁹⁰
- **Task Force 2:** ensuring integrity in the selection of major sporting events, with an initial focus on managing conflicts of interests;⁹¹
- **Task Force 3:** optimising the processes of compliance with good governance principles to mitigate the risk of corruption;⁹² and
- **Task Force 4:** enhancing effective cooperation between law enforcement, criminal justice authorities and sport organisations.⁹³

⁸⁸ See “About” on “IPACS” (last visited 30 July 2021), online: *International Partnership Against Corruption in Sport* [IPACS] <<https://www.ipacs.sport/>>.

⁸⁹ *Ibid.*

⁹⁰ “Reducing the Risk of Corruption in Procurement Relating to Sporting Events Infrastructure” (last visited 30 July 2021), online: IPACS <<https://www.ipacs.sport/procurement-task>>.

⁹¹ “Ensuring Integrity in the Selection of Sporting Events” (last visited 30 July 2021), online: IPACS <<https://www.ipacs.sport/major-sport-events-task>>.

⁹² “Optimising the Processes of Compliance with Good Governance Principle to Mitigate the Risk of Corruption” (last visited 30 July 2021), online: IPACS <<https://www.ipacs.sport/good-governance-task>>.

⁹³ “Enhancing Effective Cooperation between Law Enforcement, Criminal Justice Authorities and Sport Organisations” (last visited 30 July 2021), online: IPACS <<https://www.ipacs.sport/cross-sector-cooperation>>.

6.3.4 Summary of IOC Initiatives for Collective Action

Ultimately, Olympic Agenda 2020 has resulted in a more robust and collaborative relationship between the IOC and the Olympic Movement to support host communities, both at the bid and delivery stages of the Games cycle. The internal governance reforms of the IOC have built a significant new capacity to raise awareness and educate members of the Olympic Movement regarding the IOC's *Code of Ethics*, as well as how to identify, investigate, and sanction alleged violations. Such measures apply to every element of the work of the IOC, from the awarding of the Games to the design, build and hosting of the Games.

Throughout this period, the IOC successfully strengthened its internal integrity management systems to become more transparent and accountable. Further, the IOC enhanced its collaborative relationships with other members of the Olympic Movement to maximize the benefits local communities receive from hosting the Games. The IOC's willingness to work closely with external partners has reasserted the Olympic Movement's potential to utilize collective action in order to harness the power of sport for positive results. These kinds of working relationships have not required the IOC to diminish its basic principle of autonomy. Instead, the new collaborative approach has strengthened the IOC's capability to deliver the Games.

How can the IOC's experience working with host nations and Olympic Movement stakeholders be used in the closer working arrangements contemplated in Olympic Agenda 2020? How may these partnerships allow the IOC (while working closely with event delivery partners) to reduce corruption in the build and hosting stages of the Games? How can the IOC (and other ISOs) ensure that their officials comply with ethical conduct and avoid considering inappropriate self-interests in the decision-making process? What bright lines of ethical decision-making should apply both to the IOC and the other organizations involved in MSEs?

No one organization may unilaterally dictate such guidelines to another organization involved in these multi-stakeholder events. To bridge these fault lines of inter-organizational behaviour, commonly accepted ethical norms to guide decision-making must be embraced, communicated, and enforced. The future management of MSEs requires greater consensus about the ways of doing business in this complex multi-stakeholder environment. IBIS, the Forum, and IPACS are examples of important collective action initiatives among global sport stakeholders who have embraced this kind of shared thinking regarding appropriate conduct by both public and private actors in the MSE ecosystem. The IOC and leading government organizations joined together to develop common standards of behaviour and enforcement systems, applicable both internally and externally among stakeholder organizations. Ultimately, IBIS, the Forum and IPACS (and other similar collaborative initiatives) showcase how taking collective action on shared objectives can make significant collective progress in the fight against corruption in the global sport context.

7. INTEGRITY PACTS AND MONITORS

An integrity pact is a tool Transparency International (TI) developed in the 1990s to enhance the power of collective action.⁹⁴ It is “both a signed document and approach to public contracting which commits a contracting authority and bidders to comply with best practice and maximum transparency.”⁹⁵ In this project- or transaction-specific agreement between a customer (usually a public entity, such as a government or government agency) and all bidders for the contract (usually companies),⁹⁶ the parties agree to a fair and transparent process,⁹⁷ thus enforcing accountability in public contracting.⁹⁸ Importantly, Integrity Pacts provide a proactive instrument to supplement the largely reactive process of law enforcement.⁹⁹ TI states that “when Integrity Pacts are first tried, there are often fears that taking time for transparency and accountability will delay work. Experience has shown, however, that they help ensure projects are delivered on time and within or below budget.”¹⁰⁰

For this reason, TI further states that it is “highly desirable to make the signing of the [Integrity Pact] mandatory,”¹⁰¹ because the Integrity Pact can function only if all bidders submit to it. Although this mandatory, complete form of the Integrity Pact reflects the ideal use of this mechanism, it is also valued for its flexibility: “in some jurisdictions they are used in their complete form; in other jurisdictions only essential elements are used.”¹⁰² Sometimes they are voluntary and the party seeking the project tries to convince all bidders of the advantages of having an Integrity Pact in place, other times they are imposed.¹⁰³

⁹⁴ “Integrity Pacts” (last visited 30 July 2021) [TI Integrity Pacts], online: *Transparency International* <<https://www.transparency.org/en/tool-integrity-pacts>>.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Juanita Olaya, *Integrity Pacts in the Water Sector: An Implementation Guide for Government Officials*, (Berlin: Water Integrity Network & Transparency International, 2010) at 32, 34, online (pdf): <https://knowledgehub.transparency.org/assets/uploads/kproducts/2010_IntegrityPactsWaterSector_EN.pdf>.

⁹⁸ TI Integrity Pacts, *supra* note 94.

⁹⁹ Wesley Cragg, Uwafio kun Idemudia & Bronwyn Best, “Confronting Corruption Using Integrity Pacts: The Case of Nigeria” in Ronald J Burke, Edward C Tomlinson & Cary L Cooper, eds, *Crime and Corruption in Organizations: Why it Occurs and What to Do About It* (London: Gower Publishing, 2010), 297 at 300.

¹⁰⁰ Transparency International, Media Release, “Integrity Pacts: Reaching Out to the Water Sector” (19 January 2011) [TI Water Sector], previously online at:

<www.transparency.org/news/feature/integrity_pacts_reaching_out_to_the_water_sector>.

¹⁰¹ Transparency International, *The Integrity Pact: A Powerful Tool for Clean Bidding*, (Berlin: Transparency International, 2009) [TI Clean Bidding] at 5, online (pdf): <www.transparency.org/files/content/tool/IntegrityPacts_Brochure_EN.pdf>.

¹⁰² Cragg, Idemudia & Best, *supra* note 99 at 303.

¹⁰³ TI Clean Bidding, *supra* note 101 at 5. Beyond what we have considered in this section, additional tools and readings on Integrity Pacts are available under the “Publications and Resources” tab under “Integrity Pacts—Civil Control Mechanism for Safeguarding EU Funds” (last visited 30 July 2021), online: *Transparency International* <www.transparency.org/whatwedo/tools/resources_about_integrity_pacts/3/>.

7.1 Importance of Fairness Monitors

TI notes that “the Integrity Pact is based on a simple principle: full transparency at every step of a well-designed contracting process.”¹⁰⁴ As such, Integrity Pacts are generally overseen by Fairness Monitors—either independent experts or NGOs—that ensure “increased levels of transparency and accountability, compliance with the Pact’s commitments.”¹⁰⁵

This independent monitoring is critical to preserve not only the terms of the Pact, but also to determine when non-compliance measures outlined in the Integrity Pact need to be enforced. Juanita Olaya, writing for the Water Integrity Network and Transparency International, states this mechanism’s importance:

Without the monitoring system, the advantages created by an IP may be unrealized. The monitor scrutinises the process closely and guards the implementation and enforcement of the IP. He is the source of credibility, reassuring both the authority and the bidders that the process will go as agreed, and is a source of information for the general public, building trust in the contracting process.¹⁰⁶

Olaya also notes that there are certain necessary qualities of a good monitor, including independence, knowledge (of the project’s contractual process and technical aspects), capacity (time, effort, resources), accountability, and commitment.¹⁰⁷ But beyond these characteristics, there is no standard monitoring mechanism: the chosen monitor can be an organisation or an individual, a governmental or non-governmental body, a national or international body, etc.¹⁰⁸

8. ACTIVE PARTICIPATION BY CIVIL SOCIETY IN GOVERNMENT PROCUREMENT

A report published by the G20 in 2020 noted that worldwide spending on infrastructure reached approximately \$2.7 trillion a year.¹⁰⁹ According to estimates, between 10 and 30% of investment in infrastructure is lost due to corruption, mismanagement, and inefficiency.¹¹⁰ The IMF found that losses due to inefficiency affect all countries, with an average 15%

¹⁰⁴ TI Water Sector, *supra* note 100.

¹⁰⁵ *Ibid.*

¹⁰⁶ Olaya, *supra* note 97 at 82.

¹⁰⁷ *Ibid* at 84-85.

¹⁰⁸ *Ibid* at 86-87.

¹⁰⁹ Infrastructure Transparency Initiative (CoST), *Business Plan 2021-2025: Strengthening Economies and Improving Lives*, (16 December 2020) [CoSt Business Plan] at 10, online (pdf):

<<https://infrastructuretransparency.org/wp-content/uploads/2020/12/Business-Plan-Final.pdf>>.

¹¹⁰ Infrastructure Transparency Initiative (CoST), *The Need for CoST: Strengthening Economies and Improving Lives*, (High Holborn, UK: CoST, 2020) [Need for CoST] at 1, online (pdf):

<<https://infrastructuretransparency.org/wp-content/uploads/2020/11/The-Need-for-CoST.pdf>>.

efficiency gap in advanced economies, 34% in emerging markets and up to an astonishing 53% in low-income developing countries.¹¹¹ Weaknesses in public investment management institutions cause inefficiency, which increases the risk of rent-seeking and corruption, resulting in major value losses from global spending on public infrastructure.¹¹² Infrastructure development involves large, long-lasting, and complex projects characterized by high degrees of information asymmetry. This structure makes it harder to detect inflated prices, inferior quality, and/or slow-moving delivery.¹¹³

One recent example of this issue was found following a federal investigation in Brazil which unveiled massive kickbacks paid by companies in return for construction contracts with Petrobras, a majority-state-owned oil company.¹¹⁴ A group of companies colluded to secure contracts with Petrobras, overcharging and diverting some of the funds and facilitating kickback payments directed to Petrobras's management and top-level Brazilian political elites. According to estimates from the Institute for Strategic Studies on Petroleum, Natural Gas and Biofuels, this embezzlement scheme led to a reduction of 2% of GDP in Petrobras investments and a 5% reduction in gross fixed capital formation, in addition to the embezzlement of about \$2.5 billion in public funds (0.13% of GDP) during 2004–2012.¹¹⁵ The corrupt scheme remained undisclosed for such a long period partially due to serious vulnerabilities in the internal control framework of Brazil's national oil company, a low level of transparency, lax disclosure rules, and a fragmented external oversight system, involving multiple government agencies that proved to be incapable of detecting the irregularities.¹¹⁶

The Infrastructure Transparency Initiative (referred to as CoST) was previously known as the Construction Sector Transparency Initiative. It is a global multi-stakeholder program that strives to achieve greater transparency, participation, and accountability in public sector infrastructure constructions. CoST was launched in 2015 and is funded by the UK and the Netherlands. It is an important example of collective action that brings together governments, businesses and civil society to promote the disclosure, validation, and interpretation of data from infrastructure projects. CoST is operating in 19 participating countries, most of which are developing nations. By helping make data on infrastructure public and accessible, CoST informs and empowers civil society organizations and citizens to hold decision-makers accountable for funds held in public trust. In doing so, CoST seeks to improve the quality of public infrastructure projects and reduce risks of inefficiency, mismanagement, and corruption.¹¹⁷

¹¹¹ Gerd Schwartz et al, eds, *Well Spent: How Strong Infrastructure Governance Can End Waste in Public Investment*, (Washington, DC: International Monetary Fund, 2020) at 35, online: <<https://www.elibrary.imf.org/view/books/071/28328-9781513511818-en/28328-9781513511818-en-book.xml>>.

¹¹² CoST Business Plan, *supra* note 109 at 10.

¹¹³ Schwartz et al, *supra* note 111 at 175.

¹¹⁴ For further discussion of the Petrobras affair, see Chapter 1, Section 2.3.

¹¹⁵ Schwartz et al, *supra* note 111 at 175, citing Eduardo Costa & Esther Dweck, *Reduction of Petrobras Investments: A Balance of Losses* (The Institute for Strategic Studies on Petroleum, Natural Gas and Biofuels Zé Eduardo Dutra (Ineep), 2019).

¹¹⁶ *Ibid.*

¹¹⁷ "About Us" (last visited 30 July 2021) [CoST - About Us], online: CoST - Infrastructure Transparency Initiative <<https://infrastructuretransparency.org/about-us/>>.

8.1 CoST Pilot Project

The creation of CoST was inspired by the success of the Extractive Industries Transparency Initiative (EITI) in bringing good governance practices in the non-renewable natural resources sector, and it employs a similar framework. Since its creation in 2003, the EITI has established a global standard to promote the open and accountable management of oil, gas, and mineral resources. It does so through bringing together multi-stakeholder groups of government, companies and civil society to implement, adapt and supervise the observance of the EITI Standard.¹¹⁸ The Standard requires the disclosure of information along the extractive industry value chain, from the point of extraction as revenues make their way through the government, and reports on whether public benefit resulted. The EITI seeks to strengthen public and corporate governance, promote understanding of natural resource management, and provide the data to inform reforms for greater transparency and accountability in the extractives sector. Since the launch of its pilot project in four countries in 2003, the EITI has grown to include 56 member countries worldwide.¹¹⁹

CoST shares a similar story. It began as a 2008-2010 pilot initiative by the World Bank and the United Kingdom's Department for International Development.¹²⁰ The CoST pilot project spanned eight countries: Ethiopia, Malawi, Philippines, Tanzania, the UK, Vietnam, Zambia, and Guatemala (which joined in 2009). In each country, CoST organized a national Multi-Stakeholder Group (MSG), comprising representatives from government, industry, and civil society.¹²¹ The pilot program consisted of a comprehensive baseline study of several core indicators across countries: a) existing levels of transparency and rules on disclosure regarding public infrastructure projects b) levels of competition in procurement (bidding statistics), and c) performance of construction projects in terms of time, cost and quality (i.e., time and cost overruns, and orders to remedy defective work).¹²² A standard methodology was developed to evaluate each of the aforementioned indicators in participating countries, enabling future assessment of the results of various reforms.¹²³

MSGs were tasked to profile the local construction sector, the laws and regulations relating to public administration and transparency, and relevant institutions and initiatives relating to governance in the country. The groups tested disclosure processes across several procuring entities to assemble a list of key project data and performed assurance reviews of disclosed data, identifying causes for concern and helping stakeholders to understand the

¹¹⁸ "Multi-Stakeholder Governance - The Power of Three" (last visited 25 October 2021), online: EITI <<https://eiti.org/oversight>>.

¹¹⁹ For a discussion of the EITI's pilot program, see EITI, *Extractive Industries Transparency Initiative Source Book* (London: Department for International Development, 2005) at 7, online (pdf): <https://eiti.org/files/documents/sourcebookmarch05_0.pdf>. A list of the current EITI member countries can be found at: "Countries" (last visited 25 October 2021), online: EITI <<https://eiti.org/countries>>.

¹²⁰ Infrastructure Transparency Initiative (CoST), *Report on Baseline Studies: International Comparison*, (January 2011) [CoST Baseline] at 1, online (pdf): <<https://infrastructuretransparency.org/wp-content/uploads/2018/06/Report-on-baseline-studies-International-comparison.pdf>>.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

main issues.¹²⁴ The pilot project drew data from the assessment of 100 infrastructure projects in essential services: housing, road-building, supply of water, healthcare, education and emergency prevention infrastructure.¹²⁵ CoST looked specifically at how a multi-stakeholder approach could increase transparency and accountability in the delivery of infrastructure projects.¹²⁶

The pilot presented noteworthy findings necessary for replicating CoST on a broad scale. The study found that existing transparency requirements regarding tenders were aimed at participants, but did little to inform the public about projects.¹²⁷ Moreover, none of the pilot countries required disclosure of changes to contract time and cost during project implementation, and only one country required disclosure of final cost and time after project completion.¹²⁸ Time overruns for construction were found to be extensive and exceeded cost overruns.¹²⁹ The study also identified the most important barriers to broader disclosure:

- (i) Poor information management and limited technical capacity of procuring entities. In many countries, systems for storing and retrieving project information were found to be weak or non-existent. Moreover, the large number of agencies involved in planning, procurement, and delivery of construction projects lead to scattered storage of project information in hard copies rather than a compilation of all the project data in unified electronic databases.
- (ii) Skepticism over the potential benefits of wider disclosure. In the UK, officials from procurement entities expressed the view that public interest in information about construction project execution was generally lacking and questioned the value of transparency as a tool against corruption.
- (iii) The additional cost of compiling information in the absence of electronic data storage. Officials in Malawi, Zambia, Guatemala, and the UK suggested that in the absence of electronic storage and an improved records management system, the compilation of project-level data in an appropriate format for publication would carry significant costs that might outweigh potential benefits.¹³⁰

The pilot project resulted in substantive recommendations for legislative improvements, enhancing broader transparency and strengthening its enforcement, and building technical capacity for data management to facilitate public disclosure.¹³¹ The pilot project

¹²⁴ "Our Story" (last visited 30 July 2021) [CoST - Our Story], online: *CoST - Infrastructure Transparency Initiative* <<https://infrastructuretransparency.org/about-us/our-story/>>.

¹²⁵ *Ibid.*

¹²⁶ CoST Baseline, *supra* note 120 at 1.

¹²⁷ *Ibid* at 21.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid* at 12-13.

¹³¹ *Ibid* at 21.

"demonstrated that the CoST approach could be applied across different contexts and various government systems and infrastructure sub-sectors."¹³²

8.2 After Initial Success: CoST Approach, Development, and Toolkit

Subsequent to the successful pilot project, CoST was established as a London-based charity and by 2020 expanded its activity to an impressive 19 national and sub-national members and affiliates spanning four continents.¹³³ Over time CoST has become a well-recognized international initiative in promoting transparency through collective action. The success of the CoST approach resulted in many governments institutionalizing it through legal and policy frameworks. CoST facilitates the collaborative efforts of governments, the private sector and communities to achieve better economic efficiency in infrastructure projects by providing them with a set of principles and guidance on increasing transparency, accountability, and participation in public infrastructure.¹³⁴ In addition to working with CoST members at the national level, CoST engages with a variety of key international organizations (World Bank, TI, FIDIC, Article 19, Open Contracting Partnership, Hivos, Civic-20), facilitating the global exchange of experience and knowledge on transparency and accountability in public infrastructure¹³⁵ and pursuing common goals to better the delivery of infrastructure.¹³⁶

CoST's collaborative approach has four core features:

- **Multi-stakeholder working:** In each country, CoST is directed by groups comprising representatives of key stakeholders of infrastructure projects: government, private sector and civil society. CoST serves as a neutral forum for the stakeholders to negotiate and pursue shared objectives to ensure value for money from infrastructure investment.
- **Disclosure:** CoST increases transparency by promoting the public disclosure of data on public infrastructure projects such as the purpose, scope, costs, and implementation of infrastructure projects. To facilitate disclosure, CoST has designed a CoST Infrastructure Data Standard (CoST IDS).¹³⁷ This tool requires procuring entities to disclose 40 data points ("items") across key stages of the infrastructure project cycle. In turn, it puts data from the inception to the completion of infrastructure projects into an accessible, understandable, and applicable format for both policy-makers and the public. In 2018-2019 in collaboration with Open Contracting Partnership, CoST has designed a new

¹³² CoST - Our Story, *supra* note 124.

¹³³ CoST Business Plan, *supra* note 109 at 10. at 10

¹³⁴ Need for CoST, *supra* note 110 at 1-2.

¹³⁵ CoST - About Us, *supra* note 117.

¹³⁶ Need for CoST, *supra* note 110 at 1.

¹³⁷ Infrastructure Transparency Initiative (CoST), *CoST Infrastructure Data Standard*, (CoST, 2017), online (pdf): <<https://infrastructuretransparency.org/wp-content/uploads/2017/12/CoST-Infrastructure-Data-Standard.pdf>>.

Open Contracting for Infrastructure Data Standard (OC4IDS) that members are encouraged to adopt.¹³⁸

- **Assurance:** CoST conducts an independent review of the disclosed data. CoST validates technical data, interprets it into plain language, and identifies concerns through this assurance process. Stakeholders can then understand the main issues, and it acts as a basis for holding decision-makers to account.
- **Social accountability:** Social accountability stakeholders such as the media, civil society, and citizens work with CoST to publicly promote the findings from the CoST assurance process and to use the disclosed data to monitor infrastructure projects. The social accountability factor creates a platform for communities to address officials on the issues that are important to them. Civil society representatives hold positions on multi-stakeholder groups which guide the delivery of programmes. To ensure the expertise of participants from civil society, CoST carries out regular training programmes on identifying and processing relevant project data through the government's online data disclosure platforms. The same training is available for journalists. In 2017, Josue Quintana, a CoST-trained reporter in Honduras, published an article exposing a miscalculation of about \$170 million on a road and bridge expansion and reconstruction project. The government reviewed the contract after growing media pressure and receiving guidance from the CoST Honduras assurance process.¹³⁹

In 2018 CoST developed the manual Infrastructure Monitoring Tool, and in 2020 it launched the Electronic Infrastructure Monitoring Tool (e-IMT), an online platform for tracking the progress and quality of infrastructure delivery. The main function of the e-IMT is to compile and provide access to up-to-date pivotal project information regarding its status and any issues. The e-IMT's oversight role prevents financial mismanagement, health and safety failings, and poor project outcomes.¹⁴⁰

CoST has developed several informative tools and standards to facilitate disclosure and increase the technical capabilities of member countries to manage data on infrastructure projects and make it publicly accessible:

- **Open Contracting for Infrastructure Data Standard (OC4IDS):**¹⁴¹ This toolkit, developed with Open Contracting Partnership, provides a comprehensive

¹³⁸ "OC4IDS – A New Standard for Infrastructure Transparency" (16 April 2019), online: *CoST - Infrastructure Transparency Initiative* <<https://infrastructuretransparency.org/resource/oc4ids-a-new-standard-for-infrastructure-transparency/>>. More on the Open Contracting for Infrastructure Data Standard is discussed below.

¹³⁹ "Civil Society" (last visited 30 July 2021), online: *CoST - Infrastructure Transparency Initiative* <<https://infrastructuretransparency.org/our-approach/cost-feature-multi-stakeholder/civil-society/>>.

¹⁴⁰ "CoST Tools and Standards" (last visited 30 July 2021), online: *CoST - Infrastructure Transparency Initiative* <<https://infrastructuretransparency.org/cost-tools-and-standards/#Infrastructure-Monitoring-Tool>>.

¹⁴¹ In 2018, Open Contracting Partnership and CoST came together in a collaborative effort to develop a standard for transparency in infrastructure project delivery. The CoST IDS identifies key items and creates a framework for disclosing project data by procuring entities. Much of this data can be

approach to disclosure, combining current best standards for publishing contract and project-level data. It is applied to e-platforms, encouraging vital data centralization and accessibility in ‘real time.’ The OC4IDS provides tools for publishing and monitoring standardized data on infrastructure projects.¹⁴²

- **CoST Infrastructure Disclosure Platform:** Developed by CoST Honduras, the Information and Monitoring System for Works and Supervision Contracts (SISOCS) provides easy access to data on thousands of public and public-private partnership projects. The platform code for this tool became open source in 2021, enabling worldwide attention on the transparency of a range of high-value projects.
- **Infrastructure Transparency Index (ITI):** A tool that measures and compares levels of transparency in the infrastructure sector. Procuring entities are scored on key transparency indicators including disclosure practices and citizen participation and assessed for improvement of their performance in a country’s infrastructure sector over time.
- **CoST data analytics guidance:** CoST Ukraine’s data analytical tool generates visual representations of state investments in infrastructure. The tool brings attention to data related to the successful bidders, changes to budgets and timeframes, and geographical differences in investment. CoST provides disclosure guidance for CoST members on how to adopt and use the tool on e-platforms in the private sector.¹⁴³

captured and verified through the Open Contracting Data Standard (OCDS), another tool developed by Open Contracting Partnership, to describe millions of procurement processes around the world relating to goods, services and public works. Infrastructure projects are typically long-term processes that include numerous contracts for planning, design and preparation work, construction, and implementation monitoring.

Another problem arose from scattered published data on infrastructure projects and contracts, which populated disparate systems and needed to be manually matched, creating additional obstacles and extra time expenditures for monitors. The collaborative efforts of the two organizations linked the OCDS and CoST IDS, thereby creating a comprehensive dataset (known as OC4IDS) to facilitate monitoring. OC4IDS leverages both standards, combining CoST’s work on which project data to disclose with OCP’s work on what to disclose about contracting processes. The project was implemented during June 2018–March 2019, providing CoST MSGs with access to scalable tools and methods to secure access to open data on infrastructure projects, monitor project design and performance, and drive better quality and more affordable infrastructure. “About” (last visited 25 October 2021), online: *Open Contracting for Infrastructure Data Standards Toolkit* <<https://standard.open-contracting.org/infrastructure/latest/en/about/>>; Bernadine Fernz, “The #OC4IDS: A New Standard for Infrastructure Transparency” (17 April 2019), online (blog): *Open Contracting Partnership* <<https://www.open-contracting.org/2019/04/17/the-oc4ids-a-new-standard-for-infrastructure-transparency/>>; “Creating a Data Standard for Infrastructure Transparency: Laying the Foundations” (29 September 2020), online (blog): *CoST Infrastructure Transparency Initiative* <<https://infrastructuretransparency.org/2020/09/29/creating-a-data-standard-for-infrastructure-transparency-laying-the-foundations/>>.

¹⁴² For more information on the OC4IDS toolkit, visit “Open Contracting for Infrastructure Data Standards Toolkit” (last visited 30 July 2021), online: *Open Contracting Partnership* <<https://standard.open-contracting.org/infrastructure/latest/en/>>.

¹⁴³ Need for CoST, *supra* note 110 at 6.

The CoST program, scalable to different political, economic and social systems, involves modifying the universal approach for each country's context. Before developing and implementing country-specific recommendations, CoST conducts a baseline study, which aims to identify the main vulnerabilities and need for reforms and technical assistance. For example, in the scoping study on Ukraine, CoST noted that despite disclosure and availability of information in the public domain, there was one significant missing link—the lack of any significant impact on how Ukrainian state road operators managed business and spent money. Therefore, the main focus of CoST Ukraine shifted towards launching a platform for systemic public oversight and assurance regarding large-scale investment projects in the road building sector.¹⁴⁴

8.3 CoST Success Stories and Results

Thanks to CoST support and technical assistance, by the end of 2020, CoST members disclosed data on more than 38,000 investments.¹⁴⁵ Tools and standards developed by CoST through almost ten years of work are now recognized as international best practices, receiving endorsements from the G20, UNDP, the European Investment Bank, Transparency International, World Bank, Global Infrastructure Basel, and FIDIC. In 2019, over 5,200 people from government, civil society, investigative journalism, and the private sector were trained to use infrastructure data.¹⁴⁶ The number of private sector representatives who received training in 2019 doubled in comparison to the previous year, indicating a shift in the industry towards more transparency and signaling early success in collective action.¹⁴⁷

Besides the general increase in transparency and public awareness on spending in delivering infrastructure projects, CoST assurance reports prevent efficiency gaps and improve delivery quality. Evidence produced by CoST has been used to catalyze the closure of corrupt public institutions in Honduras;¹⁴⁸ to pressure a Ukrainian contractor into correcting serious defects in a bridge;¹⁴⁹ to trigger institutional reforms that reduced waste and inefficiency in Afghanistan;¹⁵⁰ and to deter wasteful procurement in Thailand, leading to savings of \$460 million.¹⁵¹ Findings from CoST studies and reports also helped to advocate for legislative amendments in Guatemala, stopping the frequently used scheme of

¹⁴⁴ Olga Mrinska, Stephen Vincent, & Charlotte Ellis, *Adam Smith International for Construction Sector Transparency Initiative - Ukravtodor Scoping Study: Final Report* (Adam Smith International, 2015) at 36-37, online (pdf): <https://infrastructuretransparency.org/wp-content/uploads/2015/01/147_Adam-Smith-International-Ukravtodor-Scoping-Study-Final-Report-Draft-Final-2.pdf>.

¹⁴⁵ Need for CoST, *supra* note 110 at 5.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ CoST Business Plan, *supra* note 109 at 10.

¹⁴⁹ *Ibid* at 6.

¹⁵⁰ *Ibid* at 10.

¹⁵¹ *Ibid* at 10. See also: Infrastructure Transparency Initiative (CoST), *CoST Thailand: Saving Millions, Enabling Participation and Shifting Mindsets*, (2020), online (pdf): <<https://infrastructuretransparency.org/wp-content/uploads/2020/07/Thailand-final.pdf>>; Shirley Tay, "How Thailand is Cutting Infrastructure Costs with Transparency", *GovInsider* (16 November 2020), online: <<https://govinsider.asia/smart-gov/comptroller-generals-department-pattaraporn-vorasaph-how-thailand-is-cutting-infrastructure-costs-with-transparency/>>.

establishing NGOs as a means of bypassing procurement regulations and siphoning off funding intended for public infrastructure projects.¹⁵²

CoST helped avoid waste of over \$7.4 million in the over-run on road rehabilitation in Malawi.¹⁵³ CoST also generated savings of \$3.5 million on building a road in Ethiopia,¹⁵⁴ money that enabled the government to undertake other important development projects. The CoST process in building a road in Ethiopia is further described as follows.

An Example of the CoST Process at Work

Road projects represent around a quarter of the annual infrastructure budget of the Ethiopian federal government. The Road Sector Development Program therefore constitutes one of the major lines of federal spending.

From 2010 to 2016, CoST Ethiopia's assurance process reviewed 52 building, road and water infrastructure projects representing investments worth \$3.27 billion.¹⁵⁵ Thirty-two of them are road sub-sector projects. The building of the Gindebir to Gobenza Road in Eastern Ethiopia exemplifies CoST's impact. The exorbitant price of the road caught public attention and triggered an inquiry from the federal anti-corruption agency, and the agency requested technical support from CoST Ethiopia to evaluate the cost of the road.

As a 2018 CoST report notes, "CoST Ethiopia's Assurance Team highlighted that original plans for the road in Eastern Ethiopia exaggerated the volume of retaining wall and excavation required for the road-building project. CoST Ethiopia's MSG then held a workshop involving the media and civil society organizations, sparking considerable interest in reviewing costs. As a result, the Government of Ethiopia adopted an alternative design for the road project. Furthermore, the original designers were debarred from Government contracts for two years."¹⁵⁶

The design adopted by the government resulted in \$3.5 million in savings, which Eyasu Yimer, Vice-Chair of Transparency Ethiopia, noted could be applied towards "[building] a two-block school that may allow 500 students to attend."

Lastly, the 2018 CoST report also notes that "CoST Ethiopia's disclosure of information on a rural road project led to a reduction in construction time by six months, bringing the

¹⁵² Infrastructure Transparency Initiative (CoST), *Delivering Better Value Public Infrastructure*, (CoST, 2018) [Delivering Better Value Public Infrastructure] at 2, online (pdf):

<https://infrastructuretransparency.org/wp-content/uploads/2018/06/2186_CoST-Success-Stories.pdf>.

¹⁵³ *Ibid* at 1.

¹⁵⁴ *Ibid* at 2.

¹⁵⁵ "CoST Ethiopia - From Technical Data to Actionable Information, New Aggregation Study Launched" (last visited 11 November 2021), online: *CoST - Infrastructure Transparency Initiative* <<https://infrastructuretransparency.org/news/cost-ethiopia-from-technical-data-to-actionable-information-new-aggregation-study-launched/>>.

¹⁵⁶ Delivering Better Value Public Infrastructure, *supra* note 152, at 2.

benefits to the rural community earlier than expected. Since the first sections of the road opened in 2011, it is reported that the income of local farmers has more than doubled.”¹⁵⁷

CoST supported member governments to improve their response to the COVID-19 crisis. As a result, CoST compiled robust guidance on application of the CoST approach in situations of crisis. In Honduras, the CoST approach was implemented as a governance component during the construction of 93 new health facilities as part of the rapid response to the COVID-19 pandemic.¹⁵⁸

8.4 Future Projects

The 2020 independent review recognized the significant impact of CoST worldwide, but also pointed out the areas of further improvement. Among them, the report noted: “a more robust monitoring, evaluation, accountability and learning framework; a more diverse funding base; a significant increase in income; recognition for CoST members and individual reformers who drive success; and prioritising the development and roll-out of the Infrastructure Transparency Index.”¹⁵⁹

Recognizing the need to accelerate the delivery of good quality infrastructure services in order to reach the United Nations’ Sustainable Development Goals and meet global challenges, CoST has recently adopted a Business Plan for 2021-2025. Its focus for the years to come is scaling up and responding to latent demand to deliver a step-change in impact. The plan outlines the following strategic priorities:

- increasing global impact through a growing number of CoST members and affiliates (the projected increase in 12 new members);
- increasing international support for improving transparency, participation and accountability in infrastructure investment;
- improving learning and knowledge sharing; and
- ensuring efficient use of resources to maximize impact.¹⁶⁰

8.5 Best Practice in Collective Action

CoST’s success lies with its approach. It is directed towards committed, resilient, and influential multi-stakeholder groups from government, civil society, and private sectors. By bringing them all together around the table, CoST ensures key components: political will, innovation by large industry players, and effective monitoring of the use of public funds. A committed group of stakeholders starts changing “the rules of the game,” shifting the

¹⁵⁷ This description is largely taken from Delivering Better Value Public Infrastructure, *supra* note 152 at 2.

¹⁵⁸ Need for CoST, *supra* note 110 at 6.

¹⁵⁹ CoST Business Plan, *supra* note 109 at 11.

¹⁶⁰ *Ibid* at 6-9.

construction industry towards more transparency and accountability in project delivery. Empowering media and civil society representatives through ongoing training and education events guarantees monitoring of compliance with disclosure requirements and delivery of infrastructure projects. Assurance reports highlight issues and lead to government action. Finally, the institutionalization of the implemented rules on disclosure ensures the long-lasting effect of the change, entrenching them against potential political turbulence.

CoST presents an excellent example of the success of collective action in curbing corruption. As an independent arbiter, CoST works to persuade all stakeholders that they benefit from reducing mismanagement and corruption. Governments benefit from better management of public infrastructure projects, including more competitive prices and a larger bidder pool. For politicians, better performance means greater chances of re-election, while bureaucrats enjoy increased job security and opportunities for promotion. The private sector profits from an improved investment climate and level playing field. Citizens enjoy advantages that come from better quality infrastructure, better value received for taxes paid, and greater trust in both government and the private sector.¹⁶¹ Once the key players reach this understanding and decide to implement new disclosure rules, the next most important question for everyone involved in the collaborative effort against corruption is how to ensure that no one cheats the rules and unduly benefits from deflecting.

As an independent non-profit organization, CoST enjoys a heightened level of trust from key stakeholders: government, business, and civil society. Greater credibility makes CoST well placed to launch collective action and bring together pivotal players who might suffer from a lack of mutual trust. Therefore, CoST bridges the gap between various parties and builds trust between them, guaranteeing that all the players abide by the same rules and align their activities in a collaborative effort to bring more transparency and integrity in infrastructure. After setting up a multi-stakeholder group in a member country, CoST also balances the power inequality between parties. The most important role played by CoST in the initial stage of implementing disclosure procedures is that of the external monitor, issuing assurance reports and ensuring that both government and businesses fully abide by the new rules and make the information on infrastructure procurement publicly available. Simultaneously, CoST provides training to media and civil society representatives, building up their capacity to take over monitoring once the project has been implemented.

Such an approach guarantees that the multi-stakeholder group can continue to exist independently even after CoST “exits.” Moreover, government, business, and civil society are all well-equipped to perform their function within the partnership. They also have relatively equal bargaining power and an effective system of “checks and balances” to prevent collusion and deviation. This ultimately promotes trust and institutionalizes a new culture and new rules of doing business, makes deflections intolerable, and drives smaller market actors to embrace new rules—thereby creating a self-fulfilling virtuous spiral.

¹⁶¹ “CoST Uganda: A Collective Action Approach to Integrity in Infrastructure Procurement” (25 January 2021), online: *Basel Institute on Governance* <<https://baselgovernance.org/blog/cost-uganda-collective-action-approach-integrity-infrastructure-procurement>>.

GLOBAL CORRUPTION

CoST collaboration with Open Contracting Partnership on developing OC4IDS represents collective action on an even larger scale. The cooperation between the two organizations in turn facilitates collective action by other parties. The OC4IDS is not merely a tool to link two otherwise separate datasets for better monitoring. Rather, it serves the much more important function of bringing together multi-stakeholder groups of different projects—project data and contract data transparency—to align their interests and powers in advocating for more transparency, integrity, and better funds management.

CHAPTER 16

THE ROLE OF NGOs

DUFF CONACHER

CONTENTS

- 1. INTRODUCTION**
- 2. RELATIONSHIPS WITH GOVERNMENTS AND BUSINESSES**
- 3. STRATEGIES AND TACTICS**
- 4. A CANADIAN STUDY: LONG-TERM RESISTANCE TO NGO ANTI-CORRUPTION PROPOSALS IN A SUPPOSED MATURE DEMOCRACY**
- 5. CONCLUSION**

The symbol \$ in this chapter refers to US dollars unless specified otherwise.

1. INTRODUCTION

The role of non-governmental organizations (NGOs) in combatting corruption is recognized in the United Nations Convention Against Corruption (UNCAC)¹ as a key part of any anti-corruption effort in any country. The Preamble states:

Bearing in mind that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective.

Article 13 of the UNCAC, entitled “Participation of society” states:

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:
 - (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
 - (b) Ensuring that the public has effective access to information;
 - (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;
 - (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
 - (i) For respect of the rights or reputations of others;
 - (ii) For the protection of national security or *ordre public* or of public health or morals.
2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate,

¹ United Nations Convention Against Corruption, 9 to 11 December 2003, 2349 UNTS 41, A/58/422, (entered into force 14 December 2005) [UNCAC], online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

The UNCAC's Chapter VII: Mechanisms for Implementation, Article 63 states:

Conference of the States Parties to the Convention

1. A Conference of the States Parties to the Convention is hereby established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.

...
4. The Conference of the States Parties shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of this article, including:

...

 - (c) Cooperating with relevant international and regional organizations and mechanisms and non-governmental organizations ...

The communiqués of bi-annual United Nations anti-corruption conferences have highlighted the need for every jurisdiction to implement broad, multi-pronged enforcement measures. The importance of raising public awareness of corruption through education and public promotion initiatives and support of civil society anti-corruption organizations is a particular measure that continues to receive emphasis.²

The 34 member countries of the OECD have adopted several guidelines concerning political ethics enforcement, including *The 10 Principles for Transparency and Integrity in Lobbying*.³ Principle 10 states that civil society (non-profit, citizen organizations, media, etc.) should be involved in the regular review of the implementation and impact of restrictions on lobbyists, along with public office holders, lobbyists, and watchdog agencies.

² "Conference of the States Parties to the United Nations Convention Against Corruption" (last visited 19 November 2021), online: *United Nations Office on Drugs and Crime* [UNODC] <<http://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html>>. See, for example, UNODC, *Resolutions and Decisions Adopted by the Conference of the States Parties to the United Nations Convention against Corruption*, UN Doc V.14-01171 (E), 25–29 November 2013, online: <<https://www.unodc.org/documents/treaties/UNCAC/COSP/session5/V1401171e.pdf>>.

³ OECD, *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*, OECD Legal Instruments, OECD/LEGAAL/0379 (Paris: OECD, 2021) [OECD, *Principles for Transparency and Integrity*], online (pdf): <<https://legalinstruments.oecd.org/public/doc/256/256.en.pdf>>. As a 'legal instrument' of the OECD, it is not binding, but the OECD audits implementation by member countries. See "OECD Legal Instruments" (last visited 19 November 2021), online: OECD <<http://www.oecd.org/legal/legal-instruments.htm>>. See also: OECD, OECD Anti-Corruption Division, *Fighting Corruption: What Role for Civil Society? The Experience of the OECD*, (Paris: OECD, 2003), online (pdf): <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/19567549.pdf>>.

Regional anti-corruption conventions also require the participation of NGOs. For example, Article 12 of the African Union Convention on Preventing and Combating Corruption (AUCPCC) states that parties should involve NGOs in raising public awareness and assisting with the implementation of the Convention. Article 12 also states NGOs should play a role in monitoring compliance.⁴

Courts have also recognized the key role of NGOs. A ruling by the European Court of Human Rights stated that NGOs are “one of the most important actors in the democratic process.”⁵

However, despite these lofty words and commitments, in reality, anti-corruption efforts are a multi-year struggle for NGOs. In many cases, it is an out-and-out decades-long battle to pressure and push governments and big businesses to make even the most basic changes to rules and enforcement measures to combat corruption. Often, an ongoing campaign is necessary to prevent rollback of any changes that have been won.

The strategies and tactics deployed by NGOs to manifest these changes vary country by country, jurisdiction by jurisdiction, and span across the full spectrum of nonviolent (and in some situations, violent) actions. Of course, there are debates about which strategies and tactics are effective. The debates are based upon competing and conflicting theories regarding how social change occurs and arguments concerning what has actually happened in any country or jurisdiction efforts to stop corruption.

Given space limitations, this chapter provides a sketch of the role of NGOs in combatting corruption. Thousands of NGOs are involved in anti-corruption work worldwide, and it is impossible to summarize their efforts in one chapter. Determining which anti-corruption strategies have been, or will be, effective in a given jurisdiction is immensely challenging. Such debates require the consideration of a wide range of topics, a multitude of events, and all conceivable anti-corruption efforts. Given that there is debate on how exactly changes have occurred, any discussion on anti-corruption efforts also necessarily involves the discourse surrounding the theories, methods and approaches of documenting any historical event.⁶

As a result, this chapter provides only an overview of these strategies and tactics and the debates concerning their effectiveness, along with a case study based on the author’s experience since 1993 as the Coordinator of Democracy Watch in Canada. To be clear, this chapter focuses on the role of citizen-run NGOs, as opposed to NGOs that are affiliated directly or indirectly with governments or politicians, such as the Global Organization of Parliamentarians Against Corruption (GOPAC) and the Inter-Parliamentary Union, because their structure and operations differ in significant ways. Associations of politicians often undertake some of the same activities as citizen-run NGOs and face the same types of

⁴ Indira Carr & Opi Outhwaite, “The Role of Non-Governmental Organizations (NGOs) in Combating Corruption: Theory and Practice” (2011) 44:3 Suffolk UL Rev 615 at 617.

⁵ *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203, Ziemele J et al, dissenting at para 2.

⁶ Chris Lorenz, “History: Theories and Methods” in James D Wright, ed, *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed (Amsterdam: Elsevier, 2015) 131.

resistance to their anti-corruption efforts as citizen-run NGOs, especially their members who are politicians in opposition parties. However, very different and distinct laws, structures and societal roles usually apply to political parties, politicians, and government-affiliated NGOs, which makes it difficult to summarize their role while simultaneously summarizing the role of citizen-run NGOs. Further, this chapter focuses on NGOs that are involved in the distinct role of advocating for anti-corruption measures, as opposed to other NGOs like media outlets that play a role in monitoring governments and corruption. All of these actors—political associations, parties, citizen-run NGOs, media, and the public overall—are part of what is commonly called “civil society.” The role of citizen-run advocacy NGOs as one sector of civil society involved in anti-corruption efforts is the focus of this chapter.

2. RELATIONSHIPS WITH GOVERNMENTS AND BUSINESSES

A major factor in the role, strategies, and tactics of any NGO working on anti-corruption initiatives is its relationship with the governments and businesses in which jurisdiction(s) it operates. The range of relationships begins at the low end with violent repression in jurisdictions where none or few of the rights set out in the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights*⁷ have been recognized or enacted into law. In jurisdictions where rights have been enacted and are respected and enforced at a basic level, the relationship often moves to nonviolent repression and resistance. In jurisdictions where a fuller set of rights have been enacted and are respected and enforced through a more comprehensive system, the range of possible relationships cover every step of Sherry Arnstein’s classic “Ladder of Citizen Participation,” for governments and businesses:

1. manipulating NGOs and citizens through dishonest, secretive and unethical dealings and public relations efforts; to
2. informing NGOs of policy changes; to
3. consulting them while developing changes; to
4. placating and co-opting them; to
5. partnering with them (in rare cases); to
6. delegating powers to them (even more rare); and, at the top end to
7. circumstances where NGOs and citizens have control over policy (extremely rare).⁸

⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), online: <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), online:

<<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>>. United Nations, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), online: <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

⁸ Sherry R Arnstein, “A Ladder of Citizen Participation” (1969) 35:4 J Am Plann Assoc 216. See an illustration of the ladder at: “Arnstein’s Ladder of Citizen Participation” (last visited 19 November 2021), online: *The Citizen’s Handbook* <<https://www.citizenshandbook.org/arnsteinsladder.html>>.

Based on the provisions of the UNCAC, OECD, and other international conventions, governments are required to have the following relationship with NGOs:

1. To protect, through laws and other supports, all of the fundamental rights of freedom of association, freedom of expression, and the right to petition the government and the courts for changes, set out in the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights*, subject only to restrictions to protect the rights and reputations of others (for example, through laws prohibiting defamation, and those protecting national security and public order (i.e., laws prohibiting violent protests));
2. To promote the active participation of NGOs in anti-corruption efforts;
3. To promote the transparent contribution of NGOs to government decision-making processes concerning anti-corruption measures, including involving them in developing, implementing, and regularly reviewing these measures;
4. To ensure access to government information;
5. To raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption; and
6. To allow, arguably, funding from outside the jurisdiction to support NGOs' work, including anti-corruption activities.

In 2020, the UN Office of the High Commissioner for Human Rights (OHCHR) included Article 33 in its General Comment #37 on Article 21 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 21 protects the right to peaceful assembly. With regard to the sixth requirement mentioned above, the World Movement of Democracy argues that the inclusion of Article 33 is "the strongest international mechanism yet for protecting civil society's right to receive funding."⁹ The General Comment is enforceable in international law, and Article 33 sets out the requirements for governments to protect the actions of individuals and organizations leading up to a gathering, including the protection of actions related to the "mobilization of resources."¹⁰ However, as discussed below, the practice of international funding has been controversial, and the right of NGOs to receive outside support has been attacked more and more aggressively by governments around the world since 2005.

2.1 Evolution of International Aid

Democracy aid efforts, with anti-corruption aid as a subset of those efforts, evolved and expanded from the late 1980s with three main approaches. These approaches are aimed at

⁹ "The Right to Receive Funding" (last visited 19 November 2021), online: *World Movement for Democracy* <<https://www.movedemocracy.org/defending-democratic-space/right-to-receive-funding>>.

¹⁰ UNHRC, *General Comment No 37 (2020) on the Right of Peaceful Assembly (Article 21)*, UN Doc CCPR/C/GC/37 17 September 2020, online (pdf): <<https://www.movedemocracy.org/wp-content/uploads/2020/11/General-Comment-37.pdf>>.

changing the relationship between governments and NGOs, and the citizens involved in both, to fulfill the requirements discussed in Section 2. Of course, this undertaking was just the beginning of a sustained long-term effort, given that so few governments had fulfilled even a few of the requirements. The three main approaches are:

1. support for key democratic institutions and processes (especially free and fair elections and political parties);
2. strengthening key institutions that check the power of the national government, especially parliaments, judiciaries, and local governments; and
3. support for civil society (NGOs, media, labour unions, and civic-education initiatives).¹¹

Initial aid efforts supported NGOs, but primarily NGOs that existed only due to the support of international aid or those that provided state services. NGOs that advocated for reform to stop corruption and ensure the proper use of public money for the provision of public goods and services received much less support.¹² The lessons learned from the past four decades have led substantially more aid organizations to recognize that capacity-building within local NGOs, which are rooted in, connected to, and supported by the mass of the public, can be key to advancing democratic (and relatedly, anti-corruption) reforms.¹³

Advocacy NGOs generally need support from outside their jurisdiction, especially in countries where income inequality is extreme, as the public simply does not have the money to sustain these organizations at a level that allows for effective action. As well, even in countries with a lower rate of income inequality, advocacy NGOs often criticize and challenge political parties, politicians and officials across the political spectrum—thus making it difficult to raise funding from anyone who supports any party or politician. Finally, anti-corruption advocacy is often aimed at the political and business elite of any country, who usually control significant funding sources such as government and private or family foundation grants. These ‘elites’ are often reluctant to support initiatives aimed at challenging how they are exercising their power, especially those which challenge corrupt activities.

2.2 Funding Systems in the US, UK, and Canada

The US, however, is an exception to the general trends regarding NGO fundraising. For example, Candid, an NGO, is supported by several foundations that provide grants for democratic reform work in the US. Candid has a data tool that illustrates this point. A search of the foundation grants in Candid’s database in August 2021, reveals that since 2011 a total

¹¹ Thomas Carothers, “Democracy Aid at 25: Time to Choose” (2015) 26:1 J Democracy 59, online: <<https://www.journalofdemocracy.org/articles/democracy-aid-at-25-time-to-choose/>>. Jennifer M Brinkerhoff, “Donor-Funded Government—NGO Partnership for Public Service Improvement: Cases from India and Pakistan” (2003) 14:1 Voluntas 105.

¹² Sangeeta Kamat, “NGOs and the New Democracy: The False Saviors of International Development” (2003) 25:1 Harv Intl R 65. Lina Suleiman, “The NGOs and the Grand Illusions of Development and Democracy” (2013) 24:1 Voluntas 241.

¹³ *Ibid*; Carothers, *supra* note 11.

of 828 funders had granted \$287.4 million to 1,084 organizations under the category “campaign finance.” This \$287.4 million is part of the \$12.3 billion granted by 13,971 funders to 27,508 organizations for democratic reform work in the US since 2011.¹⁴

The UK is also somewhat an exception to this trend, though not to the same extent as the US. The government funding body, the “Westminster Foundation for Democracy,” supports NGOs and civil society groups in 38 non-UK countries.¹⁵ The UK Democracy Fund¹⁶ supports several democratic reform and education organizations, including some that work on anti-corruption initiatives. Transparency International UK (TI UK) had a \$9 million annual budget in 2020, but about half the amount came from international funders, with much of the funding allocated towards addressing corruption outside the UK.¹⁷ TI UK is a member of the UK Anti-Corruption Coalition (the Coalition), which focuses on a wide scope of anti-corruption issues both inside and outside the UK. The Coalition largely consists of organizations concerned with international development issues and the UK government’s role abroad, including its implicit and explicit support of corrupt practices by other governments. The composition of the Coalition lends to its focus on issues of corrupt practices by other governments.¹⁸ Bond¹⁹ is a network of more than 400 international development organizations and other international initiatives based in the UK. Bond, however, primarily works on stopping corruption in other countries rather than in the UK. Overall, the UK has far fewer organizations working on democratic reforms and anti-corruption when compared proportionally to the US.²⁰

In stark contrast, there is almost no government funding nor grants from private or family foundations available for anti-corruption (or any kind of democratic reform) work focused on the laws that apply to politicians and government officials and their actions in Canada. The Canadian government grants tens of millions annually to support NGOs and civil society organizations trying to win democratic reforms abroad.²¹ The government, however, provides no support for these efforts in Canada (nor do any sub-national governments in Canada). Based on US statistics, discussed above, and the fact that the Canadian economy is approximately one-tenth the size of the US economy, Canada should have had, since 2011,

¹⁴ “Foundation Funding for US Democracy: Data Tool” (last visited 19 November 2021), online: *Candid* <<https://democracy.candid.org/>>.

¹⁵ “About” (last visited 19 November 2021), online: *Westminster Foundation for Democracy* <<https://www.wfd.org/about/>>.

¹⁶ “UK Democracy Fund” (last visited 19 November 2021), online: *Joseph Rowntree Reform Trust* <<https://www.jrrt.org.uk/what-we-do/the-uk-democracy-fund/>>.

¹⁷ “Annual Impact Report and Accounts 2019–2020” (September 2021), online (pdf): *Transparency International UK*

<<https://www.transparency.org.uk/sites/default/files/pdf/publications/Transparency%20International%20UK%202020%20Annual%20Impact%20Report%20and%20Accounts.pdf>>.

¹⁸ “Fighting Corruption in 2021” (last visited 19 November 2021), online: *UK Anti-Corruption Coalition* <<https://www.ukanticorruptioncoalition.org/focusareas>>; “Our Members” (last visited 19 November 2021), online: *UK Anti-Corruption Coalition* <<https://www.ukanticorruptioncoalition.org/members>>.

¹⁹ “About Us” (last visited 19 November 2021), online: *Bond* <<https://www.bond.org.uk/about-us#>>.

²⁰ See e.g. Unlock Democracy, Democracy Audit, Demos, and Electoral Reform Society.

²¹ See e.g. Global Affairs Canada, News Release, “Canada Announces Support to Fight Corruption” (9 December 2016), online: <<https://www.canada.ca/en/global-affairs/news/2016/12/canada-announces-support-fight-corruption.html>>.

83 funders grant \$29 million to 100 organizations working on campaign finance reforms alone. In other words, an average of \$2.9 million should have been granted annually over the past decade just for work on that issue. And 1,400 funders should have granted \$1.2 billion to 2,750 democratic reform organizations over the past decade for democratic reform work.

Even Transparency International Canada only had a budget of approximately CDN\$358,700 in 2020.²² This budget is barely adequate to operate at a basic level, let alone undertake multi-pronged activities. Almost half that budget came from one anonymous donor; one-quarter from sources outside Canada, and only four percent from the government. Since it was established in 1996 and throughout its history, TI Canada received even less annual funding. Further, the funding was almost exclusively for initiatives focused on anti-corruption activities outside of Canada—mainly bribery of foreign governments by Canadian companies. Only in the past few years did TI Canada begin to undertake any initiatives focused on stopping corruption from occurring within Canada. These initiatives call for laws to be enacted establishing registries that disclose the actual owners of all corporations and properties in the country (known as a “beneficial ownership” law).²³

Democracy Watch is the only national NGO in Canada that focuses on anti-corruption advocacy broadly. Democracy Watch’s work involves campaigns for reforms and enforcement of laws, and filing complaints and court cases against both public sector and business officials across the political spectrum, in the areas of bribery, money laundering, government procurement, political finance, lobbying, conflict of interest, access to information, and whistleblower protection.²⁴ Since the establishment of Democracy Watch in 1993, no government program has ever had grants available to support activities in any of these areas. Only two private foundations have ever provided grants to Democracy Watch, and those grants were discretionary and not part of an ongoing or even temporary anti-corruption granting program. The organization relies almost entirely on donations from individual Canadians, 95% of whom donate less than CDN\$150 annually, and has never had enough funding to pay for more than two employees.²⁵

2.3 International Aid and NGO Challenges

In many countries funding from outside the country supports NGOs’ anti-corruption efforts worldwide. However, foreign governments and international agencies and NGOs’ involvement in supporting domestic NGOs can have negative effects, no matter how grassroots-based the domestic NGOs. Foreign and international involvement raises questions of who is directing the activities of the domestic NGOs, whose interests are being

²² “Supporters” (last visited 20 November 2021), online: *Transparency International Canada* <<https://transparencycanada.ca/supporters>>.

²³ “Beneficial Ownership Transparency” (last visited 20 November 2021), online: *Transparency International Canada* <<https://transparencycanada.ca/beneficial-ownership-transparency/overview>>. See also Chapter 5, Section 6.1.2.3.

²⁴ “List of Key Changes Democracy Watch Has Won For You” (last visited 9 December 2021), online: Democracy Watch <<https://democracywatch.ca/about/>>.

²⁵ “Please Donate to Democracy Now” (last visited 9 December 2021), online: *Democracy Watch* <<https://democracywatch.ca/donate/>>.

furthered, and whether the dependency on international funding changes the domestic NGOs' priorities to suit the funders. When suspicions arise due to support from foreign governments and their agencies (such as the US National Endowment for Democracy), as well as international agencies, it becomes relatively easy for a government to incite the public to believe that the foreign entity is attempting to undermine or even overthrow the government. This narrative is particularly compelling given the history of the US, Russia, England, China, and other colonial and imperial powers intervening in the affairs of other countries.²⁶ Particular concerns emerge with internationally operating NGOs connected to political parties. The International Republican Institute's direct connection with the US Republican Party and the National Democratic Institute's loose connection with the US Democratic Party, serve as two examples of this phenomenon.²⁷ NGOs in a developing country working in concert with or in support of opposition parties raise similar questions.

The difficulties of providing support have become acute in the past 15 years. Through the 1980s and up to the mid-2000s, funding from international sources was generally not actively challenged or questioned. However, according to the World Movement for Democracy, since 2012, governments in 70 countries have enacted more than 160 laws to restrict the rights of NGOs to receive international funding to support their activities.²⁸ Several factors have led to these restrictions: first, the effectiveness of NGOs to mobilize the public can threaten governments and governing parties and politicians; second, many governments resist international pressure generally, and, more specifically, international pressure applied through the support of NGOs; and third, many governments look to undermine opposition parties and movements by tying them to foreign governments and agencies.²⁹

Funders have adopted a variety of methods to try to neutralize these efforts by governments. One method has been funding campaigns to stop the enactment of such laws. Alternatively, funders have increased funding transparency to reduce the public's level of suspicion (which raises the issue of revealing details about the people who run the NGOs—making them more vulnerable to attacks by the government). Lastly, funders have assisted NGOs with public education initiatives concerning their role and legitimacy.³⁰ However,

²⁶ Martin Williams, "FactCheck: America's Long History of Meddling in Other Countries' Elections", *Channel 4 News* (23 November 2017), online: <<https://www.channel4.com/news/factcheck/americas-long-history-of-meddling-in-other-countries-elections>>.

²⁷ See e.g. Grant W Walton, "Gramsci's Activists: How Local Civil Society is Shaped by the Anti-Corruption Industry, Political Society and Translocal Encounters" (2016) 53 *Political Geo* 10.

²⁸ "The Right to Receive Funding" (last visited 20 November 2021), online: *World Movement for Democracy* <<https://www.movedemocracy.org/defending-democratic-space/right-to-receive-funding>>. Lloyd Hitoshi Mayer, "Globalization Without a Safety Net: The Challenge of Protecting Cross-Border Funding of NGOs" (2018) 102:3 *Minn L Rev* 1205.

²⁹ Thomas Carothers & Saskia Brechenmacher, *Closing Space: Democracy and Human Rights Support Under Fire*, (Washington, DC: Carnegie Endowment for International Peace, 2014), online (pdf): <https://carnegieendowment.org/files/closing_space.pdf>.

³⁰ Thomas Carothers, "The Civil Society Flashpoint" (6 March 2014), online: *Carnegie Endowment for International Peace* <<https://carnegieendowment.org/2014/03/06/civil-society-flashpoint-why-global-crackdown-what-can-be-done-about-it/h2kw>>; Thomas Carothers, *The Closing Space Challenge: How Are Funders Responding?* (Washington, DC: Carnegie Endowment for International Peace, 2015), online (pdf): <https://carnegieendowment.org/files/CP_258_Carothers_Closing_Space_Final.pdf>;

governments keep trying to cut off outside support for anti-corruption, democratic reform, and development groups. The measures and changes in practices required to solve this problem are likely much more nuanced and multi-faceted, especially given the growing restrictions on civil society and resistance to the pressure of NGOs by governments in several established democracies.³¹ A recent example of this pressure is when the President of Mexico filed a diplomatic note with the US Embassy calling on the US Agency for International Development to stop funding the NGO Mexicans Against Corruption and Impunity.³² In reality, as long as NGOs need this external funding to have any chance of success in sustaining their efforts long enough to win changes, many governments will continue to try to block this funding.

2.4 Method for Sustaining NGOs Worldwide

Leading US activist Ralph Nader pioneered and developed a promising solution, albeit politically unpopular, that can be implemented in almost all countries and lowers the costs of both reaching the public and rallying their financial support for domestic NGOs. The method involves having the government establish citizen-run and citizen-funded independent NGOs by law for each government and business sector.³³ Each NGO is given the right to include a notice in the emails and mailings sent to the public by the government institutions or businesses in each sector. The notice invites the public to join the NGO for a nominal annual fee. Nader calls the method the “silicon chip” of citizen organizing, as it exponentially increases the resources and power of citizens in each sector. It can be applied in almost every government and business sector.³⁴

For example, a government would enact a law creating an anti-corruption NGO to watch over government ethics (political finance, lobbying, and conflict of interest), spending, and

Thomas Carothers, “Is it Time for the Aid Community to Explain Itself to Developing Countries?” (7 September 2016), online: *Carnegie Endowment for International Peace* <<https://carnegieendowment.org/2016/09/07/is-it-time-for-aid-community-to-explain-itself-to-developing-countries-pub-64504>>.

³¹ Saskia Brechenmacher & Thomas Carothers, *Defending Civic Space: Is the International Community Stuck?* (Washington, DC: Carnegie Endowment for International Peace, 2019), online (pdf): <https://carnegieendowment.org/files/WP_Brechenmacker_Carothers_Civil_Space_FINAL.pdf>; Saskia Brechenmacher & Thomas Carothers, “Civic Freedoms Are Under Attack. What Can Be Done?” (29 October 2019), online: *Carnegie Endowment for International Peace* <<https://carnegieendowment.org/2019/10/29/civic-freedoms-are-under-attack.-what-can-be-done-pub-80168>>.

³² Associated Press, “Mexico’s López Obrador presses US to End Contributions to Anti-Corruption NGO”, *Market Watch* (24 May 2021), online: <<https://www.marketwatch.com/story/mexicos-lopez-obrador-presses-u-s-to-end-contributions-to-anti-corruption-ngo-01621881233>>.

³³ “Questions and Answers About Using the ‘Pamphlet Method’ and Email Method To Form and Fund Citizen Associations To Watch Over Business Sectors and Government Institutions” (last visited 20 November 2021) [Democracy Watch Questions and Answers], online: *Democracy Watch* <<https://democracywatch.ca/questions-and-answers-about-using-the-pamphlet-method-to-form-and-fund-citizen-associations-to-watch-over-business-sectors-and-government-institutions/>>.

³⁴ See further information for how this method can be implemented in various business and government sectors: “Citizen Association Campaign” (last visited 20 November 2021), online: *Democracy Watch* <<https://democracywatch.ca/campaigns/citizen-association-campaign/>>.

procurement. The NGO would have the right to include a notice in the electronic communications and mailings that the government sends to the public about taxes, social spending supports, etc. In countries where government offices, banks, and other financial institutions are the hub locations where the public pay their taxes and receive public services, the NGO's notice would be distributed to each member of the public who comes to the location. The email notice would be a line like "to join the government ethics and spending watchdog group, click here." Mailings or handouts would contain a brief pamphlet describing the NGO and inviting people to join for a nominal annual fee. A board of directors elected from amongst its members would run the NGO. Strict conflict of interest rules would render government officials or their family members, friends and associates ineligible from board membership.³⁵

Another example, in the business sector, would be the government creating an NGO to watch over financial institutions and services, given their frequent connections to corrupt practices such as money laundering. Each financial institution would be required to include the NGO's notice at the top of each email or electronic communication or in one or two mailings sent to customers annually. The notice would invite customers to join the financial services watchdog group, and the NGO would have a democratic structure with a board elected from among its members.³⁶

The US demonstrates the potential for this method to create broad-based, well-resourced, self-sustaining NGOs. Groups established in three states in the early 1980s to watch over public energy and water utilities are still going strong with tens of thousands of supporters.³⁷ Moreover, the groups have saved taxpayers tens of billions of dollars while also pushing for and winning leading sustainable energy and water conservation measures. Three to five percent of the public usually join the groups.³⁸ At that rate, in Canada, where there are approximately 30 million taxpayers and 25 million banking customers,³⁹ a CDN\$20 annual

³⁵ "Questions and Answers About Using the 'Pamphlet Method' to Create Citizen Watchdog Groups For Government Institution" (last visited 20 November 2021), online: *Democracy Watch* <<https://democracywatch.ca/questions-and-answers-about-using-the-pamphlet-method-to-create-citizen-watchdog-groups-for-government-institutions/>>.

³⁶ "Questions and Answers About the Proposed Financial Consumer Organization (FCO)" (last visited 20 November 2021), online: *Democracy Watch* <<https://democracywatch.ca/question-and-answers-about-the-proposed-financial-consumer-organization/>>.

³⁷ Beth Givens, *Citizens Utility Boards: Because Utilities Bear Watching* (San Diego: Center for Public Interest Law, 1991), online: <https://democracywatch.ca/wp-content/uploads/CUB_Report.pdf>; Bill Jeffrey, *Citizen Utility Boards: Can They Work in Canada?* (Ottawa: Public Interest Advocacy Centre, 1996).

³⁸ Givens, *supra* note 37 at 70.

³⁹ Canada Revenue Agency, "Individual Income Tax Return Statistics for the 2021 Tax-Filing Season" (last updated 9 December 2021), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/individual-income-tax-return-statistics.html>>. The estimate of 25 millions banking customers is a rough estimate that I have calculated from various sources: "Focus: Banks and Consumers" (last updated November 2021) at 1, online (pdf): Canadian Bankers Association <https://cba.ca/Assets/CBA/Documents/Files/ArticleCategory/PDF/bkg_consumers_en.pdf>; Julia Kagan, "Big Six Banks" (31 May 2020), online: Investopedia <<https://www.investopedia.com/terms/b/bigsixbanks.asp>>.

membership fee would give a government ethics and spending NGO between 900,000 and 1.5 million members and an annual budget of CDN\$18 million to CDN\$30 million. A financial services industry watchdog NGO would have between 750,000 and 1.25 million members and an annual budget of CDN\$15 million to CDN\$25 million. Both organizations would transform the policies, activities, effectiveness, and accountability in respect to government ethics and spending.

Again, it will not be easy to convince a single government or business to create well resourced, self-sustaining NGOs let alone all of them. However, given opposition parties often seek policy proposals from NGOs to build support and increase their chances of winning power, a first step towards its enactment is NGOs proposing its implementation. If it is enacted, it will significantly change the balance of power between governments, big businesses, and the public in a positive way that will very likely make winning other key changes and protections more possible.

A multi-year effort is needed to win anti-corruption rules and implement strong enforcement and high penalties. Even if an NGO develops a broad base with deep roots in the community and becomes well-resourced and funded from domestic sources, including from the method discussed above, true reform necessitates a multi-year effort. The following section summarizes the main strategies and tactics that NGOs deploy in these long-term efforts to win key changes.

3. STRATEGIES AND TACTICS

The four general citizen action strategies that NGOs undertake are:

1. Community organization to build power through the involvement and empowerment of members of a community and confrontation and negotiation with people in power in government and business;
2. Advocacy through research, setting out a policy agenda, public education initiatives, lobbying, and lawsuits;
3. Service delivery for short-term disaster or humanitarian crisis relief and/or long-term initiatives based on assessments of community needs and planned objectives, sometimes with the aim of developing an alternative economy to develop the community; and
4. Community development for planned objectives, such as building a community centre, park, road, or housing development.⁴⁰

In the area of anti-corruption work, the first two strategies are usually deployed as changes to laws, regulations, actions of government and big business officials, and public awareness and attitudes are the usual goals. As categorized by A Rani Parker, NGOs that deploy these

⁴⁰ "The 4 Main Citizen Action Strategies" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2013/08/4MainStrategies.pdf>>.

first two strategies are usually advocacy NGOs (ANGOs) as compared to NGOs that deploy the third and fourth strategies which are usually operating NGOs (ONGOs), while some NGOs are hybrids whose activities span all four strategy areas (HNGOs).⁴¹

The tactics used in pursuing these strategies are wide-ranging. Gene Sharp alone documented 198 methods of nonviolent action for social change.⁴² Which strategy and tactic any NGO deploys at any one time varies based on a wide-ranging set of factors:

1. The NGO's mission statement: Some NGOs only do one or a few related things. For example, a "think-tank" usually only produces research and policy position papers and holds conferences to discuss issues. Other NGOs deploy a broad array of strategies and tactics.
2. The NGO's relationship with institutions of power: As discussed in Section 2, the human rights laws, and enforcement infrastructure for those laws, greatly affect NGOs' relationships with governments and big businesses and the strategies and tactics various NGOs will use to attempt to win changes.
3. The issue and situation: Different issues, situations, and cultural forces affect the specific strategy and tactic that an NGO will choose at any one time.
4. Theory of change: An NGO's theory of how social change occurs will also affect its choices of strategies and tactics.

While some critics and historians speculate or make definitive statements concerning why a politician, government official, or the head of a big business changed something, whether a law, policy, or practice, others recognize that it is extremely difficult to determine why any change occurs.⁴³ The difficulty is that the decision-maker may claim to make the change for a reason that is not the real reason. Usually only a few people, the closest confidantes of the decision-maker, will know the real reason, and the decision-maker may mislead even them. After the fact, depending on how the change is viewed, it is not unusual to see the decision-maker and those involved in the decision-making process take credit for the change happening or blame the others involved. This is augmented by the fact that minutes of decision-making meetings in governments and big businesses are usually very brief, only listing topics discussed but not what was said, and that meetings and other communications of the real decision-makers are often kept secret for years.⁴⁴ Anyone trying to determine why

⁴¹ A Rani Parker, "Prospects for NGO Collaboration with Multinational Enterprises," in Jonathan P Doh & Hildy Teegen, eds, *Globalization and NGOs: Transforming Business, Government, and Society* (Westport: Praeger, 2003) 81, as cited in Carr & Outhwaite, *supra* note 4 at 620–621.

⁴² "198 Methods of Nonviolent Action" (last visited 20 November 2021), online (pdf): *Albert Einstein Institution* <<https://www.aeinsteinstein.org/wp-content/uploads/2014/12/198-Methods.pdf>> summarizing Gene Sharp, *The Politics of Nonviolent Action*, vol 3 (Boston: Porter Sargent, 1973), online (pdf): <<https://www.bmartin.cc/pubs/peace/73Sharp/Sharp73-ch3.pdf>>.

⁴³ Daniel Little, "Disaggregating Historical Explanation: The Move to Social Mechanisms in the Philosophy of History" (2013) 2:8 Social Epistemology Rev Reply Collective 1, online: <<http://wp.me/p1Bfg0-QM>>.

⁴⁴ For example, in Canada the minutes of Cabinet meetings and other Cabinet documents are not disclosed for 30 years and access to information law does not apply to Cabinet ministers' offices: *Access to Information Act*, RSC 1985, c A-1, s 69.

a change has happened is forced to rely on the unreliable rumour mill in the short term and equally unreliable memoirs of the participants in the medium term.

Given the difficulty of determining why changes have been won in the past, it is difficult to determine which strategies and tactics, in any jurisdiction, have been successful in the past or may be successful in the future.⁴⁵ Although some strategies are generally considered more effective than others, comparison is difficult in the face of complex, multi-faceted, and changing situations with multiple actors. As a result, this chapter cannot pronounce exactly what the roles, strategies or tactics of NGOs should be most effective in any situation or anti-corruption effort. Instead, this section summarizes some of the main strategies and tactics used by NGOs and the results of studies which provide some insight as to their effectiveness.

Legal realism scholars, and subsequently legal pluralism and law and society scholars, have documented the gap between the “law on the books and the law in action”⁴⁶ and the effects of various institutions, social networks (especially power and inequality relationships), and local cultures on how law actually governs the actions of people and organizations. Their studies have revealed that the hegemony of a legal system is not based on legal principles and written rules alone (or, in some cases, even at all), but instead on the actions and decisions of people who hold power of various sorts (legal, political, social, and cultural). These people range from community leaders whose actions can establish community norms, through to courts, regulators, and bureaucrats exercising their discretion in multiple transactions with each other and members of the public, transactions that apply legal rules consistently or inconsistently (or even ignore them altogether).⁴⁷

The legal consciousness school of legal theory (an extension of this scholarship) proposes that the lines law draws in society are animated, even defined, by the actions of individuals and communities in response to the law.⁴⁸ Patricia Ewick and Susan Silbey propose that people position themselves as “conforming” (often unconsciously), “contesting” (through advocacy) or “resisting” the law (through non-compliance or protest).⁴⁹

Taking into account these general frameworks, I propose the following general criteria for assessing the effectiveness of NGO strategies and tactics in leading or contributing to anti-corruption changes:

1. Did the effort begin with research on the political landscape of the jurisdiction concerning the key processes and actors that make legal, social, and cultural changes, and the network of actors who participate in and protect corrupt practices?;

⁴⁵ Steven Sampson, “Anti-corruption: Who Cares?” in S Arvidsson, ed, *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (Cham, Switzerland: Palgrave Macmillan, 2019) 277. Steven Sampson, “The Anti-Corruption Industry: From Movement to Institution” (2010) 11:2 Global Crime 261.

⁴⁶ Susan S Silbey, “After Legal Consciousness” (2005) 1 Annual Rev L Soc Sci 323 at 324.

⁴⁷ *Ibid* at 330–332.

⁴⁸ *Ibid* at 333–334.

⁴⁹ Patricia Ewick & Susan S Silbey, “Conformity, Contestation, and Resistance: An Account of Legal Consciousness” (1992) 26:3 New Eng L Rev 731.

2. Did the NGO (or group of NGOs working in a formal or informal coalition) build a social movement that used multi-pronged strategies and tactics?;
3. Was each strategy and tactic strategically chosen for systemic impact?;
4. Are the NGO's staff professional and effective, or do they cause problems and hold the NGO back from success?
5. Did the NGO build partnerships or fragment the movement?;
6. Was the NGO adequately funded in order to allow it to sustain its efforts?;
7. Was the effectiveness of each strategy and tactic evaluated systematically?;
8. Did the NGO, and the social movement it fostered, coordinate, or was involved in, change the legal rules (including the enforcement system and penalties for violations) in important ways and/or hold wrongdoers accountable?;
9. Were the NGO and the social movement effective enough to stop those in power from exercising their discretion to maintain the status quo by ignoring the new legal rules (or thwarting the enforcement system and penalties in any way)?; and
10. Finally, overall, did the NGO and the social movement change not only the legal rules but also the legal and social culture enough to ensure the actions of the people and organizations governed by the rules actually changed?⁵⁰

As the summaries of common strategies and tactics and case studies below make clear, the final two criteria listed above are, not surprisingly, often the most difficult to achieve. Many NGOs worldwide have built and sustained partnerships and movements that have used multi-pronged strategies and tactics to win changes to legal rules, enforcement systems, and penalties for the purpose of holding wrongdoers accountable. However, it is more difficult to stop those in power from exercising their legal discretion to thwart changes to rules, enforcement mechanisms, and penalties. In part, the case studies are cautionary tales about how important it is to ensure that new rules are strong, clear, and restrict that discretion. This includes restricting the discretion of enforcement entities to ensure the rules are complied with through strong and strict enforcement. Further, winning a permanent change to the culture of government and business institutions so that the culture actively prevents, rather than encourages and fosters, corruption is an ultimate, very difficult change to win. This is true not only for NGOs but also for anyone and any organization involved in anti-corruption efforts.

Set out below are summaries of common strategies and tactics used by NGOs worldwide to win changes in many areas, including anti-corruption. As noted in Section 2, the government's relationship with NGOs and citizens has a significant impact on the strategies and tactics NGOs in a jurisdiction will undertake. The summaries below begin with tactics commonly used in jurisdictions where fundamental human rights are not recognized or enforced and move to strategies and tactics used in jurisdictions with well-developed laws and enforcement systems.

⁵⁰ 'Legal culture' refers to the definition discussed in David Nelken, "Comparative Legal Research and Legal Culture: Facts Approaches and Values" (2016) 12:1 Annual Rev L Soc Sci 45 at 45.

It is important to note that in undertaking anti-corruption initiatives, NGOs will not only be subject to resistance from governments and businesses, but they can also significantly undermine their efforts if NGOs do not establish and maintain internal procedures, monitoring, and enforcement systems to prevent corruption within their own organization.⁵¹

3.1 Research and Disclosure

An initial role of NGOs is to research the political landscape of the jurisdiction concerning the key processes and actors that make legal, social, and cultural changes. This information is essential to participating effectively in those processes, building allies, and neutralizing those who will resist change.⁵²

Another role of NGOs is to track the level of corruption in each jurisdiction. Sarah Chayes argues that it is key for governments to answer a series of questions concerning the structure and function of the “kleptocratic network” in any country before engaging with the government of the country to ensure that members of that network are not inadvertently supported.⁵³ NGOs must not only gather information on key actors participating in and sustaining corrupt practices, the structure and operations of their network, and the network’s strengths and vulnerabilities, but also the cultural environment of corruption in the jurisdiction. This research is not an easy task. Corrupt actions are either illegal or stigmatized in most jurisdictions. As a result, those involved usually attempt to keep their actions secret. However, documenting the absence of anti-corruption measures in a jurisdiction’s laws (or flaws in the measures) and the absence of effective enforcement agencies (or flaws in the enforcement policies and practices of existing agencies) is a step towards reform. Even an evaluation that relies on incomplete information can, through issuing a regular report, assist in raising awareness of corruption problems and the negative effect of corruption in the country, which is one step in the long road of effectively ending corruption.

⁵¹ See, for example: Albert Anton Traxler, Dorothea Greiling & Hannah Hebesberger, “GRI Sustainability Reporting by INGOs: A Way Forward for Improving Accountability?” (2018) 31:6 Voluntas 1; Soha BouChabke & Gloria Haddad, “Ineffectiveness, Poor Coordination, and Corruption in Humanitarian Aid: The Syrian Refugee Crisis in Lebanon” (2021) 32:4 Voluntas 894; Ronald D Francis & Anona Armstrong, “Corruption and Whistleblowing in International Humanitarian Aid Agencies” (2011) 18:4 J Financial Crime 319.

⁵² See e.g. “Democracy Skills Civics and Citizenship Course” (last visited 20 November 2021), online: *Democracy Education Network* <<http://democracyeducation.net/democracy-skills-course/#government>>; “Key Questions to Ask to Hold Governments Accountable” (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2013/08/KeysForGovt.pdf>>; “How to Know Your Political Landscape” (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2013/08/PoliticalLandscaping.pdf>>.

⁵³ Sarah Chayes, “Corruption: The Prior Intelligence Requirement” (9 September 2014), online: *Carnegie Endowment for International Peace* <<https://carnegieendowment.org/2014/09/09/corruption-priority-intelligence-requirements/ho96>>.

International NGOs have played a major role in completing such evaluations of the anti-corruption culture, rules, and enforcement systems in various jurisdictions. As described in Chapter 1, Transparency International (TI), the world's largest anti-corruption NGO, produces the annual Corruption Perceptions Index (CPI) which, through a survey of experts and businesses in jurisdictions around the world, attempts to measure the perceived level of corruption in the public sector of each jurisdiction.⁵⁴ The main criticism of the CPI is that its sample of experts often does not include people on the front line of anti-corruption efforts and that surveying business executives skew the results toward lowering the level of perceived corruption. Executives are incentivized to rank a country as "clean" if their business benefits from corrupt actions or weak enforcement. To its credit, in recent years TI's CPI has highlighted cases demonstrating big businesses in "clean" countries bribing governments of other countries⁵⁵ and how governments in "clean" countries facilitate both domestic and international corruption by failing to enact key anti-corruption measures.

TI also produces the Global Corruption Barometer (GCB) which is based on a survey of the public's experience with, and perception of, corruption in their country.⁵⁶ For example, the 2017 report, based on surveys of 162,316 people in 119 countries between 2014 and 2017, found that one in four people had paid a bribe in order to obtain public services during the previous year.⁵⁷ However, comparing countries using the GCB is difficult because the full survey was mainly conducted in developing countries and the questions asked were not consistent between countries. For example, the bribery questions were not asked in Belgium, France, Greenland, the Netherlands, Sweden, Switzerland, the UK, and the USA due to funding constraints.⁵⁸

Some NGOs have developed other evaluation techniques to challenge the survey method of measuring corruption. For example, Global Integrity developed an evaluation methodology with 15 categories and more than 300 criteria for measuring the effectiveness of rules and enforcement systems for ensuring government integrity in any jurisdiction. Global Integrity evaluated more than 30 countries in 2010 and more than 100 countries from 2006 to 2010. An expert researcher in each jurisdiction completed a peer-reviewed Integrity Scorecard and a media representative produced a summary report of news and developments during that year.⁵⁹ The initiative ended in 2013, in part due to lack of funding and the difficulties of maintaining consistency in evaluation standards and assessments across countries whose

⁵⁴ "Corruption Perceptions Index 2020" (last visited 20 November 2021), online: *Transparency International [TI]* <<https://www.transparency.org/en/cpi/2020/index/nzl>>.

⁵⁵ "CPI 2020: Five Cases of Trouble at the Top" (28 January 2021), online: *TI* <<https://www.transparency.org/en/news/cpi-2020-trouble-at-the-top-cases>>; "CPI 2020: Trouble in the Top 25 Countries" (28 January 2021), online: *TI* <<https://www.transparency.org/en/news/cpi-2020-trouble-in-the-top-25-countries#12-canada-77-snow-washing>>.

⁵⁶ "Global Corruption Barometer" (last visited 20 November 2021), online: *TI* <<https://www.transparency.org/en/gcb>>; "GCB Survey" (last visited 20 November 2021), online (pdf): *TI* <https://images.transparencycdn.org/images/Global_Corruption_Barometer_Core_Questionnaire2017.pdf>.

⁵⁷ "People and Corruption: Citizens' Voices from Around the World" (14 November 2017) at 7, online (pdf): *TI* <https://images.transparencycdn.org/images/GCB_Citizens_voices_FINAL.pdf>.

⁵⁸ *Ibid* at 12 n IX: Canadians were not surveyed for the GCB 2017.

⁵⁹ "Global Integrity Report 2010: Data" (last visited 20 November 2021), online: *Global Integrity* <<https://www.globalintegrity.org/resource/global-integrity-report-2010-data/>>.

political and legal systems vary greatly. However, the criteria still provide a fairly comprehensive basis for evaluating the state of anti-corruption measures in any jurisdiction. Since 2012, Global Integrity has continued using the same methodology in Africa through the Africa Integrity Indicators project.⁶⁰ Global Integrity also maintains the Anti-Corruption Evidence Research Programme that gathers evidence for developing and implementing effective anti-corruption initiatives.⁶¹

A different corruption related measure involves assessing the strength of the rule of law in each country. For NGOs in many countries, anti-corruption efforts focus mainly on establishing a rule of law system that will investigate, prosecute, and penalize corrupt acts and give citizens and organizations the right to file complaints calling for investigations. This reality is reflected in the World Justice Project's Rule of Law Index⁶² which is based on several criteria, including constraints on government powers and the absence of corruption.⁶³

However, these international indices are only a starting point for a domestic NGO's anti-corruption methods. As Chayes proposes, the research challenge continues with compiling evidence of corruption, including tracking the assets and liabilities of politicians, political staff, and government officials, to determine who may be living beyond the means of their salaries due to acceptance of bribes, kickbacks, etc.

3.2 Public Education

In addition to their country-level and, in some cases, sub-national jurisdiction, monitoring, measuring, and surveying activities, some international NGOs also provide support to domestic NGOs' anti-corruption efforts through providing guidance and direct training in these research efforts. For example, TI has several free online anti-corruption toolkits that NGOs in any jurisdiction can use to research, reveal, and combat corruption. The National Democratic Institute and the UN also have toolkits.⁶⁴

⁶⁰ "About the Africa Integrity Indicators" (last visited 20 November 2021), online: *Africa Integrity Indicators* <<https://www.africaintegrityindicators.org/about>>.

⁶¹ "Anti-Corruption Evidence Research Program" (last visited 20 November 2021), online: *ACE Global Integrity* <<https://ace.globalintegrity.org/>>.

⁶² "WJP Rule of Law Index" (last visited 20 November 2021), online: *World Justice Project* <<https://worldjusticeproject.org/rule-of-law-index/global>>.

⁶³ See e.g. "World Justice Project: Canada" (last visited 20 November 2021), online: *World Justice Project* <<https://worldjusticeproject.org/rule-of-law-index/country/2020/Canada>>.

⁶⁴ "Anti-Corruption Toolkits for Civil Society" (last visited 20 November 2021), online: *TI* <<https://www.transparency.org/en/toolkits/civil-society>>; Richard Holloway, "NGO Corruption Fighters' Resource Book: How NGOs Can Use Monitoring and Advocacy to Fight Corruption" (2006), online (pdf): *National Democratic Institute* <<https://www.ndi.org/sites/default/files/NGO-Corruption-Fighters-Resource-Book-ENG.pdf>>. The UN also published its own toolkit (although it has not been updated since 2004): United Nations Office on Drugs & Crime [UNODC], *The Global Programme Against Corruption: UN Anti-Corruption Toolkit*, 3rd ed (Vienna: UN, 2004), online (pdf): <https://www.un.org/ruleoflaw/files/UN_Anti%20Corruption_Toolkit.pdf>. See also the UNDP Global Portal on Anti-Corruption for Development, (last visited 22 November 2021) online: *UNDP Anti-Corruption for Development* <<https://anti-corruption.org/>>.

Beyond this international “train the trainer” educational efforts aimed at other NGOs, some NGOs like the UN, move beyond research and disclosure to undertaking formal education campaigns. When UNCAC was adopted in 2003, the UN General Assembly designated December 9th as the annual International Anti-Corruption Day.⁶⁵ It also makes public education materials available in several languages for use by NGOs, including posters and social media graphics, and videos that local TV stations can broadcast.⁶⁶

As set out in Article 13(1)(c) of UNCAC, governments are required to undertake “public information activities that contribute to nontolerance of corruption, as well as public education programmes, including school and university curricula.”⁶⁷ While the US government has a public education program called the International Anticorruption Champions Award to recognize anti-corruption leaders and innovators around the world, it does not have a program to recognize and award anti-corruption champions in the US.⁶⁸ The US government’s self-assessment for its 2018 review by the UNODC of its compliance with UNCAC requirements lists no activities under Article 13(1)(c).⁶⁹

Though the UK developed an anti-corruption strategy after consultation with anti-corruption NGOs, it also does not have a public education program to raise awareness of corruption and to educate the public about how to file complaints.⁷⁰ Canada has not yet been reviewed by UNODC concerning its compliance with Article 13(1)(c) and other articles in Chapter II of the UNCAC. Canada does not currently have such a public education program. Chapter II is scheduled to be reviewed in 2021.⁷¹

Many governments educate their public about corruption in other countries but not in their own. NGOs in many countries fill this gap by raising awareness of incidences of corruption and how to file complaints by issuing reports and news releases, conducting surveys, holding events, maintaining websites, and posting on social media sites.⁷² Media outlets not

⁶⁵ “International Anti-Corruption Day: Background” (last visited 20 November 2021), online: *United Nations* <<https://www.un.org/en/observances/anti-corruption-day/background>>.

⁶⁶ “Campaign Materials” (last visited 20 November 2021), online: *UNODC* <<http://www.anticorruptionday.org/actagainstcorruption/en/print/index.html>>; “Corruption Scenarios” (last visited 20 November 2021), online: *UNODC* <<http://www.anticorruptionday.org/actagainstcorruption/en/scenarios/index.html>>.

⁶⁷ UNCAC, *supra* note 1, art 13(1)(c).

⁶⁸ “Recognizing Anticorruption Champions Around the World” (23 February 2021), online: *US Department of State*, online: <<https://www.state.gov/dipnote-u-s-department-of-state-official-blog/recognizing-anticorruption-champions-around-the-world/>>.

⁶⁹ UNODC, *United Nations Convention Against Corruption: United States Self-Assessment*, UN Doc CAC/COSP/IRG/2016/4, 28 November 2018 at 91–95, online (pdf):

<https://www.unodc.org/documents/treaties/UNCAC/SA-Report/2019_07_05_USA_SACL.pdf>.

⁷⁰ UNODC, *Country Review Report of the United Kingdom of Great Britain and Northern Ireland*, at 157–162, online (pdf): <https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2020_11_16_UK_Final_Country_Report.pdf>.

⁷¹ “Country Profile: Canada” (Last visited 20 November 2021), online: *UNODC* <<https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html#?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fcan.html>>.

⁷² “How To Do a Credible Survey/Poll” (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2019/01/8-HowToSurveyPoll.pdf>>.

only amplify the voices of NGOs but also conduct investigations, publish articles, and air broadcasts revealing what they find, as well as provide whistleblowers with an outlet for reporting wrongdoing, including corrupt activities.

As attacks on NGOs and other civil society organizations have escalated in the past decade, they have also been essentially forced to respond with public education concerning the legitimacy of their role in society. This has been a difficult challenge for high-level NGOs that are mainly funded through aid grants from other countries. This highlights the importance of having broad-based NGOs that represent the public and advocate their concerns as a key component of any effort aimed at winning anti-corruption and other democracy reforms.⁷³

3.3 Advocacy for Stronger Rules, Enforcement, and Penalties

The research and disclosure and public education efforts of NGOs are often the initial steps in an overall strategy of advocating for key changes to enact and implement stronger rules, enforcements, and penalties to stop corruption. Research in several countries has shown that the policy proposals developed by NGO think-tanks and advocacy groups often seed the policy and election platforms of political parties that are looking to seize opportunity when an opening presents itself, due to a crisis, scandal, or other reason, to either adapt as a governing party in order to maintain power or to move from being an opposition party to being the governing party.⁷⁴ If NGOs are connected to a broad base or sector of the public, they often seed not only the policies and platforms of opposition parties, but also the parties' support base itself.⁷⁵

The following are brief summaries of the main advocacy tactics used by NGOs.

3.3.1 Protests and Demonstrations

Protests and demonstrations can be an initial reaction to the disclosure of corruption in a political system. Protests and demonstrations are often aimed at winning a short-term concession or promise of reform from a government or business. They are sometimes, but often not, successful. However, they can also be much more. A 2005 study found that over the previous 33 years, nonviolent people-powered civic resistance (boycotts, mass protests, blockades, strikes, and civil disobedience) was one of the most effective tactics for winning a transition from a dictatorial, corrupt government to a more democratic good government, as long as the civic resistance includes strong and cohesive nonviolent coalitions of NGOs

⁷³ Saskia Brechenmacher & Thomas Carothers, "Five Ways to Build Civil Society's Legitimacy Around the World" (9 May 2018), online: *Carnegie Endowment for International Peace* <<https://carnegieendowment.org/2018/05/09/five-ways-to-build-civil-society-s-legitimacy-around-world-pub-76294>>.

⁷⁴ Jorge Valladares Molleda, Kristen Sample & Sam van der Staak, "Implications for Action: Enablers, Triggers, Lockers and Agents of Programmatic Parties" in *Politics Meets Policies: The Emergence of Programmatic Political Parties* (Stockholm: International IDEA, 2014) [Politics Meets Policies] at 107–108, online (pdf): <<https://www.idea.int/sites/default/files/publications/politics-meets-policies.pdf>>.

⁷⁵ Nic Cheeseman & Dan Paget, "Programmatic Politics in Comparative Perspective" in *ibid*, 73 at 76, 83–85.

and other civil society actors (including political parties).⁷⁶ Another study of the period 2013 to 2018 found that 10% of the world's countries had experienced government leadership change due to corruption, but that broad-based NGOs connected to grassroots NGOs were a key driver of the transition, again, through nonviolent civic resistance.⁷⁷

As other studies have shown, national NGOs that are more technocratic and legal-based are needed to translate popular demands into policy proposals for changes, but grassroots NGOs are still vital. National NGOs may not pursue changes that will resonate with most people nor have the political power needed to push a new government or ruling party to adopt and implement the proposals, even in the face of resistance by the country's power elite.⁷⁸ Since national NGOs lack access to the public, they need the assistance of grassroots NGOs that are involved in developing policy proposals and mobilizing people to push for changes. These ingredients of successful systemic change have been seen in various areas of reform, including for advancing essential rule of law measures.⁷⁹

3.3.2 International Appeals

This tactic is included despite the fact that international appeals and court cases can take a significant amount of financial resources. However, while NGOs in developing countries may lack the resources themselves to undertake this tactic, NGOs in jurisdictions with well-developed human rights laws and enforcement systems and significant resources can help attract international attention and put international pressure on their government to implement anti-corruption measures. Such international appeals, and resulting media coverage, can often be an early and effective first step towards reforms.

⁷⁶ Adrian Karatnycky & Peter Ackerman, *How Freedom is Won: From Civic Resistance to Durable Democracy* (Washington, DC: Freedom House, 2005), online (pdf):

<<https://freedomhouse.org/sites/default/files/How%20Freedom%20is%20Won.pdf>>.

⁷⁷ Thomas Carothers & Christopher Carothers, "The One Thing Voters Hate the Most", *Foreign Policy* (24 July 2018), online: <<https://foreignpolicy.com/2018/07/24/the-one-thing-modern-voters-hate-most-corruption/>>; Thomas Carothers & Benjamin Press, "Understanding Protests in Authoritarian States" (2020) 40:2 SAIS Rev Intl Affairs 15.

⁷⁸ Abigail Bellows, "Bridging the Elite-Grassroots Divide Among Anticorruption Activists" (2020) Carnegie Endowment for International Peace Working Paper, online (pdf): <https://carnegieendowment.org/files/WP_Bellows_EliteGrassroots.pdf>; Moisés Naím, "What Has a Bigger Impact, Elections or Street Protests?", *El País* (19 June 2019), online: <https://english.elpais.com/elpais/2019/06/19/inenglish/1560937997_603402.html>; Jonathan Pinckney, *When Civil Resistance Succeeds: Building Democracy After Popular Nonviolent Uprisings* (Washington, DC: ICNC Press, 2018), online (pdf): <<https://www.nonviolent-conflict.org/wp-content/uploads/2018/10/When-Civil-Resistance-Succeeds-Pinckney-monograph.pdf>>; Moisés Naím, "Why Street Protests Don't Work", *The Atlantic* (7 April 2014), online:

<<https://www.theatlantic.com/international/archive/2014/04/why-street-protests-dont-work/360264/>>; Maria J Stephan & Erica Chenoweth, "Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict" (2008) 33:1 Int'l Security 7, online (pdf): <https://www.belfercenter.org/sites/default/files/legacy/files/IS3301_pp007-044_Stephan_Chenoweth.pdf>.

⁷⁹ Rachel Kleinfeld, "How to Advance the Rule of Law Abroad" (4 September 2013), online: *Carnegie Endowment for International Peace* <<https://carnegieendowment.org/2013/09/04/how-to-advance-rule-of-law-abroad/glfa>>.

NGOs in jurisdictions with well-developed laws and enforcement can, and should, always play a role in supporting NGOs in jurisdictions where fundamental human rights are not recognized or enforced. Actions such as signing on to a letter calling for action from the UN, OECD, World Bank or a regional inter-state body or informing media outlets of abuses are relatively easy, low-cost actions that can assist by putting a spotlight on corruption in developing countries.

As well, an extension of the research and disclosure tactic outlined above that involves partnering of domestic and international NGOs is a joint effort to track bank accounts and other assets in other countries that have been established or bought by government officials from the proceeds of corruption. These efforts can help with the push for governments to impose *Magnitsky Act* sanctions to freeze and seize those assets in the US, UK, Canada, and other countries.⁸⁰

However, as summarized in Section 2, the involvement of international NGOs in any jurisdiction, actively or by supporting domestic NGOs, can easily be controversial because it raises the question of whether the citizens of the jurisdiction actually support the activities and aims of the NGOs involved. As well, while shining a spotlight on corrupt actions in any country can lead to international pressure on the country's government, the pressure that may lead to a change in government, usually domestic pressure of NGOs, opposition parties, and citizens, must also continue over the long-term to result in the implementation and enforcement of effective anti-corruption measures.

3.3.3 Coalition Building

NGOs working in coalition, coherently and strongly advocating together, has proven to be an effective tactic for winning key democratic reforms, including anti-corruption reforms. A network involves several groups that all work on the same issue or problem. Groups in a network usually meet with each other, or communicate with each other, regularly. However, groups in a network do not usually work together on strategies, approaches, tactics, or activities. In other words, the groups share a concern about an issue or problem but work independently to try to solve the issue or problem.

While working as a network allows each group to work independently without agreement from the other groups, uncoordinated activities can conflict with each other and make it appear to a government or corporation that there is not broad support for proposed solutions. Unlike a network, a coalition of groups works together on strategies, approaches,

⁸⁰ Brent Bambury, "Canada is Getting its Own Magnitsky Act and Vladimir Putin is Not Impressed", *CBC News* (6 October 2017), online: <<https://www.cbc.ca/radio/day6/episode-358-outsmarting-the-nra-canada-s-magnitsky-act-ham-radios-for-puerto-rico-music-in-dna-and-more-1.4329733/canada-is-getting-its-own-magnitsky-act-and-vladimir-putin-is-not-impressed-1.4329831>> (Canada); UK, HC Library, *Magnitzky Legislation* (Briefing Paper No 8374) by Ben Smith & Joanna Dawson (London: HC Library, 2020), online (pdf): <<https://commonslibrary.parliament.uk/research-briefings/cbp-8374/>> (UK); "Global Magnitzky Act" (last visited 20 November 2021), online: *US Department of State* <<https://www.state.gov/global-magnitsky-act/>> (US); "Global Magnitzky Sanctions" (last visited 20 November 2021), online: *US Department of the Treasury* <<https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/global-magnitsky-sanctions>> (US). See Chapter 5, Section 5.3 for further discussion on the *Magnitsky Act*.

tactics, or activities. The difficulty of coalitions is reaching agreement. This means that networks are more common than coalitions. However, by working together, coalitions are often more effective than networks because they clearly show broad support for proposed solutions.⁸¹

3.3.4 Lobbying and Campaigns

NGOs that can mobilize the public, through research and disclosure, public education, and possibly international appeals, as well as build strong, unified coalitions, still have the challenge of transferring all of that power into a long-term campaign and lobbying effort for the key systemic changes that will stop corruption or other societal problems the NGOs are tackling. Many of these efforts are ongoing strategies and tactics to overcome seven barriers to social change, the “D” barriers:⁸²

- The first is the density of government. Political landscape research effort can help overcome density to government by determining key actors and decision-makers and what processes governments use for making decisions.
- The second is that governments will often deny that there is a problem to be solved. Extensive research documenting and disclosing the problem is needed to overcome this barrier.
- The third is that governments will often delay changes, which is why it is a good idea for any campaign plan to take into account that key systemic changes often take five to ten years to be won, if not longer.
- The fourth is discredit, which occurs when governments begin to actively resist pressure for change as a movement gains strength. This can take the form of alleging that movement leaders are engaging in questionable activities and attempting to label NGOs as front groups for opposition political parties or foreign governments.
- The fifth is divide, which usually tests whether the coalitions that the NGOs have built are cohesive and strong. Often governments will seek to make a deal with one or more of the partner NGOs in a coalition, usually the groups that make the weakest demands, giving them some or most of what they want in exchange for applauding the government’s actions, thereby undermining the coalition’s more significant demands for systemic changes.
- The sixth is deceive, which is usually implemented by governments that are trying to spin small changes to be perceived as more significant changes than NGOs are seeking. In a country such as Canada, where only a small fraction of eligible voters read newspaper articles daily and the majority of readers only skim articles or scan headlines, if governments can win favourable headlines

⁸¹ “How to Organize a Network or Coalition” (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2019/01/6-CoalitionsNetworks.pdf>>.

⁸² “How To Overcome The 7 D's Of Government and Corporate Decision-Making Processes” (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2019/01/4-Overcome7DsGovtCorp.pdf>>.

that set out such a spin, then they may deceive the public into believing that they have fully implemented the demanded changes.⁸³

- The final “D” for NGOs to overcome in any campaign and lobbying effort for systemic changes is destroy. While this response by governments has not been frequently used in recent years in developed democracies such as the United States, the UK, and Canada, it has certainly been used, and continues to be used, to stop campaigns by NGOs representing visible minorities, Indigenous peoples, and other vulnerable sectors of society. It is also used by many autocratic, authoritarian governments worldwide through jailings, poisonings, and assassinations of leaders of NGOs, media outlets, and other civil society sectors who dare to challenge politicians’ illegal and corrupt actions.

Overall, whether an NGO’s lobbying and campaign efforts involve setting out policy proposals,⁸⁴ organizing a demonstration⁸⁵ or boycott,⁸⁶ holding events, undertaking public education initiatives, writing letters,⁸⁷ and holding lobby meetings with politicians and government officials,⁸⁸ they will almost always be met with resistance from at least some institutions in any government. By campaigning over the long-term in multi-faceted ways, building allies and coalitions, and addressing and neutralizing opposing arguments or arguments to maintain the status quo along the way, sometimes all the barriers can be

⁸³ It is difficult to give a precise estimate of the number of eligible voters who read full newspaper articles every day and what portion of them simply scan headlines. Based upon various sources, I estimate that of the approximately 27 million eligible voters, roughly one million read full newspaper articles every day and four million only skim articles and scan headlines: "Voter Registration Safeguards" (last visited 12 December 2021), online: *Elections Canada* <<https://www.elections.ca/content2.aspx?section=proc&dir=reg&document=index&lang=e>>; "Daily Newspaper Circulation Data" (last visited 11 December 2021), online: *News Media Canada* <<https://nmc-mic.ca/about-newspapers/circulation/daily-newspapers/>>; Kate Moran, "How People Read Online: New and Old Findings", *Nielsen Norman Group* (5 April 2020), online: <<https://www.nngroup.com/articles/how-people-read-online/>>; Farhad Manjoo, "You Won't Finish This Article: Why People Online Don't Read to the End", *Slate* (6 June 2013), online: <<https://slate.com/technology/2013/06/how-people-read-online-why-you-wont-finish-this-article.html>>.

⁸⁴ "How to do an Effective Policy Proposal Report" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2019/01/5-EffectiveProposalRpt.pdf>>.

⁸⁵ "How To Organize An Effective Peaceful Legal Action Or Peaceful Illegal Action" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2019/01/2-HowToProtest.pdf>>.

⁸⁶ "How To Organize An Effective Boycott" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2019/01/1-HowToBoycott.pdf>>.

⁸⁷ "How To Write a Letter to a Politician" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2013/08/LetterToPolitician.pdf>>.

⁸⁸ "How To Lobby a Decision-Maker" (last visited 20 November 2021), online (pdf): *Democracy Education Network* <<http://democracyeducation.net/wp-content/uploads/2019/01/3-LobbyDecisionmaker.pdf>>.

overcome and the systemic changes won to stop corruption or other undemocratic, unaccountable government actions.

3.3.5 Public Interest Litigation

Another NGO strategy is public interest litigation (PIL). The debate concerning the effectiveness of PIL for winning social change is as long as the history of the use of the courts for this purpose. In recent decades, some commentators, such as Gerald Rosenberg, have concluded that the courts offer a “hollow hope” (at least for movements seeking change in the US, where it took governments 20 years to desegregate schools after the US Supreme Court ruled segregation in education unconstitutional).⁸⁹ Other commentators argue that PIL can help mobilize a movement and legitimize its claims or the personal claims of its members and that strategic “impact” cases can destabilize institutions, increase accountability, raise awareness, change public opinion, and threaten institutions with legal costs.⁹⁰

Scott Cummings and Deborah Rhode argue history shows that to be effective PIL must be:

- one part of a multi-pronged social change effort;
- adequately funded to ensure comprehensive litigation efforts are possible (especially in ensuring enforcement of court orders); and
- evaluated systematically and continuously to ensure strategic litigation decisions and efforts over the long-term.⁹¹

Orly Lobel posits that, when pursuing either legal reform or extralegal activism aimed at transformative changes, one should be concerned about and monitor the possibility of “cooptation” that can essentially neutralize efforts aimed at winning changes.⁹² Lobel’s review of the literature leads to conclude that the following six key causes of co-optation can undermine PIL:

⁸⁹ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), as cited in Nancy Nicol & Miriam Smith, “Legal Struggle and Political Resistance: Same Sex Marriage in Canada and the USA” (2008) 11:6 Sexualities 667 at 668.

⁹⁰ Stuart Scheingold, “Constitutional Rights and Social Change: Civil Rights in Perspective” in Michael W McCann & Gerald L Houseman, eds, *Judging the Constitution: Critical Essays on Judicial Lawmaking* (Glenview, IL: Scott Forseman, 1989) at 73–91; Alan Hunt, “Rights and Social Movements: Counter-Hegemonic Strategies” (1990) 17:3 JL Society 309 as cited in Nicol & Smith, *supra* note 89; Charles F Sabel & William H Simon, “Destabilization Rights: How Public Law Litigation Succeeds” (2004) 117:4 Harv L Rev 1015, 1021 as cited in Scott L Cummings & Deborah L Rhode, “Public Interest Litigation: Insights from Theory and Practice” (2009) 36:4 Fordham Urban LJ 603 at 608; Michael W McCann, “How Does Law Matter for Social Movements?” in Bryant G Garth & Austin Sarat, eds, *How Does Law Matter?: Fundamental Issues in Law and Society Research* (Evanston, IL: Northwestern University Press, 1998) at 83–84, as cited in “Public Interest Litigation: Insights from Theory and Practice” (2009) 36:4 Fordham Urban LJ 603 at 608.

⁹¹ Cummings & Rhode, *supra* note 90 at 603.

⁹² Orly Lobel, “The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics” (2007) 120:4 Harv L Rev 937.

1. Lack of the resources and energy needed to win the changes fully (echoing the concern of Cummings and Rhode);
2. That filing one specific case in specific legal forums like courts can undermine comprehensive calls for change, and as a result fragment a social movement;
3. That lawyers handling the PIL can control the agenda of the movement, not always in the movement's best interests;
4. That the effects of court rulings are inherently limited because they do not enforce themselves, nor necessarily change public opinion or actions;
5. That becoming involved in PIL, and the legal system generally, can undermine other social change tactics (in part because of the resources required for PIL); and
6. That existing social arrangements can use legal rules set out in statutes, regulations, or court rulings (if a PIL case is lost), and also social and cultural norms, to resist, restrict, or reject change efforts.

No matter what, Lobel argues, political and market powers are always forces that can undermine efforts to win changes.⁹³

Another form of litigation involves NGOs in any jurisdiction, alone or in partnership with international NGOs, filing or intervening in court cases aimed at freezing or seizing the accounts and assets of government officials that are the proceeds of corruption. For further discussion of freezing and seizing illegal assets see Chapter 5.

4. A CANADIAN STUDY: LONG-TERM RESISTANCE TO NGO ANTI-CORRUPTION PROPOSALS IN A SUPPOSED MATURE DEMOCRACY

Case studies of NGOs involved in anti-corruption efforts are readily available in many online publications.⁹⁴ This section focuses on one Canadian case study, specifically the experiences of the Canadian NGO, Democracy Watch's advocacy for long-delayed federal lobbying reform. As has been highlighted in the previous sections, this case study shows that the struggle for anti-corruption reforms is almost always a multi-year effort, involving many strategies and tactics, with many hurdles to overcome for the NGOs involved. This case study demonstrates the multi-faceted resistance to NGO anti-corruption proposals that is deeply rooted in a tradition of lobbyists and politicians trading favours even in a jurisdiction like Canada that is often ranked as a mature, developed, and leading democracy. This case study also shows how the struggle by NGOs for reforms can be resisted by the

⁹³ *Ibid* at 949–958.

⁹⁴ See e.g. case studies in: Holloway, *supra* note 64 at 231–275; UNODC, *supra* note 64; “Anti-Corruption Toolkits for Civil Society”, *supra* note 64; Sarah Chayes, *Fighting the Hydra: Lessons From Worldwide Protests Against Corruption*, (Washington, DC: Carnegie Endowment for International Peace, 2018), online (pdf): <https://carnegieendowment.org/files/CP_330_Chayes_Kleptocracy_Final.pdf>.

power elite in several ways, including implementing measures that create a gloss of reform while unethical practices continue largely unabated.

From 1994 to 2011, Democracy Watch, in partnership with other organizations, advocated for federal restrictions on lobbyists supporting the politicians they are lobbying, through political donations, fundraising, and other means. The case study documents the multi-year, multi-pronged, active resistance by several actors in Canada's federal political system following the enactment of those restrictions in 1997. This resistance effectively delayed the enforcement of the restrictions until 2011, and after 2011 limited enforcement to only a small percentage of cases.

The only legal restrictions on lobbyists at the federal government level in Canada before 1988 were provisions prohibiting the fundamentally illicit influence actions of bribery, influence peddling, and extortion. These provisions were first enacted by the federal Parliament in 1883 and incorporated into the *Criminal Code of Canada* when it was first enacted in 1892.⁹⁵ Very few people were charged with crimes, let alone convicted, in part because donations were not considered bribes unless they could be directly connected to a government decision (a difficult evidentiary hurdle).⁹⁶

More than 20 private member bills (bills introduced by individual Members of Canada's Parliament who are not a government Minister) aimed at regulating lobbyists were introduced in Parliament between 1965 and 1985, mainly in response to scandals, but none became law.⁹⁷ Still, even though it took until 1988, Canada became one of the first countries in the world to regulate lobbying in non-criminal ways when Parliament enacted the *Lobbyists Registration Act (LRA)* that year (although the law came long after the laws in the US (1946) and Germany (1951), and just behind Australia (1983)).⁹⁸ The coming into force of the *LRA* in 1989 began the slow process of lobbying disclosure. The first version of lobbying disclosure was called the "business-card law" because it only required lobbyists to register their name, work address, the subject matter(s) of their lobbying, and the government institutions they lobbied. Four years later, the registry was still only available in print form

⁹⁵ *Sommers and Gray v The Queen*, [1959] SCR 678 at 683.

⁹⁶ Kenneth M Gibbons & Donald Cameron Rowat, *Political Corruption in Canada Cases, Causes and Cures* (Toronto: McClelland & Stewart, 1976). See discussion on Robert Sommers, forestry minister for the Government of British Columbia and the first Cabinet minister in the Commonwealth to be jailed for corruption in office in 1958 for taking bribes, at 226. "Socred Cabinet Minister Jailed for Corruption, Dies at 89", *CBC News* (30 October 2021), online:

<<http://www.cbc.ca/news/canada/socred-cabinet-minister-jailed-for-corruption-dies-at-89-1.225006>>.

J C Van Horne, former leader of the Progressive Conservative Party in New Brunswick, pled guilty in 1975 to accepting a bribe over the purchase of park lands: "Colourful NB Tory leader was Convicted of Bribery", *Globe and Mail* (2 September 2003), online: <<http://www.theglobeandmail.com/incoming/colourful-nb-tory-leader-was-convicted-of-bribery/article1045260>>.

⁹⁷ Nancy Holmes & Dara Lithwick, "The Federal Lobbying System: The Lobbying Act and the Lobbyists' Code of Conduct" (last modified 28 April 2020) at 14 n 5, online (pdf): *Library of Parliament* <<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2011-73-e.pdf>>.

⁹⁸ *Lobbyists Registration Act*, RS 1985, c 44 (4th Supp). In 2008, the title of the law was changed to the *Lobbying Act*. For the timeline of countries' implementing lobbying regulation see: "Lobbying" (last visited 20 November 2021), online: *OECD* <<http://www.oecd.org/gov/ethics/lobbying.htm>>.

for review during office hours at the Office of the Registrar General in Hull, Quebec. As a result, few reporters, and almost no members of the public, made the effort to look at the registry.

Democracy Watch was not involved in the first round of legal restrictions on federal lobbyists in Canada because the non-profit advocacy organization was not established until September 1993. There is no evidence of a social movement (other than general concern by the public and proposals by opposition political parties and their MPs) advocating for restrictions on lobbyists before 1993 or involved in the enactment of the *LRA*.⁹⁹ Leading up to the 1993 federal election, the Liberal Party of Canada began to highlight the issue of political ethics. The former Liberal leader Jean Chrétien gave a speech listing promises of change that resulted in a chapter entitled “Governing with Integrity” in the Liberal’s campaign platform. Democracy Watch’s first action was the release of a report card on the main federal parties’ election platforms, including their proposals to reform the political finance system, to “restrict and require full disclosure of the activities of lobbyists,” and to “increase ethical standards in government.”¹⁰⁰

After the Liberals won a majority of seats in the House of Commons in November 1993, they began the process of implementing their government integrity election promises. Through 1994, Democracy Watch issued news releases and reports on the issues and received extensive media coverage.¹⁰¹ This set the basis for its campaign aimed at winning changes in three areas: restrictions on third-party advertising spending, restrictions and disclosure of donations, and restrictions on influence actions by lobbyists.

In their election platform, the Liberals had promised to “put an end to backroom deals” and bring lobbyists “from the shadows out into the open.”¹⁰² On June 14, 1994, the government introduced Bill C-43, which proposed to amend the *LRA* essentially by requiring more detailed disclosure of lobbying activities, including the specific bill, regulation, contract, etc.,

⁹⁹ For example, the following article does not mention any such a movement: John Sawatzky, “Power Plays: How the Lobby System Works”, *Montreal Gazette* (28 May 1983) B5.

¹⁰⁰ Democracy Watch, “Report Card on the Federal Parties 1993 Democratic Reform Election Platforms” (8 October 1993), Ottawa, Democracy Watch Archive File.

¹⁰¹ “Government Ethics Campaign: 1994” (last visited 20 November 2021), online: *Democracy Watch* <<http://www.dwatch.ca/camp/ethicdir94.html>>; Democracy Watch, Media Release, “Democracy Watch Calls on Federal Government to Enact Model Lobbying and Ethics Reforms” (11 May 1994), online: <<http://www.dwatch.ca/camp/RelsMay1994.html>>. The report was entitled *Spring Cleaning: A Model Lobbying Disclosure and Ethics Package for Those Hard to Reach Places in the Federal Government*.

Wilson was responsible for administering the Registry of Lobbyists established under the *LRA*: “Media and Public Appearances: 1994” (last visited 20 November 2021), online: *Democracy Watch* <<http://www.dwatch.ca/camp/media94.html>>.

¹⁰² “Government Ethics Campaign” (last visited 22 November 2021), online: *Democracy Watch* <<https://democracywatch.ca/campaigns/government-ethics-campaign/>>; see also the Red Book: *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: The Liberal Party of Canada, 1993), online (pdf): <https://www.poltext.org/sites/poltext.org/files/plateformesV2/Canada/CAN_PL_1993_LIB_en.pdf>.

that was the focus of a lobbying effort.¹⁰³ The bill did not address several loopholes that allowed unregistered, secret lobbying. A sub-committee of the House of Commons Standing Committee on Industry began a review of Bill C-43 on September 27, 1994. Of the few citizen organizations that testified before the Committee, only Democracy Watch called for requirements to ensure disclosure of all lobbying and the amounts spent on each lobbying effort (including creating an electronic registry so people across Canada could easily see lobbying details) and to restrict political donations and other activities by lobbyists. At the time, the general position of citizen organizations was that they were “public interest” groups with publicly known mandates and, therefore, should not be required to disclose their lobbying. As a result, while Democracy Watch’s proposals were reviewed and responded to in the sub-committee’s report, none were implemented. Only paid lobbyists, and business lobbyists who lobbied more than 20% of their work time, were required to register. Lobbying concerning the enforcement of a law did not have to be registered. As well, the Liberal government added a new loophole to the LRA: a lobbyist no longer had to register if they were invited by the public office holder to lobby them.¹⁰⁴

The Liberals had also promised a new Ethics Counsellor position as a watchdog who “has the teeth to investigate and take strong action.”¹⁰⁵ Instead, the Ethics Counsellor, Howard Wilson, chosen by the Prime Minister, had no security of tenure, no independent decision-making power, no investigative powers, and no power to penalize violators of ethics rules.¹⁰⁶

As often happens, the media’s interest in the issue decreased after the Liberals implemented these changes, as many assumed that the key problems had been solved. From 1995 to 1998, Democracy Watch continued to point out problems and issue regular report cards on the government’s record, but received scant media coverage.¹⁰⁷ Funding received from foundations also caused Democracy Watch to focus its resources and efforts on the issue of bank accountability through these years.

The one positive development during this time was the establishment of the *Lobbyists’ Code of Conduct (Lobbyists’ Code)* in March 1997, which included honesty, ethical, and professionalism requirements on federal registered lobbyists. For more detail on lobbying see Chapter 11.

In 1999, as the media reported that the Liberals were preparing some changes to political finance rules, Democracy Watch began to focus on the issue again. It released a report setting

¹⁰³ “The Lobbying Act: Key Events in the History of the Canadian Lobbyists Registration Regime” (last visited 20 November 2021), online: *Office of the Commissioner of Lobbying of Canada* <<https://www.lobbycanada.gc.ca/en/rules/the-lobbying-act/>>.

¹⁰⁴ Paul A Pross, “The Lobbyists Registration Act: Its Application And Effectiveness” in Donald Savoie et al, *Restoring Accountability – Research Studies: Volume 2 – The Public Service and Transparency*, (research paper prepared for the Commission of Inquiry into the Sponsorship Program and Advertising Activities) (Ottawa: Privy Council Council, 2006), online: <http://dsp-psd.pwgsc.gc.ca/Collection/GomeryII/ResearchStudies2/CISPAA_Vol2_5.pdf>.

¹⁰⁵ “Government Ethics Campaign: 1994”, *supra* note 101.

¹⁰⁶ Democracy Watch, News Release, “Democracy Watch Releases Letter to Chrétien Calling for Changes to Ethics Enforcement Regime” (31 October 1994), online:

<<http://www.dwatch.ca/camp/RelsOct3194.html>>.

¹⁰⁷ “Government Ethics Campaign”, *supra* note 102.

out comprehensive recommendations for changes in June 1999, organized a broad Money in Politics Coalition of citizen groups supporting those recommendations, and organized a separate Government Ethics Coalition to push for restrictions on lobbyists.¹⁰⁸ The Liberal government introduced Bill C-2 in June, which, among other mostly minor changes requiring more disclosure of donations, limited third-party advertising spending during the statutory election campaign period to CDN\$150,000 nationally and CDN\$3,000 in each riding.¹⁰⁹ Despite the efforts of the coalitions to win changes to Bill C-2 by labelling it “more loophole than law,” it came into force without changes in June 2000.

Democracy Watch continued to build its campaign and coalitions. Public attention to Liberal fundraising scandals and the loopholes left by Bill C-2 caused the Liberals to introduce Bill C-9 in 2001, which required riding associations to disclose the identity of their donors (before only parties were required to disclose donors).¹¹⁰ Democracy Watch continued to issue news releases and reports for the next few years.¹¹¹

Democracy Watch explicitly questioned the ethics of large donations and fundraising by lobbyists through filing several ethics complaints from 2000 to 2004. This marked the beginning of Democracy Watch’s decade-long attempt to require the Ethics Counsellor to enforce the *Lobbyists’ Code*. First, Democracy Watch filed 12 complaints from April 2000 to October 2002 with Ethics Counsellor Wilson about lobbyists violating the *Lobbyists’ Code*. Then, in December 2002, Democracy Watch applied to the Federal Court of Canada for a review of the Ethics Counsellor’s structural bias (because the Counsellor was controlled by the Prime Minister) and the delay in ruling on eight of the 12 complaints.¹¹²

In response to Democracy Watch’s December 2002 court application, Ethics Counsellor Wilson, in January 2003, issued an interpretation bulletin of a key rule in the *Lobbyists’ Code* that essentially said that lobbying was only unethical if a lobbyist forced a politician to make

¹⁰⁸ Democracy Watch, Media Release, “Report Calls on Government to Clean Up Political Finance in Canada” (1 June 1999), online: <<http://www.dwatch.ca/camp/RelsJun199.html>>; Democracy Watch, Media Release, “New Coalition Launches Campaign to Clean Up Canadian Political Finance” (10 November 1999), online: <<http://www.dwatch.ca/camp/RelsNov1099.html>>; Democracy Watch, Media Release, “New Coalition Launches Campaign for Stronger Lobbying And Ethics Laws, Files Complaint With Ethics Counsellor” (25 September 2000), online: <<http://dwatch.ca/camp/RelsSep2500.html>>.

¹⁰⁹ Bill C-2, *An Act respecting the election of members to the House of Commons, repealing other Acts relating to elections and making consequential amendments to other Acts*, 2nd Sess, 36th Parl, 2000, online: <<https://www.parl.ca/DocumentViewer/en/36-2/bill/C-2/royal-assent>>.

¹¹⁰ Democracy Watch, Media Release, “Liberals Hide Sources of \$2.1 Million in Election Donations, Group Calls for Changes to Bill C-9 to Close Loopholes” (23 April 2001), online: <<http://www.dwatch.ca/camp/RelsApr2301.html>>.

¹¹¹ “Show Us the Names Behind the Money” (26 May 2000), online: *Democracy Watch* <<http://www.dwatch.ca/camp/OpEdMay2600.html>>; Democracy Watch, Media Release, “Democracy Watch Raises Serious Ethical Concerns About Canadian Alliance and All Other Leadership Races” (9 March 2002), online: <<http://www.dwatch.ca/camp/RelsMar0802.html>>; Democracy Watch, Media Release, “Donations and Lobbying by Top Federal Government Contractors Reveal Problem of Money in Politics” (31 October 2002), online: <<http://www.dwatch.ca/camp/RelsOct3102.html>>.

¹¹² Democracy Watch, Media Release, “Democracy Watch Launches Court Challenge of Ethics Counsellor’s Bias, Delay and Failure to Fulfill Legal Duties in Eight Complaints” (18 December 2002), online: <<http://dwatch.ca/camp/RelsDec1802.html>>.

a decision by extorting them. The Ethics Counsellor then used this interpretation to rule on several of Democracy Watch's complaints.¹¹³ In April and May 2003, Democracy Watch responded by filing for judicial review of the Ethics Counsellor's structural bias and rulings. In January 2004, the federal Liberal government introduced Bill C-4, which proposed to replace the Ethics Counsellor with a more independent Registrar of Lobbyists and Ethics Commissioner.¹¹⁴ The government tried to stop Democracy Watch's court case on the basis that the Ethics Counsellor position no longer existed, but the court not only rejected that motion, but ruled in July 2004 that the Ethics Counsellor was "structurally biased," "specifically biased" against Democracy Watch, and that its complaints had to be re-ruled on by the new Registrar.¹¹⁵

In early 2003, public attention to various fundraising and unethical lobbying scandals prompted the Liberal government to introduce Bill C-24. Democracy Watch and its coalition responded with a concerted push to finally win changes that would limit donations to a level that would inhibit lobbyists from influencing politicians.¹¹⁶ Its intervention in the review of the bill led the House Committee to make an amendment lowering the individual donation limit from CDN\$10,000 annually to CDN\$5,000 as of January 1, 2004.¹¹⁷ The bill also implemented Democracy Watch and the coalition's recommendations to restrict donations by corporate, union, and other organizations to CDN\$1,000 annually; to require quarterly disclosure of donations to parties; and to require disclosure of donations to party leadership race candidates (the Liberals had already imposed this on candidates in their 2003 leadership race).¹¹⁸

Through this 2000 to 2004 period, Democracy Watch continued to advocate for closing the loopholes in the *LRA* that allowed for secret lobbying or obscured key details about lobbying activities. Scandals and public concern led to the government introducing Bill C-15 in fall 2002. The Bill closed the loophole in the *LRA* that Bill C-43 had created in 1995 allowing lobbyists not to register if a public office holder invited the lobbyist to lobby them. It also expanded the definition of lobbying so that more people communicating with public office holders about their decisions would be required to register.¹¹⁹ Another win in 2005 was the

¹¹³ *Ibid.*

¹¹⁴ Democracy Watch, Media Release, "Democracy Watch Hails Passage Of Bill C-4, Ethics Enforcement For Federal Politicians Closer Than Ever In Canadian History" (31 March 2004), online: <<http://dwatch.ca/camp/RelsEthicsMar3104.html>>.

¹¹⁵ *Democracy Watch v Canada (Attorney General)*, [2004] 4 FCR 83, 2004 FC 969, at paras 25–31, 41–56, 95–97.

¹¹⁶ "Analysis of Bill C-24 re: Federal Political Donations" (March 2003), online: *Democracy Watch* <<http://www.dwatch.ca/camp/BillC24AnalysisMar0503.html>>. Aarn Freeman, "Submission on Bill C-24 to the Standing Committee on Procedure and House Affairs" (10 April 2003), online: *Democracy Watch* <<http://www.dwatch.ca/camp/BillC24TestimonyApr1003.html>>; Democracy Watch, Media Release, "Democracy Watch Issues 'Search Warrant' For Secret Political Funds, Changes To Bill C-24" (24 April 2003), online: <<http://www.dwatch.ca/camp/RelsApr2403.html>>.

¹¹⁷ Aaron Freeman, "Political Financing Bill Closes Some, But Not All, Donations Loopholes" (1 February 2003), online: *Democracy Watch* <<http://www.dwatch.ca/camp/OpEdFeb0103.html>>.

¹¹⁸ "New Political Fundraising Rules Passed into Law!: Money in Politics Campaign Update" (August 2003), online: *Democracy Watch* <<http://www.dwatch.ca/camp/BillC24AnalysisAug03.html>>.

¹¹⁹ Democracy Watch, Media Release, "Coalition Calls for Stronger Lobbying Law" (21 November 2002), online: <<http://dwatch.ca/camp/RelsNov2102.html>>.

creation of a new House of Commons Committee, called the Standing Committee on Access, Privacy and Ethics, which focused on the key accountability issues.¹²⁰

Responding to ongoing scandals in November 2005, the Conservative Party of Canada, now led by Stephen Harper, promised a *Federal Accountability Act (FAA)* that included further restrictions on donations. When the Conservatives won the January 2006 election, they introduced some of their promised *FAA* measures in Bill C-2. The bill banned corporate and union donations; lowered the annual individual donation limit to CDN\$1,000; changed the *LRA* into the *Lobbying Act*; established a new five-year prohibition on individuals registering as lobbyist after leaving public office (although a weak prohibition given that loopholes allow for lobbying without having to be a registered lobbyist); increased penalties; and increased the limitation period for prosecutions for violations.¹²¹

Democracy Watch won these changes due to the efforts of its coalitions and the unexpected developments related to scandals and competition between parties. Further, all these efforts ran parallel to Democracy Watch's coordinated campaign and the PIL strategy that mobilized to restrict the other schemes designed by lobbyists to have undue influence over politicians.

After being taken to court by Democracy Watch, the new Registrar Michael Nelson (a position that the *FAA* was changing into a Commissioner of Lobbying) finally issued a ruling in October 2006 on one of Democracy Watch's original eight complaints about unethical lobbying. The complaint was filed in April 2000 against lobbyist Barry Campbell (a former Liberal MP) lobbying the federal Liberal government's Minister of State (Financial Institutions) Jim Peterson (brother of former Ontario Premier David Peterson) while organizing an event that raised CDN\$70,000 for Jim Peterson.¹²² Democracy Watch filed yet another judicial review application challenging the Registrar's ruling because it used the same interpretation used by Ethics Counsellor Wilson and found that Campbell had not violated any *Lobbyists' Code* rule.¹²³

In January 2007, Peterson and Campbell filed a libel lawsuit against Democracy Watch concerning a new release it had issued about the application for judicial review.¹²⁴ This was a typical use of "Strategic Litigation Against Public Participation" lawsuit, a SLAPP suit as they are known.¹²⁵ The lawyer for Peterson and Campbell offered to withdraw the lawsuit

¹²⁰ "Standing Committee on Access to Information, Privacy and Ethics" (last visited 22 November 2021), online: *House of Commons Canada* <<https://www.ourcommons.ca/Committees/en/ETHI>>.

¹²¹ Democracy Watch, Media Release, "Accountability Act's Half-Measures a Half-Step Forward In Federal Government Accountability" (12 December 2006), online: <<http://www.dwatch.ca/camp/RelsDec1206.html>>.

¹²² Democracy Watch, Media Release, "Democracy Watch Calls for Changes to Political Finance Law and Investigation to Address Conduct By Member Of Cabinet And Lobbyist" (13 April 2000), online: <<http://www.dwatch.ca/camp/RelsApr1300.html>>.

¹²³ Democracy Watch, Media Release, "Group Files Court Challenge of Federal Registrar of Lobbyists' Ruling That Lobbyists Can Fundraise For Ministers They Lobby" (25 January 2007), online: <<http://www.dwatch.ca/camp/RelsJan2507.html>>.

¹²⁴ *Ibid.*

¹²⁵ "Anti-SLAPP Advisory Panel" (last updated June 2013), online: *Ontario Ministry of the Attorney General* <https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/>.

if Democracy Watch would withdraw its case challenging the Registrar's ruling. Democracy Watch refused. Peterson and Campbell did not withdraw the libel lawsuit for the following two years until the judicial review case was over.

Finally, on January 28, 2008, the case was heard in Federal Court in Toronto,¹²⁶ and on February 19 the court issued a ruling finding that the Registrar's ruling was reasonable. Democracy Watch appealed that ruling to the Federal Court of Appeal.¹²⁷ In the summer of 2008, Campbell filed a motion for security for costs, a motion usually filed when a defendant in a case believes they will win the case, but does not believe that the plaintiff will be able to pay a cost award. Democracy Watch tried to settle the motion, but Campbell's lawyer only offered instead to drop the motion if Democracy Watch would drop its appeal. Democracy Watch again refused, and soon after Federal Court of Appeal Justice Allen Linden, who historically was deeply involved in the Liberal Party of Canada,¹²⁸ issued an order giving Democracy Watch 30 days to pay CDN\$10,000 into court or forfeit the case.¹²⁹ Democracy Watch's board decided to pay the amount rather than delay the case further by appealing the ruling.

There were no further attempts to stop the case. The Federal Court of Appeal heard the case in January 2009.¹³⁰ It ruled on March 12, 2009, that the Ethics Counsellor's and Registrar of Lobbyists' interpretation was "deeply flawed"¹³¹ because it "mistakes conflict of interest for corruption"¹³² and that the *Lobbyists' Code* rule clearly "prohibits lobbyists from placing public office holders in a conflict of interest" because "[a]ny conflict of interest impairs public confidence in government decision-making."¹³³

While Democracy Watch finally won this case, it took until 2011 for the Commissioner of Lobbying to rule on all eight of the complaints Democracy Watch had filed from 2000 to 2002.¹³⁴ The Commissioner ruled that all of the lobbyists involved were "innocent" because

¹²⁶ Democracy Watch, News Release, "Challenge of Federal Registrar of Lobbyists' Ruling that Lobbyists Can Fundraise for Ministers They Lobby, and of Federal Lobbying Ethics Enforcement System, in Federal Court in Toronto on Monday" (25 January 2008), online: <<http://dwatch.ca/camp/RelsJan2508.html>>.

¹²⁷ Democracy Watch, Media Release, "Democracy Watch Appeals Federal Court Ruling That Legalizes Lobbyists Raising Money and Doing Favours for Cabinet Ministers They Lobby" (11 April 2008), online: <<http://dwatch.ca/camp/RelsApr1108.html>>.

¹²⁸ For details see, Ellen Anderson & Bertha Wilson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2002) at 124–125.

¹²⁹ Democracy Watch, News Release, "Federal Court Justice Orders Democracy Watch To Pay In Advance \$10,000 in Costs or Face Dismissal..." (15 August 2008), online: <<http://www.dwatch.ca/camp/RelsAug1508.html>>.

¹³⁰ Democracy Watch, News Release, "Federal Court of Appeal Hearing on Monday of Landmark Case Challenging Ruling that Approved of a Lobbyist Organizing a Fundraising Event for a Cabinet Minister He Was Registered To Lobby" (9 January 2009), online: <<http://dwatch.ca/camp/RelsJan0909.html>>.

¹³¹ *Democracy Watch v Campbell*, [2010] 2 FCR 139, 2009 FCA 79 at para 48.

¹³² *Ibid* at para 51.

¹³³ *Ibid* at para 48.

¹³⁴ Democracy Watch, News Release, "Federal Commissioner of Lobbying Fails in Past Year to Rule on Five Longstanding Ethics Complaints" (8 April 2010), online: <<http://dwatch.ca/camp/RelsApr0810.html>>.

they had been operating under the old Ethics Counsellor's interpretation of Rule 8 and could not retroactively be found guilty, and also because too much time had passed.

In September 2009, Democracy Watch filed a new complaint about a lobbyist assisting a cabinet minister with a fundraising event while lobbying the minister. In February 2011, the Commissioner of Lobbying (now Karen Shepherd) ruled on the complaint, finding the lobbyist, and another lobbyist who had also assisted with the event, guilty of violating the *Lobbyists' Code*.¹³⁵ These were the first lobbyists found guilty of violating the *Code* since it was enacted fourteen years earlier, in March 1997.

However, the ongoing loopholes in the *Lobbying Act* that excluded numerous lobbying activities and weak enforcement by the Commissioner and Canada's national police force (the RCMP), essentially made the *Code* meaningless. The chances of getting caught, let alone penalized, for failing to register were still slim.

From 1990 to 2005, the Ethics Counsellor only published two reports concerning a lobbyist failing to register lobbying as required by the *LRA*.¹³⁶ Between the 2004–2005 and 2008–2009 fiscal years Registrar of Lobbyists Michael Nelson (and then Commissioner of Lobbying Shepherd) along with RCMP and Crown prosecutors, decided not to prosecute 135 of the 136 lobbyists who were caught violating the *LRA*.¹³⁷ No one was prosecuted for violating the federal lobbying law from 1988 to the end of the 2009 fiscal year.

Along with ongoing weak enforcement, as of 2009, federal Canadian laws and codes still allowed:

1. donations that an average voter could not afford;
2. spending on election ads at a level that an average voter could not afford;
3. secret lobbying;

¹³⁵ Office of the Commissioner of Lobbying of Canada, *Report on Investigation: The Lobbying Activities of Michael McSweeney*, (Ottawa: Office of the Commissioner of Lobbying, 2011), online (pdf): <https://lobbycanada.gc.ca/media/1797/ri_mcsweeney-eng.pdf>; Office of the Commissioner of Lobbying of Canada, *Report on Investigation: The Lobbying Activities of Will Stewart*, (Ottawa: Office of the Commissioner of Lobbying, 2011), online (pdf):

<https://lobbycanada.gc.ca/media/1792/ri_stewart-eng.pdf>. See the complaint at: Democracy Watch, News Release, "Group Files Complaints with Lobbying Commissioner, Ethics Commissioner and Elections Canada About Lobbyist's Assistance" (22 October 2009), online: <<http://www.dwatch.ca/camp/RelsOct2209.html>>.

¹³⁶ Paul A Pross, "Law and Innovation: The Incremental Development of Canadian Lobby Regulation" in O P Dwivedi, Byron M Sheldrick & Timothy A Mau, eds, *The Evolving Physiology of Government: Canadian Public Administration in Transition* (Ottawa: University of Ottawa Press, 2009) 151 at 173.

¹³⁷ Office of the Commissioner of Lobbying of Canada, "Annual Report: Office of the Commissioner of Lobbying of Canada" (last visited 22 November 2021), online: *Government of Canada* <<https://publications.gc.ca/site/eng/9.505813/publication.html>>. Office of the Commissioner of Lobbying, *Annual Report on the Application: 2008–2009*, (Ottawa: Office of the Commissioner of Lobbying, 2009) at 10–12, online: <https://publications.gc.ca/collections/collection_2009/cal-olc/Iu77-1-2009E.pdf>. Note that few details were provided in the Registrar's reports. The main source of the statistics is the Monitoring subsection of the Commissioner's 2008–2009 Annual Report.

4. lobbying the day after a public office holder leaves office; and
5. politicians to accept the gift/favour of fundraising assistance from a lobbyist (as long as the lobbyist exploits one of the loopholes in Canada's lobbying law that allows lobbying without registering under the law).

As the OECD and other international organizations have articulated, the key to restricting undemocratic and unethical influence by lobbyists is to prevent illicit actions through establishing a “culture” of transparency, integrity, and compliance.¹³⁸ The ongoing loopholes in federal Canadian laws and codes and weak enforcement and penalties, point to a conclusion that the changes to rules won by Democracy Watch and its coalitions, combined with ongoing public expectations, were not enough to change the legal culture, let alone the social culture, of unethical favour-trading in Canada’s capital.

Though legal rules were changed in important ways, the federal government bureaucracy (most specifically the Registrar of Lobbyists and Commissioner of Lobbyists) resisted enforcing legal changes and delayed rulings for 14 years. This allowed wrongdoers to escape accountability and a status quo of non-enforcement to persist through to 2009.

The overall lesson from the experience of Democracy Watch and the social movement it led from 1994 to 2011 is that even if an NGO does nearly everything right in the short-term to win anti-corruption changes to legal rules, it may not be enough. It will almost always still face a long-term struggle to change the legal and social culture in ways that will entrench the legal rules, make them effective, and, finally, close the gap between what is legal and what is ethical in government and business.

5. CONCLUSION

NGOs play multiple critical roles in combatting corruption: researching and disclosing loopholes and flaws in rules and enforcement, raising public awareness, organizing protests, building coalitions for change, lobbying and campaigning, and filing petitions with enforcement agencies, tribunals, and courts. NGOs face many challenges in their anti-corruption work: from building a strong and broad base of public support; to partnering with other organizations without compromising too much; to obtaining the resources for the multi-faceted activities needed to win reforms; to ensuring they are proposing effective reforms; to trying to maintain their independence, internal integrity, and legitimacy.

The record in many countries shows that, in part because of these many challenges, few NGOs are strong enough on their own or in coalition to win effective anti-corruption changes, even if they have the capacity to undertake long-term campaigns. As corruption is a collective action problem,¹³⁹ collective action by many sectors is needed to overcome the

¹³⁸ OECD, Principles for Transparency and Integrity, *supra* note 3.

¹³⁹ Anna Persson, Bo Rothstein & Jan Teorell, “Why Anticorruption Reforms Fail: Systemic Corruption as a Collective Action Problem” (2012) 26:3 Governance 449. Alina Mungiu-Pippidi, “Quantitative Report on Causes of Performance and Stagnation in the Fight Against Corruption” (21

GLOBAL CORRUPTION

barriers and create a culture of ethical government and business in any jurisdiction. NGOs lead the way in many parts of this collective action, organizing and activating the grassroots, brokering and negotiating the building of coalitions and partnerships to pressure the power elite, and connecting the public's concerns with strategic advocacy in government policy-making processes.

As they are not seeking power or the perks of power like opposition political parties are, NGOs create continued pressure for effective anti-corruption measures through changes in government over the long-term. While opposition parties may undertake research and play "gotcha" politics, exposing corrupt activities of government officials and then promise changes to try to win elections, the record in many countries shows this approach to be ineffective on its own. When those parties win power, or a share of power, the ongoing pressure from NGOs and other sectors of civil society is essential to ensuring those election promises are kept.

In these ways, NGOs provide the force behind historical changes across jurisdictions. They provide the fuel, the oxygen, the spark, and the engine to activate the public and push government to combat corruption and address other problems in society.

May 2014), online: *AntiCorruption Policies Revisited* <<http://anticorrp.eu/publications/quantitative-report-on-causes/>>.