

CANADA

● Limited enforcement

2.3% of global exports

Investigations and cases

In the period 2016-2019, Canada opened at least two investigations, opened one case and concluded four cases with sanctions. There are no publicly available statistics on the number of investigations commenced.

The single case commenced concerned the charges filed against the president of **Canadian General Aircraft** in 2016 for violation of the Corruption of Foreign Public Officials Act (CFPOA) by conspiring to offer a bribe to officials in Thailand in order to secure the sale of a commercial plane to Thai Airways, the national airline of Thailand.¹ However, these charges were stayed in November 2017 for undisclosed reasons.² Convictions were handed down in 2019 on two individuals involved in the **Cryptometrics Canada** case, where bribes were offered to an Indian minister in a failed bid to win a major contract to supply security-screening equipment to Air India.³

The most high-profile case in this period involved **SNC-Lavalin Group Inc** and two of its subsidiaries, **SNC-Lavalin Construction Inc (SLCI)** and **SNC Lavalin International Inc**. The case concerned a scheme whereby payments were made to Libyan

officials to secure contracts for the benefit of SLCI and to obtain payments on amounts owed to SLCI by a Libyan government agency, the Great Man-Made River Authority.⁴ Charges of fraud and foreign corruption were laid against all three entities in 2015, but the case was ultimately settled with a plea by SLCI to a single charge of defrauding the government of Libya. In the terms of the settlement endorsed by a Quebec Superior Court judge in December 2019, SLCI agreed to the appointment of an independent monitor and a monetary penalty of CDN\$280 million (US\$209 million), the largest penalty for fraudulent behaviour in Canadian history.⁵ However, as the judge only endorsed the dollar amount of the fine and not the separate submissions presented by the prosecution and the defence, his rationale for doing so is ambiguous. This is unfortunate, as the facts presented in the submissions of the parties suggest the joint fine amount was at a substantial discount to what might have been imposed based on the gravity of the offence and the amounts involved. SLCI's former president was charged with multiple counts, convicted in December 2019 and sentenced to concurrent prison terms, meaning 8 years, 6 months incarceration.⁶

MagIndustries, a Toronto-based mining company, was investigated by Canadian authorities for allegedly paying bribes to Congolese officials in exchange for reduced taxes and expropriation permits, among other favours.⁷ Internal investigations reportedly confirmed four under-the-table payments, totalling about US\$76,500. The authorities ultimately decided in 2017 not to file charges.⁸

¹ <https://www.cbc.ca/news/canada/calgary/rcmp-bribery-larry-kushniruk-canadian-general-aircraft-thai-airways-1.3866073>

² <https://www.cbc.ca/news/canada/calgary/rcmp-bribery-larry-kushniruk-canadian-general-aircraft-thai-airways-charge-stayed-1.4436289>

³ Court Case: *R v Karigar*, 2013 ONSC 5199, <http://canlii.ca/t/g03dw> (conviction); Court Case: *R v Karigar*, 2014 ONSC 3093, <http://canlii.ca/t/g6zz0> (sentencing); <https://www.canlii.org/en/on/onca/doc/2017/2017onca576/2017onca576.pdf>; <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-18.aspx?lang=eng>; <https://fcablog.com/2019/03/21/canada-convicts-american-and-brit-for-cfpoa-offenses/>

⁴ *R v SNC-Lavalin Construction Inc*, 2019 Court of Quebec (Criminal and Penal Division), Court file no. 500-73-00461-158, paras.6.7-6.40. There is also a brief summary of the facts of the case in the 20th Annual Report to Parliament, Sept 2018-August 2019, <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-20.aspx?lang=eng#fnbxvii>

⁵ *R v SNC-Lavalin Construction Inc*, 2019 Court of Quebec (Criminal and Penal Division), Court file no. 500-73-00461-158; <https://www.bloomberg.com/press-releases/2019-12-18/snc-lavalin-construction-inc-pleads-guilty-to-fraud>

⁶ *R v. Bebawi*, 2020 QCCS 22, par. 50-55 Mr. Bebawi has appealed both his conviction and his sentence. He is free on bail pending the outcome of his appeal: *Bebawi v. R.*, 2020 QCCA 20 (CanLII).

⁷ <https://business.financialpost.com/commodities/mining/magindustries-reveals-evidence-that-company-paid-major-bribes-in-republic-of-congo>; <https://www.cbc.ca/news/business/magindustries-probed-by-rcmp-over-bribery-allegations-in-congo-1.3091035>

⁸ <https://www.icis.com/explore/resources/news/2017/04/19/10098360/magindustries-says-it-will-not-face-canada-bribery-charges/>

In other jurisdictions, **Kinross Gold**, another Canadian mining company, agreed to pay US\$950,000 in the United States to settle a case with the Securities and Exchange Commission for having failed to introduce anti-corruption programmes and internal accounting controls when it acquired African subsidiaries, which especially impacted business conducted in Mauritius.⁹ Also in the United States, a Canadian clean fuel technology company, **Westport Fuels Systems**, and a former top executive agreed in 2019 to pay more than US\$4.1 million to resolve charges of bribes paid to Chinese officials to obtain business.¹⁰

Recent developments

Remediation agreements – as deferred prosecution agreements are called in Canada – were integrated into Canadian law under the Criminal Code of Canada, which came into force in September 2018.¹¹ The rushed legislative process made it seem to many that remediation agreements were slipped into Canadian law as a concession to powerful corporate interests, rather than as a legitimate enforcement tool.¹² This issue came to the fore in 2019 with the so-called “SNC-Lavalin scandal”, which involved allegations that the Prime Minister’s Office attempted to influence the Minister of Justice to offer SNC-Lavalin a remediation agreement, contrary to the advice of the Director of the Public Prosecution Service, which had determined that SNC Lavalin did not meet the criteria for such an agreement.¹³ Once this decision was made, the

criminal proceedings continued as before toward a trial on the merits. Ultimately, the prosecution and SNC-Lavalin agreed to settle the charges with a plea bargain and a joint sentencing submission, both of which were presented to Justice Claude Leblond of the Superior Court of Quebec on 18 December 2019.¹⁴

In January 2020, the Public Prosecution Service of Canada (PPSC) issued a Guideline for remediation agreements.¹⁵ However, the guideline is of limited value as they are focused primarily on the process and procedure to be followed, rather than on how the facts and circumstances should be evaluated in a given case.

The government held public consultations in 2017 about how to strengthen Canada’s corporate accountability toolkit. It also sought input on the Integrity Regime, an administrative policy that sets out certain ethical conditions applicable to businesses bidding for federal contracts. The federal government also undertook public consultations in 2020 on improving the transparency of corporate beneficial ownership information, including the consideration of adopting a publicly accessible register.¹⁶

Transparency of enforcement information

There are some published and updated statistics on foreign bribery enforcement available in Canada.

⁹ <https://www.sec.gov/news/press-release/2018-47>

¹⁰ <https://www.sec.gov/news/press-release/2019-197>

¹¹ Bill C-74, An Act to implement certain provisions of the budget tabled in Parliament on 27 February 2018 and other measures, 42nd Parliament, 1st session, House of Commons, 2018, Division 20, ss 403-409 (“Budget Implementation Act No. 1”). For ease of reference, in this section we refer to the relevant section numbers of Part XXII.1 of the Criminal Code, rather than those of the Bill.

¹² The government’s 2017 public consultation solicited responses to a set of general questions, including one on the merits of deferred prosecution agreements (DPAs). However, the consultation questionnaire did not present a draft of proposed legislative amendments, nor did it ask about specific features of the design of a DPA regime. There was also no suggestion that the government was planning to table a proposed RA regime in early 2018. Canada (Department of Justice), “Expanding Canada’s toolkit to address corporate wrongdoing: What we heard”, Ottawa, 2018, <https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html>

¹³ <https://www.cbc.ca/news/politics/trudeau-wilson-raybould-attorney-general-snc-lavalin-1.5014271>

¹⁴ For further review of remediation agreements please see Transparency International Canada’s “Briefing Note: Overview of Remediation Agreements in Canada” <https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/t/5f73e45e5c383345fa626237/1601430625022/Overview+of+Remediation+Agreements+in+Canada+%286%29.pdf>

¹⁵ <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html>

¹⁶ https://www.ic.gc.ca/eic/site/142.nsf/eng/h_00000.html; The provinces of Quebec and British Columbia also held consultations for a beneficial ownership registry in 2019 and 2020 respectively. The Government of Quebec proposed the establishment of a public registry in the 2020-2021 budget. Your Future Budget: Additional Information. Government of Quebec, March 2020, http://www.budget.finances.gouv.qc.ca/budget/2020-2021/en/documents/Budget2021_AdditionalInfo.pdf

However, these do not include information on open investigations. There are no official sources for statistics on requests for mutual legal assistance made by Canada or received from other countries.

Under the CFPOA, the Minister of Foreign Affairs, the Minister for International Trade and the Minister of Justice and Attorney General of Canada are required to jointly prepare a report on the implementation and enforcement of the OECD Anti-Bribery Convention and CFPOA. The Minister of Foreign Affairs must submit this report to the House of Commons each year. The reports are posted on a Government of Canada website.¹⁷

Court decisions are technically publicly available documents. While significant improvements have been made, especially with free, online databases such as the Canadian Legal Information Institute, there is not always an electronic version of a decision available, especially where reasons are rendered orally by the court or where there is a guilty plea and joint submission on sentence. The SNC-Lavalin plea deal is a prominent example of an important case decision not available on a free, publicly accessible website.

Beneficial ownership transparency

There is no central register of beneficial ownership of companies in Canada, but introduction of such a register is under consideration at federal and provincial levels. In 2019, the federal government amended the Canadian Business Corporations Act to require all federally incorporated companies to maintain beneficial ownership records and provide them to law enforcement authorities “as soon as possible” if requested. Amendments were passed in April 2020 to include increased requirements for designated non-financial persons and businesses to report beneficial ownership information on entities

with whom they do business.¹⁸ These amendments will come into force on 1 June 2021.¹⁹

Inadequacies in legal framework

At present, the CFPOA offences are subjective *mens rea* offences that target reckless or intentional conduct. This sets a high a burden on prosecutors. The burden is even higher where the defendant is a business organisation, because under Canada’s rules for organisational criminal liability, proof of corporate recklessness or intention is drawn from proof beyond a reasonable doubt that senior members of a corporation know about corrupt activities. In practical terms, this is difficult to prove without an admission.

Under Canadian law, prosecutors are not required to provide reasons for their decisions and they rarely, if ever, do so in practice. However, in the context of remediation agreements, since court approval is limited to the final agreement as negotiated, it has been suggested that prosecutors should provide public information about how they decide when such agreements are in the public interest, to ensure consistency across cases. The handling of the SNC-Lavalin case led the OECD WGB to express concerns about the independence of Canadian prosecutors and the risks of improperly factoring “national economic interest” into the assessment of the public interest in inviting an organisation to negotiate a remediation agreement in cases of foreign corruption, contrary to Article 5 of the OECD Anti-Bribery Convention.²⁰

Inadequacies in enforcement system

¹⁷ <https://laws-lois.justice.gc.ca/eng/acts/C-45.2/FullText.html?txthl=report#h-112373>; See also

20th Annual Report to Parliament, Sept 2018-August 2019, <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-20.aspx?lang=eng#fnbxvii>; 19th Annual Report to Parliament, Sept 2017-August 2018, <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-19.aspx?lang=eng>; 18th Annual Report to Parliament, Sept 2016-August 2017, <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-18.aspx?lang=eng#highlights>; 17th Annual Report to Parliament, Sept 2015-August 2016, <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-17.aspx?lang=eng>

¹⁸ <https://fcpablog.com/2020/04/15/its-time-for-canada-to-embrace-public-ubo-registries/>

¹⁹ Canada Gazette: Part II. Vol 1154, No. 12. 10 June 2020, Ottawa <http://gazette.gc.ca/rp-pr/p2/2020/2020-06-10/pdf/g2-15412.pdf>. Pp. 972-997.

²⁰ <https://www.oecd.org/corruption/oecd-will-follow-canadian-proceedings-addressing-allegations-of-political-interference-in-foreign-bribery-prosecution.htm>

The 2016 “Jordan” decision has caused upheaval in criminal and regulatory cases in Canada.²¹ The case saw the Supreme Court set strict time limits within which those charged with crimes must be tried, in order to protect the constitutional right to be tried within a reasonable time (para 11b of the Canadian Charter of Rights and Freedoms). There are few exceptions to the time limits. This presents a practical challenge for the overburdened and under-resourced Canadian courts, especially in complex criminal cases, such as those involving economic crime. In general, court cases that take longer than the timeframes set out in “Jordan” have been stayed or dismissed, which has happened in corruption cases.²²

The Royal Canadian Mounted Police (RCMP) has exclusive jurisdiction to investigate foreign corruption, which is carried out by a special group of investigators. The limited RCMP expertise and financial resources are split between a number of high-priority types of crime, including money laundering, cyber-crime and terrorism.²³ Federal prosecutors at the Public Prosecution Service of Canada handle complex prosecutions involving economic crimes, but the staff is still limited and needs to be expanded. By contrast, a centralised agency would bring together people with relevant expertise within government and allow development of tools. It would also have the advantage of centralising data collection and ensuring timely dissemination of information on foreign bribery enforcement.

There is a lack of guidance to corporations in terms of what an appropriate preventive ethics and compliance programme should look like. Similarly, there is not enough guidance on what is expected when providing cooperation to authorities, the process applicable to receiving and evaluating voluntary disclosure, and methodologies for calculating fines.

Recommendations

- Increase transparency of court decisions, preferably via a central agency
- Create a publicly accessible centralised register of beneficial

²¹ *R v Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, is the Supreme Court of Canada decision that set down strict timelines for the completion of criminal cases in light of the constitutional protection of trial within a reasonable time under s. 11b) of the Canadian Charter of Rights and Freedoms.

²² Mr. Roy was an executive at SNC-Lavalin beginning in 1997. He was charged in relation to his alleged role in the corruption scheme in Libya. He reported to Riadh Ben Aïssa, who was then President of Socotec and Executive Vice-President of SNC-Lavalin.

²³ <https://www.cbc.ca/news/politics/rcmp-significant-resourcing-challenges-security-1.5492424>

- ownership information
- Promptly enact the detailed regulations needed to support full implementation of the remediation agreement regime, in particular providing essential guidance on those aspects not directly addressed in the current legislation, such as the structure of agreements and the conditions applicable to the appointment of monitors
- Increase transparency about how prosecutors evaluate the public-interest criteria when assessing whether it is appropriate to invite an organisation to negotiate a remediation agreement
- Consider the merits of creating a “Failure to Prevent” offence with a negligence-based fault (either penal negligence or strict liability) as an additional option for anti-corruption enforcement
- Increase police resources dedicated to corruption cases
- Consider alternatives to enable addressing corruption cases in a more expedited manner – through either the creation of a separate regulatory, quasi-criminal justice body to handle these cases or the attribution of this competence to the Competition Bureau of Canada, with appropriate resources in either case
- Provide guidance on the appropriate standards of a corporate compliance programme, and on post-crime cooperation between corporations and the authorities.