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Other matters

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Canada: Civil Society Report by Transparency International Canada, Inc.

An input to the UNCAC Implementation Review Mechanism: First year of review of UNCAC chapters III and IV

Executive Summary

This is an executive summary of Transparency International Canada, Inc.'s Civil Society Report on Canada's implementation and enforcement of selected articles in chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation) of the United Nations Convention Against Corruption (UNCAC). It was written and researched from the perspective of civil society and is intended as a contribution to the UNCAC implementation review process currently underway covering those two chapters.¹

Conduct of process

Table 1

Transparency and CSO participation in the review process

Did the government make public the contact details of the country focal point?	Yes
Was civil society consulted in the preparation of the self-assessment?	Yes (limited)
Was the self-assessment published online or provided to CSOs?	No
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	Yes (October 21 to 24, 2013)
Was civil society invited to provide input to the official reviewers?	Yes (selected CSOs and private sector representatives were invited to participate in a conference call with peer reviewers)
Has the government committed to publishing the full country report?	The government has not decided if it will publish the full country report, prepared by the peer reviewers, Iraq and Switzerland. The relevant Minister will decide once Canada has received the report.

Availability of information

There is little public information about investigations of corruption-related offences. Canadian authorities do not publish any statistics or other details about the investigations commenced or concluded in a given year. The Royal Canadian Mounted Police (RCMP) has declined to provide information about corruption investigations due to historical Canadian police practices and a concern about the risk of litigation claims in the event of adverse publicity to the target of an

¹ The report was concluded in October 2013.

investigation. In a recent international peer review mechanism, Canada reported that it has 35 active investigations underway pursuant to the *Corruption of Foreign Public Officials Act*.²

Once charges have been laid, details thereof and some evidence immediately becomes public. All court proceedings are public and well-reported in the press. Courts have discretion to close courts, seal warrants, and keep some evidence secret in very limited circumstances.

However, Canadian government officials have engaged in dialogue with civil society about anti-corruption efforts, for example through consultations on amendments to the *CFPOA* in 2013. Canada's Focal Point also provided some statistics at TI-Canada's request. As such, TI-Canada did not feel it would be necessary or useful to seek an Access to Information request in order to obtain further information. Government sources confirmed that information such as the Self-Assessment Checklist could not be made available through an Access to Information request.

Implementation into law and enforcement

Table 2

Implementation and enforcement summary table

UNCAC article	Status of implementation (Is the article Fully/Partially/ Not implemented?)	How are these provisions enforced in practice? (Good/ Moderate/ Poor)
Art 15 (bribery)	Fully	Moderate
Art. 16 (foreign bribery)	Fully	Moderate
Art.17 (embezzlement)	Fully	Good
Art. 20 (illicit enrichment)	Not implemented	N/A
Art.23 (Money laundering)	Fully	Moderate
Art. 26 (Liability of legal persons)	Fully	Good
Art. 32 and 33 (protection of witnesses, and whistleblower)	Partially	Poor
Art. 35 (compensation for damage)	Partially	Poor
Article 46(9)(b) &(c) (mutual legal assistance)	Fully	Good

Recommendations for priority actions

Recommendation #1. Domestic bribery. Federal and provincial governments must ensure that combating domestic bribery is a focus of law enforcement efforts. Absent dedicated efforts and resources, corruption will go uninvestigated. The strong role of journalists in uncovering corruption in Quebec speaks to the vital role that the media plays in uncovering corruption; however the responsibility for enforcing domestic bribery laws rests with law enforcement officials.

Recommendation #2. Foreign Bribery. When enacting the revenue transparency legislation promised by Prime Minister Stephen Harper, consider the

² OECD, "Canada: Follow-Up to the Phase 3 Report and Recommendations" (May 2013) at 3.

recommendations of civil society actors such as the Resource Revenue Transparency Working Group.³

Among other things, the Working Group recommends that mandatory disclosure requirements be implemented through provincial securities regulators, which have the expertise and the capacity to ensure that Canadian public companies and foreign companies who seek to raise capital in Canadian markets comply with these disclosure obligations.⁴ TI-Canada further recommends that Parliament consider how such requirements can be applied to private companies or state-owned enterprises which are not subject to the jurisdiction of securities regulators. Federal, provincial and civil society collaboration will help ensure Canada's legislation in this area both responds to transparency concerns and works appropriately within Canada's federal structure.

Recommendation #3. Foreign Bribery. Provide a civil (non-criminal) enforcement option for corruption offences to provide greater enforcement flexibility. A civil enforcement option would permit appropriate cases to be investigated and pursued without full-blown criminal investigations and prosecutions. Following the U.S. experience, the civil offence could omit the intent required by the criminal offence. It would operate based on a reasonableness standard, particularly respecting financial misrepresentation since bribes may be concealed, if grouped with other legitimate expenses.⁵ Alternative and potentially non-criminal proceedings could, for example, be part of the oversight of public companies by provincial securities regulators.

Recommendation #4. Foreign Bribery. All federal and provincial government departments, agencies and Crown corporations should introduce strict sanctions for corruption offenders. Export Development Canada (EDC) provides one such model: it requires companies to provide an anti-corruption undertaking, has publicly-available Debarment Procedures, and has developed anti-corruption compliance requirements for past offenders.⁶

Recommendation #5. Illicit Enrichment. Canada should build on the disclosure regimes it already has in place for public servants. For example, within 60 days of being elected, Members of Parliament are required to disclose their finances in detail.⁷ Summaries of this disclosure are published on the Conflict of Interest and Ethics Commissioner's website.⁸ In order to strengthen Canada's ability to detect illicit enrichment or other forms of corruption, Members of Parliament should also declare their assets when they leave office, so that any questionable changes can be investigated.

³ <http://www.pwyp.ca/en/issues/transparency-working-group>.

⁴ The Resource Revenue Transparency Working Group, "Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments, Draft for Consultation" (14 June 2013) at 4.

⁵ On June 4, 2013, TI-Canada's Legal Committee spoke with members of the US SEC in order to assist TI-Canada's development of submissions on the amendments to the CFPOA.

⁶ Export Development Canada, "Business Ethics"; EDC's *Anti-Corruption Policy Guidelines*.

⁷ Conflict of Interest Code for Members of the House of Commons, Standing Orders, Appendix (June 2011), ss. 20 and 21.

⁸ Public Registries, Office of the Conflicts of Interest and Ethics Commissioner (1 April 2011).

Recommendation #6. Money Laundering. To avoid the criminal misuse of legal entities, Canada should require the disclosure of beneficial ownership by trusts and companies registered in Canada. This information should be collected and made available to Canadian law enforcement authorities.

Recommendation #7. Whistleblower Protection. Canada should ensure that there is adequate statutory protection for whistleblowers within both the public and private sector. This requires the federal government to amend the Criminal Code and all levels of government to introduce more robust legislative protection for whistleblowers in the private sector. Similarly, all provinces and territories should have whistleblower protection statutes for both public and private sector employees. Following the Supreme Court of Canada’s ruling in *Merk*, legislation should ensure that whistleblowing employees are protected whether they choose to take their information “up the ladder” or outside the organization, directly to law enforcement officials.⁹

Recommendation #8. Whistleblower Protection. A civil remedy that would enable whistleblowers who experience reprisals to recover damages for their treatment would enhance the protection of whistleblowers. For example, employment standards legislation could be amended to provide for greater entitlement to damages if a wrongful dismissal were the result of a reprisal for whistleblowing.

Recommendation #9. Access to Information About the UNCAC Review. The federal government should publish information about the review process in an accessible location on government websites. This information should include: timely information about the process (focal point, schedule); Canada’s Self-Assessment Checklist (even without appendices, due to translation costs); the full country report; and links to relevant information on the UNODC website.¹⁰

Recommendation #10. UNCAC Review Process. The federal government should establish a follow-up process to review recommendations with civil society. Canada should announce the changes it makes as a result of the UNCAC Review Process.

Recommendation #11. Enforcement Resources. The federal government should ensure that changes to the structure of the law enforcement operations of the RCMP do not reverse the recent progress, but focus on corruption-related offences, both in Canada and by Canadians abroad.

The full TI-Canada review report can be found at
<http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>.

⁹ *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425 at 437 [*Merk*].

¹⁰ Recommended by Transparency International and the UNCAC Coalition, “The First Three Years of the UNCAC Review Process: A Civil Society Perspective” (16 May 2013).