TO BRIBE OR NOT TO BRIBE -
a less than ethical dilemma, resolved?

by Peter M. German*

“Corruption is not capitalism’s natural product, but its perversion.”
- Hon. Madeline Albright

I Introduction

Bribery of public officers has been an offence under Canada’s criminal law, since its
codification in 1892. That offence and a collection of other, little used provisions are
intended to serve as a bulwark against the corruption of Canadian public officials. Until
recently, however, the bribery of a foreign public official was not accorded similar, or
any treatment, in Canada’s criminal law. This void existed, despite passage of the
legislation passed unanimously in both Houses of Congress, part of the post-Watergate

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2 55-56 Vict. (Dom.), c. 29, now R.S.C. 1985, c. C-46, as amended, s. 120.

3 The provisions categorize public officers, as follows: s.119 (bribe judicial and political office holders); s.120 bribery of officials (bribery, influence peddling, interfering with tenders and contracting with Government); s.121 (fraud on the government and influence peddling in various forms); s. 122 (breach of trust by public officer); s.123 (municipal corruption); s. 124 (selling or purchasing office); and s. 125 (dealing in offices, etc.).

4 On a yearly basis, Transparency Internal ranks the relative corruptness of countries in a world corruption index. Canada ranked 50th out of 54 nations surveyed in the 1996 rankings; the United States ranked 40th; and Britain was 43rd. By 2001, Canada had improved to 7th place, the U.S. to 16th and Britain to 13th, out of 91 nations surveyed (http://www.transparency.org/).

attempt to cleanse America government of unethical behaviour and illegal conduct. It also came after a large number of high profile companies admitted to bribing foreign officials in order to obtain large government contracts.

For many years, the United States stood alone in its attempt to legislate international ethical standards. Being alone did not sit well however, with the American business community. Corporate America objected to the competitive advantage it felt was enjoyed by countries which did not require a similar, high ethical standard. A belief gradually developed that the best way to level the playing field was not to scrap the FCPA, but to universalize its terms. The exponential increase in free market economies after the fall of the Iron Curtain only exacerbated the need for ground rules to guide business, both domestic and foreign.

American pressure appears to have worked. In recent years numerous international organizations have studied the effects of corruption and made efforts to reduce its impact on business. The Organization of American States, the Commonwealth, the G8, the World Bank, multilateral development banks, the Council of Europe, the International Monetary Fund, the World Trade Organization, the European Union and the Financial Action Task Force have all attempted to deal with the problem. Canada has been an active participant in many of these organizations. In addition, various non-governmental organizations and pressure groups, notably Transparency International, have lobbied for change.


8 The Inter-American Convention Against Corruption was signed in Caracas, Venezuela, on March 29, 1996, by most nations in the Americas, and later by Canada (OAS Doc. B-58).

9 The Summit of Eight (G-8), meeting on June 21, 1997 in Denver, Colorado, endorsed the OECD’s work in the battle against corruption, as well as its timetable for action. At its Birmingham Summit, on May 17, 1998, the G-8 affirmed their desire to ratify the Convention by year end.

10 For example, in Africa and Asia.

11 The Criminal Law Convention on Corruption, ETS No. 173, was signed in Strasbourg on January 27, 1999.

12 See General Assembly Resolutions 51/59 and 51/191.

13 The Convention on the Fight Against Corruption was signed in May 1997.

14 The Forty Recommendations of the Financial Action Task Force include requiring the criminalization of money laundering, based on “serious offences”. The determination of what constitutes a serious offence is left to each jurisdiction.
The international organization which emerged as the most influential was the Organization for Economic Co-operation and Development (OECD). At the urging of the United States, it began negotiating a convention in 1989. The OECD is composed of 30 of the world’s most advanced economies, including Canada. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed by all members and by 5 non-member countries, in Paris, on December 17, 1997. Canada took great pride in becoming the country that triggered the Convention coming into force on February 15, 1999, by being the fifth major exporter to deposit its instrument of ratification, joining Japan, Germany, the United Kingdom and the United States.

In order to give substance to the Convention and meet its obligations, Canada required domestic enabling legislation. Bill S-21, the Corruption of Foreign Public Officials Act, was designed to do just that, both outlawing bribery of foreign officials and interfacing with Canada’s proceeds of crime and money laundering laws. The Bill raced through both Houses of Parliament and obtained Royal Assent in 10 days, almost a record for criminal legislation. Although its quick passage has been attributed to the upcoming Parliamentary Christmas break, the speed was more likely a result of the politics of international diplomacy than Yuletide festivities. Now in force, it awaits its first test. Pity the entity which becomes that test case for, in the words of one law firm: “the potential for embarrassment and unwanted publicity is obvious”.

Without question, the legislation will have an effect on how Canadians and Canadian corporations carry on business abroad. For that reason alone, an understanding of the

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16 Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

17 Argentina, Brazil, Bulgaria, Chile and the Slovak Republic. Martin notes that it is not an official OECD document but was negotiated in the framework of the OECD. For the Convention and commentaries, see [http://www.oecd.org/daf/corruption/](http://www.oecd.org/daf/corruption/).

18 Pursuant to Article 15(1) of the Convention, 60 days after the fifth of the ten OECD countries which have the largest share of exports, representing at least sixty per cent of the combined total exports of those ten countries, deposited its instrument of acceptance, approval or ratification, the Convention was to come into force.


legislation is of the utmost importance. This article examines the background to the legislation, its provisions, its strengths and its weaknesses.

II The Canadian Legislation

Bill S-21 was introduced in the Senate on December 1, 1998, passed on December 3rd, introduced in the House of Commons on December 7th and given Royal Assent on December 11th, becoming S.C.1998, c.34. It came into force on February 14, 1999, one day before the OECD Convention.

The Bill is the result of artful drafting, required in order to incorporate the mandatory provisions and certain optional provision in the OECD Convention, into Canada’s criminal law, while at the same time ensuring that the final product does not conflict in a material way with the parallel American legislation. In this way, Canada can meet its commitment to the OECD, yet avoid Canadian businesses being subject to different standards at home and south of the border. In order to achieve the foregoing objective, Parliament elected to use a stand alone statute as its vehicle and, in so doing, rejected the normal route of amending the Criminal Code.

Traditionally, criminal offences have been codified in the Criminal Code. Exceptions tend to be in areas that are considered the constitutional preserve of the federal government, including drugs, customs and excise. Although the provinces possess the right to investigate and prosecute certain federal statute offences, some object to the federal government doing likewise under the Criminal Code. This fact was not lost on those who wanted to ensure that the federal government retained the ability to investigate and prosecute foreign corruption cases. The corollary, however, is that the provinces will likely show little interest in expending resources on enforcing what will be viewed as legislation of national and international interest, leaving investigation to the Royal Canadian Mounted Police and prosecution to the federal Department of Justice.

A cynic might argue that creation of a stand alone statute is merely an attempt to showcase Canada in the international arena and has nothing to do with enforcement. The framers of the legislation argue, however, that the new offences will garner more attention in a stand alone format than as amendments to the already very lengthy Criminal Code. They also suggest that the new statute may expand over time and become

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22 The general rule being that the power to make a law carries with it a parallel power to enforce that law. For cases and a discussion of the federal power to prosecute offences created under its criminal law power or another federal power, see Attorney General of Canada v. C.N. Transportation [1983] 2 S.C.R. 206; R. v. Wetmore [1983] 2 S.C.R. 284; and Peter Hogg, Constitutional Law of Canada (Scarborough, Ont.: Carswell, 1997) at 17.
a code of its own. In any event, the stand alone format gives the federal government an unfettered ability to investigate and prosecute offences under the legislation.

III Analysis

Section 3, which closely follows the language of Article 1 of the OECD Convention, the heart of the legislation, creates the indictable offence of “Bribing a Foreign Public Official”. The offence is reproduced below, followed by an examination of its constituent elements:

3.(1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official

(a) as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions; or

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

(a) “Every person commits an offence who,”

Person is defined by reference to s. 2 of the Criminal Code, thereby including human and corporate (legal) persons. Legal persons include governments, public and private companies and societies. The real issue is not the definition of person, which admittedly is quite inclusive, but rather that person’s locus. Canadian criminal law, unlike that of the United States, does not use nationality as a basis for jurisdiction over an offence or an accused. Only in very limited circumstances will Canadian criminal law extend its


24 Ensures that the principles of corporate criminal liability will continue (see Gerry F. Ferguson, “Corruption and Corporate Criminal Liability”, a paper delivered to the Seminar on New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions, Vancouver, B.C., Feb. 4/5, 1999). The definition of person in s. 2 “include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively”.

reach to a person, including a Canadian citizen, who is alleged to have committed a
criminal offence wholly outside Canada. Normally, jurisdiction is territorial, a fact
reinforced by the Supreme Court of Canada’s decision in Libman v. The Queen
Libman involved a Toronto ‘boiler room’ operation, in which stock in dubious foreign
ventures was sold over the phone to American citizens, who sent their purchase money to
offshore destinations. Charged with fraud and conspiracy to commit fraud, Libman
challenged the jurisdiction of Canadian courts. After an exhaustive review of the English
and Canadian authorities, such as they were, LaForest J. crafted a test, which requires
close examination of the facts in each case.

The test calls for a real and substantial link between an alleged offence and Canada. At
least part of the offence must have occurred in Canada. According to LaForest J., a court
must first assess what occurred in Canada, in order to ascertain if there is a basis for
prosecuting and then, whether such a prosecution would offend the principles of
international comity. In his words:

…all that is necessary to make an offence subject to the jurisdiction of our
courts is that a significant portion of the activities constituting that offence
took place in Canada…. It is sufficient that there be a “real and substantial
link” between an offence and this country, a test well known in public and
private international law…

The Libman test invites the possibility that Canadians domiciled outside the country and
foreign nationals, as well as foreign subsidiaries of Canadian companies and possibly,
joint ventures between Canadian and foreign companies, can all be subject to the new
offence.

Jurisdiction based on territory was contemplated by Article 4(1) of the OECD
Convention, which calls for signatories to “take such measures as may be necessary to
establish jurisdiction over the bribery of a foreign public official when the offence is
committed in whole or in part in its territory.” In Article 4(4), the Convention urges
signatories to “review whether [its] current basis for jurisdiction is effective… and, if it is
not, [it] shall take remedial steps.” The provision is sufficiently broad to permit either the
territorial or the nationality principles as bases of jurisdiction. It is doubtful that
significant change will occur in Canadian legislation, although there is precedent for a
wider reach.

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26 The basic Criminal Code prohibition against convictions for offences committed outside Canada is
contained in s. 6(2). Exceptions include s. 7 (offences on aircraft) and s. 465 (conspiracies).
28 Ibid at 232.
29 Martin, supra at 9.
In the absence of more specific guidance from the Court, one commentator has observed that “where the scheme is “hatched” and largely put into effect in Canada, it is likely the court will conclude that Canadian criminal law will apply.”\(^{30}\) The farther from Canada, the harder it will be to show a link. Offshore companies, with mind and management outside Canada, or who work through subsidiaries are problematic. One academic suggests that the fact of a benefit accruing to a Canadian parent company, as a result of a bribe paid overseas, may suffice to create the required link.\(^{31}\) That, of course, is only a partial answer as a briber who fails to win a contract will receive no benefit.

If Canada’s criminal law does not capture a particular offence, that does not remove a briber from harm’s way. On the contrary, the act may contravene the domestic laws of the country where the bribe was paid or where the work is to be performed. The person may also unwittingly succumb to the jurisdiction of United States criminal law, which includes all companies that do business or that publicly trade in the United States.\(^ {32}\)

The second prong of the test, that international comity is not offended, is aided by the existence of the OECD Convention and similar treaties, which demonstrate an international commitment to fighting bribery of public officials.

(b) “in order to obtain or retain an advantage in the course of business.”

“Business” is broadly defined to include any venture carried out in Canada or abroad, for profit, specifically “any business, profession, trade, calling, manufacture or undertaking of any kind”.\(^ {33}\) Non-profit ventures, which likely include many, if not most, charitable and foreign aid societies, are therefore excluded.

This phraseology is significant because it sets up the facilitation exception to the statute's bribery offence. By specifying that the offence must relate to instances in which a bribe is paid in order to obtain or retain business, bribes paid to facilitate ongoing projects are not proscribed.

The term, “in the course of business”, likely captures contract specific bribes as well as monies expended in the present, but for future consideration. This view is contemplated

\(^{30}\) *Ibid.* at 3.

\(^{31}\) Ferguson, *supra* at 10.


\(^{33}\) Section 2.
by Article 1 of the OECD Convention which refers to the payment of bribes to retain, as well as to obtain business or another improper advantage.

(c) “directly or indirectly gives, offers or agrees to give or offer”

This terminology is also found in s.121(1)(a) of the *Criminal Code* and is intended to capture bribes paid directly or through an agent. This is important because such activity can occur through the medium of an intermediary - an agent or a consultant. Article 1 of the OECD Convention uses the words “through intermediaries” instead of “indirect” and the word “promise” instead of “agrees to give or offer”.

It is significant that the receipt of bribes is not proscribed by this legislation. Following the lead of the OECD Convention, the statute deals only with the briber, referred to as the active component or ‘supply side’ of the bribery equation. Although in many cases this will suffice to capture errant businesspersons, while leaving it to host countries to charge the recipient or “demand side” under domestic bribery legislation, the omission ignores two realities. Host countries may not have effective domestic legislation to capture the recipient. Secondly, the bribe may be given in a third country, such as Canada, where it would not be an offence for the foreign official to receive the bribe, unless he or she offends the conspiracy, or aiding and abetting provisions of the *Criminal Code*.

The curious omission of the recipient, “demand side” from both the OECD Convention and Canada’s legislation finds its genesis in international diplomacy and politics. It took a very long time for the OECD Convention to be negotiated, some ten years. Major concessions were made in order to bring countries aboard. One such concession was that the recipient’s conduct would not be criminalized. It was argued that the recipient will often be from a Third World country, poor by Western standards and possibly unaware of Western business ethics. The flip side to this argument is that the recipient could just as easily be a wealthy dictator, very familiar with the workings of the marketplace. The OECD choose to deal with the demand side, by way of education in public service ethics and not by enforcement. In the words of Canada’s Donald J. Johnston, Secretary-General of the OECD:

> On the “demand” side, corruption should be seen as more than individual criminal actions. It results from flawed government systems, faulty legislation and weak public institutions that do not enforce laws, and fail to provide adequate control, oversight, and transparency.

Article 1 of the OECD Convention requires that the offence be committed “intentionally”. Although not specifically mentioned in the Canadian legislation, intention or another form of *mens rea*, such as wilful blindness, is an essential ingredient.

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of a criminal offence. As indicated above, in addition to the ‘briber’, the normal rules of criminal responsibility provide that persons who conspire to bribe, attempt to bribe, aid or abet in an offence, form an intention in common to commit an offence or counsel the commission of an offence are also culpable.  

(d) “a loan, reward, advantage or benefit of any kind”

These words broadly define a bribe and are adopted from s.121(1)(a) of the Criminal Code. It matters not whether, independent of the bribe, the accused was the most deserving bidder or the successful bidder.

The foregoing definition is subject, however, to sections 3(3) and 4. The former includes two statutory defences and the latter exempts certain, otherwise dubious payments. All are significant caveats to the otherwise clear bribery offence.

Section 3(3)(a) creates an absolute defence to the offence, if the payment was lawful in the foreign state or organization. This defence is not a requirement of the OECD Convention, but is contained in the U.S. statute and thereby helps to align the Canadian and American statutes.

Section 3(3)(b) creates a defence if the bribe was made in payment for reasonable expenses, incurred in good faith, by or on behalf of a foreign official. These expenses must be directly related to the marketing of the person’s products or services or to the execution or performance of a contract between the person and the foreign state. Again, this defence is not mentioned in the Convention, but closely parallels one in the U.S. statute.

Section 4 exempts facilitation payments from the definition of a bribe. These payments, sometimes described as minor bribery, quid pro quo bribery or “speed money”, are made to foreign public officials “to expedite or secure the performance… of any act of a routine nature that is part of the foreign public official’s duties or functions.” An “act of a routine nature” does not include a decision to award new business, to continue business

35 The relevant provisions in the Criminal Code apply to this statute by virtue of s. 34(2) of the Interpretation Act.

36 Article 1 of the OECD Convention is more restrictive when it states “any undue pecuniary or other advantage.”

37 Section 104A(c)(1). Although not in the Convention, it is referred to in its Commentaries.

38 Section 104A(c)(2).

with a particular party, to decide on terms of business or to encourage others to make such a decision, or to secure an improper advantage.\textsuperscript{40}

Although presumably not exhaustive, examples of facilitation payments are provided in the statute. They include the issuance of business permits and licences;\textsuperscript{41} the processing of official documents;\textsuperscript{42} the provision of routine mail and utility services;\textsuperscript{43} and “the provision of services normally provided as required”.\textsuperscript{44} This latter category can include police protection, cargo loading and unloading, the protection of perishables and “the scheduling of inspections related to contract performance or transit of goods”.\textsuperscript{45} The recipients of facilitation payments can include any officials, not just minor functionaries.

Allowance for facilitation payments, which includes courtesy gifts, is another feature adopted from the American legislation.\textsuperscript{46} The view appears to be that payments which are not made to secure new business, such as procurement contracts, should be unlawful; whereas payments made in order to expedite contracts which are already in place should not. The distinction therefore is between discretionary acts, generally the purview of senior officials, such as the granting of contracts; and non-discretionary, routine functions performed by bureaucrats. The obvious purpose is to avoid business grinding to a halt as a result of minor or routine payments not being made. It may also reflect a desire that the might of the state not be unleashed upon minor transgressions. At least one law firm admonishes its clients to ensure that such payments are truly nominal.\textsuperscript{47}

The irony that a statute that seeks to outlaw bribery, specifically exempts ‘small bribes’ is not easy to reconcile. The effect of permitting ‘minor’ bribes to bureaucrats, in Third World countries has been described by one commentator as an “apologetic approach”, indefensible from the perspective of the world’s poor: “the higher the prevalence of corruption, the lower the capacity or willingness of public service agencies to solve their clients’ problems.”\textsuperscript{48}

\textsuperscript{40} Section 3(5).
\textsuperscript{41} Section 3(4)(a).
\textsuperscript{42} Section 3(4)(b).
\textsuperscript{43} Section 3(4)(c).
\textsuperscript{44} Section 3(4)(d).
\textsuperscript{45} Ibid.
\textsuperscript{46} Also in the OECD Commentaries. The U.S. includes a catch-all, “actions of a similar nature” in its definition of facilitation payments. Martin questions whether the absence of a catch-all provision in the Canadian definition, combined with the inclusion of the specific examples noted above, will restrict the Canadian definition to those specific items (Martin, supra at 8).
\textsuperscript{47} McMillan Binch, supra at 3.
\textsuperscript{48} Carel Mohn, Speedy services in India, \textit{TI Newsletter}, March 1997, p. 3.
This irony is compounded when one recognizes that it creates, or perpetuates, a clear double standard, legitimating conduct involving foreign public officials which would be illegal if committed in Canada, in respect of domestic public officials, where no such defences apply. The only philosophic justification appears to be a concession to the fact that less advanced forms of bribery are endemic in many emerging economies, combined with a pragmatic view that the world cannot be changed overnight.

(e) “to a foreign public official or to any person for the benefit of a foreign public official”

The definition of a “foreign public official” is important because the legislation is directed at the bribery of government officials and not private individuals. It includes persons who hold an elected, non-elected or judicial position in any level of a foreign government, body or authority and who perform public duties or functions. It also includes officials or agents of public international organizations, such as the OECD or the United Nations, which have been formed by governments or by other public international organizations.

Restricting the application of this new offence to incidents involving public officials omits ‘private to private’ situations, arguably a much broader and more numerous category, in which the director, employee or agent of a public or private company bribes a private citizen or company, in a foreign country.

The OECD recognized that by restricting the ambit of the Convention to foreign public officials, much corruption will go untouched. Why the Convention is intentionally restricted is explained by the trade offs that occurred in the negotiation process. Stemming the tide of public, as opposed to private corruption was viewed as the highest priority and a good starting point, at least one which was palatable. The OECD now hopes to expand the ambit of the Convention, to include private to private bribery, recognizing that the global expansion of free market principles will inevitably increase the privatization of state owned enterprises.

The term, “for the benefit of”, is intended to cover intermediaries or third parties, such as family members and political allies. Whether this includes contributions to political parties depends upon their status as “persons”. The involvement of third parties has been a recurring problem with the United States legislation and doubtless will be with Canada’s as well. In the absence of legislated vicarious liability, which is found in the

\[49\] See Art. 1.4(a) of the OECD Convention.

\[50\] Section 2. This definition is similar to that in Art. 1.4 (a) of the OECD Convention.

\[51\] Article 1 of the OECD Convention uses the term “for that official or for a third party”.

\[52\] See the definition in s. 2 of the Criminal Code.
FCPA. Canada is left with existing principles of corporate and personal liability.\textsuperscript{53} A large corporation which hires people ‘on the ground’ in foreign countries may attempt to insulate itself from practices which run afoul of the legislation. If the corporation is insulated, chances are that its key managers and directors will be as well. This has certainly been the United States experience, in which front-line managers have taken the ‘heat’ for those back home.\textsuperscript{54} The best fix in the Canadian context, short of statutory amendment, will be a strong case based upon wilful blindness as a form of mens rea.

\begin{itemize}
\item[(f)] ‘(a) as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions; or’
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\item[(b)] to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.’\textsuperscript{55}
\end{itemize}

A “foreign state” can be any country, other than Canada, as well as that country’s political subdivisions, such as provinces, states and territories; government departments and branches; and agencies of government, such as Crown or state-run corporations.\textsuperscript{56}

The legislation seeks to prevent Canada from becoming a bribery haven as much as it attempts to prevent Canadian businesspersons from engaging in such activity. As a result, non-citizens coming to Canada in order to bribe a foreign public official, who happens to be resident or present in Canada, are captured by the legislation in the same manner as Canadian citizens bribing persons abroad.

\section*{IV Penalty}

Article 3 of the OECD Convention requires that signatories impose criminal sanctions which are “effective, proportionate and dissuasive”, comparable to the offence of bribery of a domestic public official\textsuperscript{57} and; in the case of natural persons, of sufficient length to permit effective mutual legal assistance and extradition. Section 3(2) of Canada’s legislation meets these criteria by imposing a maximum term of five years

\textsuperscript{53} See Ferguson, supra.

\textsuperscript{54} Martin notes that no CEO of a US company has ever been convicted of a bribery offence under the FCPA, supra at 8.

\textsuperscript{55} Article 1(4)(c) of the OECD Convention defines the performance of one’s duties to include “any use of the public official’s position, whether or not within the official’s authorised competence”.

\textsuperscript{56} Section 2. This definition parallels that in Art. 4.4 (c) of the OECD Convention.

\textsuperscript{57} Sections 121(1)(a) and 123 of the Criminal Code carry a maximum term of five years in prison.
imprisonment. Legal persons, other than natural persons, can be fined in the discretion of the judge.

In recent United States cases, large fines were imposed. In the 1995 Lockheed case, a fine of US$24.8 million was ordered, double the company's profit on the offending transaction. In the United States, officers, directors and employees are not entitled to indemnification for fines imposed under the FCPA. Such is not the case in Canada.

V Proceeds of Crime Provisions

Section 5 establishes the offence of laundering proceeds of the new bribery offence and is patterned on s. 462.31 of the Criminal Code and like provisions in the Controlled Drugs and Substances Act, the Customs Act and the Excise Act. It outlaws laundering the property or proceeds of the bribery of a foreign public official. As with laundering provisions in the other statutes, the definition of the actus reus is extremely broad and there is a two level knowledge requirement. The offence is deemed to have occurred even if the proceeds, in Canada, resulted from an act or omission outside Canada, which would have constituted bribery of a foreign public official if it was committed in Canada.

Section 4 imports the offence of possession of proceeds of crime, which is patterned on s. 354 of the Criminal Code and is also similar to provisions in the Controlled Drugs and Substances Act, the Customs Act and the Excise Act. It outlaws possession of the proceeds of the offence of bribery of a foreign public official and of the offence of laundering the proceeds of that bribe. As with laundering, the bribery that gave rise to the proceeds may have occurred in Canada or abroad, provided that the proceeds are in Canada.

An interesting issue for the courts will be to determine what constitutes proceeds of bribery. By example, a one thousand dollar bribe may allow a company to obtain a contract worth a million dollars.

Under the legislation, both possession and laundering of the proceeds are hybrid offences which carry a maximum term of ten years imprisonment, if proceeded by way of indictment, or a maximum fine of $50,000 and imprisonment for six months, or both, if proceeded summarily. Ironically this is double the maximum for the predicate bribery offence. A corporate accused is liable on indictment to a fine with an unlimited maximum.

This is the same maximum that applies to bribery of a domestic public official (s.121).


15 USC 78 ff(c)(3).

These are the same maximums that apply to possession of the proceeds under s.355 and laundering under s. 462.31(2) of the Criminal Code.
The inclusion of proceeds offences results from Article 3(3) of the OECD Convention, which requires that the bribe and its proceeds, or property of equivalent value, be eligible for seizure and forfeiture, or that a comparable monetary sanction be imposed. Although property substitution is not permitted in Canada, a fine in lieu of forfeiture is permitted under s. 462.37(3) of the Criminal Code. Article 3(4) of the OECD Convention encourages signatories to impose additional civil or administrative sanctions. The Canadian legislation does not, likely out of fear that such sanctions would violate the constitutional responsibility of provinces over property and civil rights.

Article 7 of the OECD Convention provides that where bribery of a domestic public official is a predicate money laundering offence, which it was not in Canada, the bribery of a foreign public official should be accorded similar treatment. In order to ensure uniformity, s. 462.3 of the Criminal Code was amended to include the new offences and to add three pre-existing corruption provisions to the definition of “enterprise crime offence”. As a result, they all become predicate offences for the purpose of the possession of proceeds and laundering offences found in Part XII.2 of the Criminal Code.

VI Income Tax Act

In the same manner that the Criminal Code had not previously addressed the bribery of foreign public officials, so too the Income Tax Act had not addressed the deductibility of bribes to such persons. A 1990 amendment proscribed the deduction of monies expended for any purpose which constitutes an offence of bribery under ss. 119, 120, 121, 123, 124, 125, 393 and 426 of the Criminal Code and s. 465 of the Code, as it relates to the foregoing offences. The deduction of bribes of foreign public officials has now been added to that list through an amendment included in Bill S-21. Section 10 of the Act amends s. 67.5(1) of the Income Tax Act, to include the bribery of foreign public officials, as a prohibited deduction.

VII Prevention

Canada’s legislation does not include any provisions designed to assist with the identification of possible violations, such as whistleblower protection. Furthermore, no requirements are placed on professionals, such as accountants, to report such cases.

62 Section 123 (municipal corruption), s. 124 (selling or purchasing office) and s. 125 (influencing or negotiating appointments of dealing in offices).

63 Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3, s. 92(13).

64 S.C. 1970-71-72, c.63, s. 67.5(1).

65 This amendment flows from a 1996 Recommendation of the OECD (see Martin, supra at ft. 21).
Article 8(1) of the OECD Convention requires that signatories take the steps which they can, in relation to financial record keeping, disclosure, accounting and auditing, which will prohibit off-book, slush funds and other false or misleading practices, which aid in the payment or concealment of bribes. Article 8(2) requires “effective, proportionate and dissuasive civil, administrative or criminal penalties” for such falsehoods. The Canadian legislation includes no such provisions, relying instead on existing provisions in the *Criminal Code*, regulatory legislation and on the rules of conduct of professional societies.

Ironically, the majority of American prosecutions have arisen from the accounting provisions in their anti-corruption legislation, which require the maintenance of accurate records and impose accounting controls. Despite the absence of any preventative provision related to accounting in Canada’s legislation, one law firm has advised its clients in the following terms:

> Internal audit and accounting systems should be reviewed to ensure that they meet the Convention standards. Corporations which are obliged to disclose contingent liabilities must also take into account the possible consequences of being convicted for bribery. The accounting provisions [of the Convention] also have serious implications for those conducting audits should they suspect that bribery or related offences have been committed.

**VIII  Enforcement**

Canada’s legislation attempts to satisfy provisions of the OECD Convention, which further the investigation and prosecution of offences. It also incorporates additional features related to the proceeds of crime. These provisions, which facilitate mutual legal assistance, extradition, wiretaps and undercover operations, and are described below.

Following the pattern in other proceeds of crime statutes, the legislation protects police officers and persons acting under their direction, from prosecution for laundering or possession of the proceeds of the new bribery offence, if they commit the *actus reus* of either offence in the course of their duties. Typically this could occur if the police pose in an undercover capacity, as drug traffickers or money traders and either possess or launder bribe money. They are not permitted to commit the predicate bribery offence, however. The legislation incorporates the definition of “peace officer” found in s. 2 of the *Criminal Code*.^{68}

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66 15 USC 78 m(b)(2)(A).

67 15 USC 78 m(b)(2)(B).

68 The definition of “peace officer” includes numerous persons, as opposed to “public officer”, which is much more restrictive.
Similarly, the restraint, seizure, forfeiture and ancillary proceeds of crime provisions found in Part XII.2 of the *Criminal Code* apply, with such modifications as the circumstances dictate, to the three new offences created by the legislation.

(a)  **Electronic Eavesdropping**

All three offences created by this legislation have been added to the definition of “offence” in section 183 of the *Criminal Code*, making them predicate offences for electronic eavesdropping applications.

(b)  **Mutual Legal Assistance**

Mutual legal assistance, already well established in Canada, is encouraged by Article 9 of the OECD Convention. Article 9(1) calls for prompt and effective legal assistance in criminal and civil matters. Article 9(2) provides that, in the case of countries which insist on dual criminality as a precondition to actioning an incoming mutual legal assistance request, that condition is deemed to exist if the offence is within the scope of the Convention. Furthermore, a party must not decline to assist another, based solely on the ground of bank secrecy.69

(c)  **Extradition**

The new offences are extraditable. Where countries, insist on reciprocal extradition treaties and a treaty is not in force with another country, Article 10(2) of the OECD Convention provides that the Convention can itself be the legal basis for extradition in regard to the offence of bribery of a foreign public official. Similarly, Article 10(4) remedies the requirement of nations, such as Canada, 70 that extradition is conditional on there being dual criminality, by deeming that condition to be satisfied if the offence for which extradition is sought comes within the scope of the bribery offence in Article 1. Nations are given the option in Article 10(3) of doing one of two things with respect to nationals alleged to have bribed a foreign public official: either extradite the person or try that person in its domestic courts.

Where more than one state has jurisdiction over an alleged offence, nations are expected to consult in order to determine which forum is most appropriate for the prosecution. 71 Article 5 of the OECD Convention states that the investigation and prosecution shall not be influenced by national economic interest, by international relations or by fear of disclosing the identity of persons involved.

69 Article 9(3).


71 Article 4(3).
(d) **Limitation of Action**

Being indictable offences, no statute of limitation applies to the newly created offences. This differs from the United States legislation, to which the standard, five year federal limitation of action applies.\(^2\)

**IX Report**

Section 12 of the legislation, added by the Senate during its deliberations, requires that within four months of the end of each fiscal year, the Ministries of Foreign Affairs, International Trade and Justice, jointly report on the implementation of the OECD Convention and on the enforcement of the new statute. Article 12 of the OECD Convention also creates an independent monitoring process, carried out through the offices of the OECD Working Group on Bribery in International Business Transactions.

**X Summary**

At a recent conference which focussed on public corruption, U.S. Treasury Secretary Robert E. Rubin summed up the effect of corruption on public institutions: \(^3\)

Corruption disrupts normal business and public policy decision-making by benefiting the few at the expense of the majority. It distorts the allocation of financial and human resources to inefficient uses often inconsistent with a nation’s social, political and economic objectives and needs. It discourages small business, entrepreneurs, and consumers who simply cannot afford the costs of bribery. It discourages foreign investment. And it damages the respect for law and public and financial institutions, undermines the credibility and effectiveness of both elected and appointed government officials, and creates an environment conducive to crime in the private sector, including organized crime.

Rubin noted that corruption can increase a nation’s vulnerability to crisis, it can impede the necessary response to crisis and affect national confidence. It can displace resources intended for social programs. It is a threshold economic issue in the global economy. In 1996, the Executive Director of Interpol, Raymond Kendall, described the growth of corruption as the greatest obstacle to effectively

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\(^2\) 18 USC 3282.

combating organized crime and “a cancer to the world which must not be underestimated.”

Globalization of world economies, the rapid flow of money across international borders, the flight of capital to offshore havens and the weakness and instability of many nations contribute to the increase in corruption around the world. Dealing with these factors will remain a challenge for all nations, including Canada.

The investigation and prosecution of foreign corruption cases will, by their nature, be both resource and time intensive. Such cases tend not to be favourites of police or prosecutors, and are not perceived to be priorities within the criminal justice system, which increasingly targets its resources against violent crime and other crimes against persons. Effective enforcement and prosecution will depend on political will, largely demonstrated through the application of resources to the agencies within the criminal justice system which are charged with giving life to its provisions. In the final analysis, the deterrent role of the new legislation may well be its lasting and most effective legacy.

The development of a “zero tolerance”, anti-fraud culture in business and government combined with effective due diligence, will likely be the most effective route by which society can hope to curb the expansion of corruption and ensure the sanctity of those institutions which we hold precious.

In the end, if the new legislation serves to foster a new attitude in domestic and international business, one which decries corruption and bribery in every form and encourages a level playing field in business and government contracts, it will have been a success.

74 Berliner Morgenpost (Gy.), reported by Transparency International (http://www.transparency.org/).
