CHAPTER 2

BRIBERY AND OTHER CORRUPTION OFFENCES

CONTENTS

1. INTRODUCTION AND OVERVIEW

As noted in Chapter 1, corruption is a broad concept. In part, what counts as corruption is shaped by social, political and economic beliefs and norms in a given society. While there are legitimate disputes on whether certain forms of conduct are or should be classified as corruption, there is a core of conduct which is almost unanimously viewed as corruption. The fact that the periphery of corruption is grey does not provide any insurmountable barrier to defining and criminalizing the core of corruption.

If the concept of corruption is generally understood, in the words of Transparency International, to be "the abuse of entrusted power for private gain," it is readily apparent that there are many types of behaviour that constitute corrupt abuse of public power for private gain. For the most part, states do not treat corruption as one offence, but rather create a number of separate offences to deal with corrupt behaviour. Those separate offences can be defined narrowly to apply only to corrupt behaviour in the sense of the misuse of public power or they may be defined to apply more broadly to all persons, whether or not those persons are in positions of public power. For example:

- Theft (embezzlement) is (in general) the unlawful taking of another's property. When that taking is by a public official in respect to public funds, that conduct is corrupt. States can treat this latter corrupt behaviour as simply one example of the general offence of theft, or can create a specific crime of corruption called theft by public officials in respect to their entrusted powers.
- Fraud is (in general) the unlawful taking or use of another's property by dishonest means (i.e., lies, false pretences, omission of material information, etc.). When that fraud is committed by a public official in respect to their public functions that conduct is corrupt. States can treat this latter conduct as simply one example of the general offence of fraud, or they can create a specific crime of fraud by public officials carrying out their public duties. Bribes offered or received in the context of

public procurement and bid rigging can be treated as offences of fraud or as specific corruption offences.

- Extortion is a third example. It is (in general) a crime of theft which is committed by threatening economic or physical harm to another, unless the threatened person gives the person making the threat the money or other benefit or advantage being demanded. Once again, extortion can be committed by or in respect to a public official in the context of their public functions in which case the conduct can be criminalized under a specific crime of extortion by, or of, public officials, or it can be treated as one example of the general offence of extortion.

On the other hand, there are offences that are specifically created to deal with the corrupt behaviour of public officials in respect to their public functions. For example:

- Bribery is (in general) the asking or taking by a public official of a benefit or advantage for private gain in exchange for a misuse of the official's entrusted powers. Bribery is also a bilateral offence—it criminalizes the conduct of the public official and also the conduct of third party bribers who have offered, given or agreed to give a bribe to a public official.
- Buying or selling a public office or exercising or promising to exercise improper influence on an appointment to a public office is an offence of corruption and is a specific offence in the penal codes of many nations.

There are other offences relevant to corruption and bribery. These offences include money laundering and books and records offences, which are seen as necessary to effectively fight against the commission of large-scale bribery, as well as other economic crimes.

Rose-Ackerman notes that merely creating offences will not on its own adequately address corruption. She states:

> A narrowly focused reform may not limit corruption unless combined with greater overall governmental transparency and outside monitoring. Particular laws against bribery, extortion, and self-dealing will never be sufficient to deal with widespread corruption. Fundamental redesign of the relations between the state and society will often be the only way to control systemic corruption. Nevertheless, well-designed and enforced laws against bribery and extortion are a necessary backup to any broader reform.[1]

As noted in Chapter 1, the United Nations Convention against Corruption (UNCAC) has been ratified by 183 countries across the globe. It is by far the most influential international anti-corruption instrument. State Parties to UNCAC are required to enact legislation criminalizing certain offences and are required to consider criminalizing other offences. In other words, UNCAC contains both mandatory and optional corruption offences and

[1] Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion" (2010) 6 Annual Rev Law Soc Sci 217 at 220-221.

provisions. Signatories to UNCAC and members of the OECD are required to implement mandatory offences and to consider implementing optional offences. Both types of provisions are listed below.

Mandatory Offences:

(1) Bribery of National Public Officials
(2) Bribery of Foreign Public Officials
(3) Public Embezzlement
(4) Money Laundering
(5) Obstruction
(6) Liability of Legal Entities
(7) Accomplices and Attempts
(8) Conspiracy to Commit Money Laundering
(9) Book and Records Offences[2]

The OECD Convention is restricted to criminalizing bribery of foreign public officials in the course of international business transactions. The OECD Convention does not contain offence provisions on items (1), (3) and (5) listed above from UNCAC.

As you will see in the course of reading this chapter, domestic law in the US, UK and Canada incorporates all the mandatory provisions set out above, albeit with slightly different language and scope. Appendix 1 of this chapter references the exact provisions in each country that correspond to the UNCAC provisions.

Optional Offences:

(1) Foreign Official Taking a Bribe
(2) Giving a Bribe for Influence Peddling
(3) Accepting a Bribe for Influence Peddling
(4) Abuse of Public Function to Obtain a Bribe
(5) Illicit Enrichment
(6) Private Sector Bribery
(7) Embezzlement in the Private Sector
(8) Concealing Bribery Property

Apart from the offence of illicit enrichment, these optional offences can also be found in US, UK and Canadian law.

[2] UNCAC does not require State Parties to "criminalize" books and records offences per se but instead requires signatories to take necessary steps to prevent the creation and use of improper and fraudulent books and records.

While UNCAC and the OECD Anti-Bribery Convention include a number of corruption offences, this chapter explores the two most commonly charged offences: (1) bribery of national and foreign public officials and (2) books and records offences. The other Convention offences are listed in Appendix I at the end of this chapter. The offence of money laundering is explored in detail in Chapter 4 of this book. The remainder of this chapter involves a description of the elements of and relevant defences to bribery and books and records offences both domestically and in foreign countries under:

(1) UNCAC
(2) OECD Convention on Corruption of Foreign Officials
(3) US law, especially the *Foreign Corrupt Practices Act* (*FCPA*)
(4) UK law, especially the *Bribery Act 2010* and
(5) Canadian law, especially the *Corruption of Foreign Public Officials Act* (*CFPOA*).

Chapter 3 then continues with an analysis of several general criminal law principles that are relevant to defining the scope of bribery and books and records offences, namely:

(1) extra-territorial jurisdiction for bribery offences
(2) criminal liability of corporations and other legal entities
(3) party or accomplice liability and
(4) inchoate liability (attempts, conspiracy and solicitation).

An understanding of the foreign bribery laws of the US and UK is especially important for lawyers and their corporate clients in other jurisdictions because these two countries have wide extra-territorial jurisdiction provisions in their bribery statutes. Foreign persons and companies can often be prosecuted under the US or UK law. For example, a Canadian company which offers a bribe to a public official in Bangladesh can be prosecuted not only in Canada, but also in the US under the *FCPA* if the Canadian company's shares are listed on the New York Stock Exchange (or any other US Stock Exchange).

2. DOMESTIC BRIBERY

2.1 UNCAC

2.1.1 Offence of Bribery of a National Public Official

Article 15 of UNCAC requires State Parties to create a criminal offence in respect to bribery of its public officials. Article 15 states:

> *Article 15. Bribery of national public officials*
>
> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

> (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
>
> (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(i) Active and Passive Bribery

Article 15(a) is sometimes referred to as active bribery of a domestic public official, while Article 15(b) is sometimes called passive bribery. "Active" bribery refers to the giving or the offering of a bribe or other form of "undue advantage" to a national public official. "Passive" bribery, though somewhat a misnomer, refers to the actions of the corrupt public official who accepts, or in some cases, actively solicits, a bribe.

(ii) Public Official

Bribery is an offence involving public officials. "Public official" is defined in Article 2(a) of UNCAC as follows:

> "Public official" shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function including for a public agency or public enterprise, or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party.

As Michael Kubiciel notes in his article "Core Criminal Law Provisions in the United Nations Convention Against Corruption," the UNCAC definition of "public official" is very broad.[3] It includes persons who do not hold official positions but perform a public function or provide a public service. This definition is more expansive than the definition prescribed by earlier multilateral conventions. The definition recognizes that even those who do not occupy official positions may still exercise influence and be subject to corruption.

(iii) Undue Advantage

Another key term in Article 15 is "undue advantage." The United Nations Office on Drugs and Crime (UNODC)'s *Legislative Guide for the Implementation of the United Nations Convention against Corruption* states that an "undue advantage may be something tangible or intangible,

[3] Michael Kubiciel, "Core Criminal Law Provisions in the United Nations Convention Against Corruption" (2009) 9 Intl Crim L Rev 139.

whether pecuniary or non-pecuniary."[4] As Kubiciel notes, the word "undue" is an imprecise term. According to a strict interpretation, "undue advantage" could mean all types of advantages, even small, culturally acceptable gifts. The word "undue" could also support a flexible interpretation and exclude gifts of low value that are generally socially acceptable (e.g., a cup of coffee). He warns, however, that the "line between an acceptable gift and corruption is thin."[5] A tradition of gift-giving should not necessarily be an automatic defence to a bribery charge. Kubiciel argues that states should be careful to evaluate which behaviours are actually cultural traditions, and whether even those that can be characterized as cultural traditions are nonetheless harmful to public confidence in the state. Some countries deal with the issue by passing laws or regulations requiring all public officials to report (and sometimes surrender) to an appropriate authority a) the receipt of any gift/advantage, or b) the receipt of a gift/advantage over a specified monetary value.

(iv) Offering, Promising or Giving

Article 15(a) criminalizes the "offering, promising or giving" of an undue advantage. Therefore, the unilateral offer of a bribe, irrespective of whether the offer was accepted, must be criminalized by State Parties.

(v) Soliciting or Accepting

Similarly, a request for a bribe, whether or not a bribe is agreed to or is actually given is to be criminalized (Article 15(b)). Kubiciel argues that the prohibition of an "acceptance" of an "undue advantage" (Article 15(b)) should be interpreted to mean that an offence is committed even if the public official acquiesces to the offer of a bribe, but subsequently returns the bribe or does not follow through on performance of the corrupt agreement. The latter circumstances would be, however, relevant to determining an appropriate sentence for the public official. It also raises the issue of whether voluntary withdrawal from the bribery scheme might be accepted as a defence as it is in the law of attempts in some countries.

(vi) Intention

Article 15 clearly states that the prohibited conduct in that article must be committed intentionally. The phrase in subparagraphs (a) and (b) "in order to act or refrain from acting in the exercise of his or her official duties" requires that "some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties."[6] In instances where the accused offers a bribe that is not accepted, the accused must have intended to offer the advantage and must also have

---

[4] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* [Legislative Guide (2012)], 2nd ed (United Nations, 2012), at 65, online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf>.

[5] Kubiciel (2009).

[6] Legislative Guide (2012) at 65.

intended to influence the behaviour of the recipient in the future. Kubiciel notes that this phrase does not expressly prohibit instances where an undue advantage is offered or received by an official after the official has acted or refrained from acting in the exercise of his or her official duties. It could be argued that such conduct does constitute "indirectly" giving an undue advantage if the parties know or reasonably suspect that an undue advantage will be given after the fact. Alternatively, if courts do not adopt that interpretation of "indirectly," State Parties could consider implementing legislation that criminalizes this type of behaviour.

2.1.2 Defences

There are no special defences for domestic bribery under UNCAC. Of course, the absence of any elements of the offences in Articles 15 to 25 will constitute a defence.

Article 28 of UNCAC deals with knowledge, intent and purpose as elements of an offence. The provision states that "[k]nowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances." Absence of these objective factual circumstances is a defence if the knowledge, intent or purpose is not proven in another way. The UNCAC Commentary provides that "national drafters should see that their evidentiary provisions enable such inference with respect to the mental state of an offender, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven."

The issue of whether facilitation payments are prohibited by UNCAC is discussed in Section 4 below.

2.1.3 Limitation Periods

Article 29 of UNCAC sets out its requirements in respect to limitation periods. Article 29 states:

> Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

The *Legislative Guide* notes "the concern underlying this provision is to strike a balance between the interests of swift justice, closure and fairness to victims and defendants and the recognition that corruption offences often take a long time to be discovered and established."[7] This justifies the wording of Article 29, which requires States to "introduce

[7] *Ibid* at 108.

long periods for all offences established in accordance with the Convention and longer periods for alleged offenders that have evaded the administration of justice."[8]

The provisions under UNCAC with regard to limitation periods parallel those under the OECD Convention, but with the additional option of suspending the limitation period when the offender is found to have been evading the administration of justice. The *Legislative Guide* suggests two ways that State Parties may implement Article 29. The first is to review the length of time provided for by existing statutes of limitations. The second is to review the way in which limitation periods are calculated. The *Legislative Guide* notes that "Article 29 does not require States parties without statutes of limitation to introduce them."[9]

2.1.4 Sanctions

UNCAC has very little in the way of requirements or guidance for sanctions and sentencing in regard to corrupt conduct. It does not specify any maximum or minimum sentences for corruption offences. Instead, Article 12(1) of UNCAC 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. And Article 30(1) provides that "each State Party shall make the commission of [corruption] offences ... liable to sanctions that take into account the gravity of that offence." As an ancillary consequence, Article 30(7) indicates that State Parties should consider disqualification of persons convicted of corruption from holding public office for a period of time.

2.2 OECD Convention

As the name of the Convention implies, the OECD *Convention on Combatting Corruption of Foreign Public Officials in International Business Transactions* only deals with bribery of foreign public officials, not domestic public officials.[10] Thus the OECD Convention is not relevant to this section on domestic bribery.

2.3 US Law

2.3.1 Offense of Bribery of a National Public Official

Domestic bribery is criminalized under both state and federal criminal law. Federal law (18 USC., chapter 11) sets out a number of offenses dealing with bribery, graft and conflict of interest. The principal federal section prohibiting both active and passive bribery is section 201 of 18 USC. Section 201(b)(1) which criminalizes any person who "directly or indirectly,

---

[8] *Ibid* at 109.
[9] *Ibid*.
[10] OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), [OECD Convention (1997)], online: <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

corruptly gives, offers or promises anything of value" to (or for the benefit of) any public official (or person nominated or selected to be a public official) with intent to influence any official act or the commission of any act of fraud by that official on the US, or to induce a public official to violate that official's lawful duties. Section 201(b)(2) creates similar offenses for a public official to "corruptly demand, seek, receive, accept or agree to receive or accept anything of value" in return for improper influence or use of his or her public powers and duties. Section 201(a) defines "public official," "person selected as a public official" and "official act." The above offenses are similar to bribery offenses in most countries. The conduct (*actus reus*) elements which need to be proven are: (1) the offering/giving or seeking/receiving of "anything of value" to or by (2) a current or selected public official (3) for improper influence of an official act or duty. The mental element (*mens rea*) is doing so "corruptly with intent to influence an official act or duty." The expression "anything of value" is very wide and can include many things other than money. Also, there is no minimum economic value (or dollar figure) placed on a thing of value. A prosecutor who offers an accomplice immunity or leniency is offering a thing of value, but that is not bribery because the offer is not for a corrupt purpose. "Public official" is also defined widely. The expression "an official act" is defined in § 201(a) as follows:

> (3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

In *R v McDonnell*,[11] the US Supreme Court interpreted the meaning of "official act." The Court held that the prosecutor must "identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official" and then prove the public official made a decision or took action on that issue or agreed to do so.[12] The action taken must involve formal exercise of governmental power similar in nature to a lawsuit, determination before an agency or hearing before a committee.[13] In this regard, a typical meeting, call or event will not be an "official act." The Court was critical of the prosecution's expansive definition of "official act" noting that "White House counsel who worked in every administration from that of President Reagan to President Obama warn that the Government's 'breathtaking expansion of public corruption law would likely chill federal officials' interactions with the people they serve.'"[14]

---

[11] *R v McDonnell,* No 15-474 (2016) (Supreme Court of the United States), 579 US __ (2016), at 14. For a brief summary of the case, see Richard L Cassin, "Supreme Court Tosses McDonnell Conviction, Knock DOJ's 'Boundless Interpretation' of Federal Bribery Law", *The FCPA Blog* (27 June 2016), online: <http://www.fcpablog.com/blog/2016/6/27/supremes-toss-mcdonnell-conviction-knock-dojs-boundless-inte.html>. See also Bill Steinman, "Bill Steinman: What Does the Bob McDonnell Ruling Mean for the FCPA", *The FCPA Blog* (29 June 2016), online: <http://www.fcpablog.com/blog/2016/6/29/bill-steinman-what-does-the-bob-mcdonnell-ruling-mean-for-th.html>.

[12] *Ibid* at 14.

[13] *Ibid* at 26.

[14] *Ibid* at 22-23.

The US Supreme Court's decision has been widely criticized and has provoked calls for reform.[15]

In regard to the mental element—a corrupt intent to influence, or be influenced in, the commission of an official act—the US Supreme Court has held that the prosecution must establish a *quid pro quo*, that is "specific intent to give or receive something of value in exchange for an official act."[16] This excludes vague expectations or generalized hope of some future benefit and in this way excludes election campaign donations if they are not made in exchange for a specific official act.[17]

Section 201(c) creates a separate offense sometimes referred to as giving or promising "illegal gratuities." Section 201(c) involves giving or accepting a gratuity for or because of the performance of an official act. There is no need to show the official act was conducted improperly or illegally, nor any need to show a *quid pro quo* for the gratuity. In effect, the section provides that it is an offense to give or accept a gratuity in respect to the official's public duties. As the US Supreme Court said in *Sun-Diamond Growers* "[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken."[18]

2.3.2 Defenses

A person charged with a domestic bribery or illegal gratuities offense is entitled to plead any general defense that is applicable to any other crime. These defenses might include claims of entrapment or abuse of due process, but both of these defenses have requirements that will limit their availability in most bribery cases. If a person engages in bribery under physical duress, that duress will constitute a defense if the general requirements for the defense of duress exist. Likewise, necessity may be a defense, if there was no other reasonable option but to pay a bribe. For example, paying a bribe (which was more than a facilitation payment) to a customs officer who demands a bribe before allowing a shipload of perishable goods to be lawfully unloaded may well be excused on the basis of necessity (assuming there was no

---

[15] See Carl Hulse, "Is the Supreme Court Clueless About Corruption? Ask Jack Abramoff", *The New York Times* (5 July 2016), online: <http://www.nytimes.com/2016/07/06/us/politics/is-the-supreme-court-clueless-about-corruption-ask-jack-abramoff.html?_r=1>; Claudia Dumas, Shruti Shah & Jacqui de Gramont, "Gov. McDonnell and the Supremes: Corruption by Any Other Name Is Still Corruption", *The FCPA Blog* (17 June 2016), and subsequent reader comments, online: <http://www.fcpablog.com/blog/2016/6/17/gov-mcdonnell-and-the-supremes-corruption-by-any-other-name.html>; PJ D'Annunzio, "McDonnell Case Casts Long Shadow in Public Corruption Prosecutions", *The National Law Journal* (27 December 2016), online: <http://www.nationallawjournal.com/home/id=1202775543648/McDonnell-Case-Casts-Long-Shadow-in-PublicCorruption-Prosecutions?mcode=1202617074964&curindex=4&slreturn=20170003135314>.

[16] *Ibid* at 404-405.

[17] *United States v Jennings*, 160 F3d 1006 (4th Cir 1998) and *United States v Tomlin*, 46 F3d 1369 (5th Cir 1995).

[18] *United States v Sun-Diamond Growers*, 526 US 398 at 404-405.

other reasonable option). Likewise, the general defenses of double jeopardy, *res judicata* and incapacity are available. Also, prosecution of the offense is barred if the prosecution violates an applicable state or federal statute of limitations.[19]

2.3.3 Limitation Periods

18 USC. Chapter 11 does not set out any specific limitation periods. Accordingly, the general statute of limitations of five years for non-capital offenses applies to the bribery offences under the US Code.[20] This five-year limitation can be extended by three more years in certain circumstances (see Section 3.3.3 below).

2.3.4 Sanctions

According to § 202(b)(4), whoever commits the offense of bribery under § 202(b) "shall be fined under this title [a maximum of $250,000 for individuals or $500,000 for organizations] or no more than three times the monetary equivalent of the thing of value, whichever is the greater, or to imprisonment for not more than fifteen years, or to both, and may be disqualified from holding any office of honor, trust or profit under the United States."

Anyone committing the offense of illegal gratuities under § 201(c) is "fined under this title [a maximum of $250,000 for individuals or $500,000 for organizations] or imprisoned for not more than two years, or both." The actual sentences imposed for both offenses are subject to the US Federal Sentencing Guidelines.[21] For a description of sentencing principles and practices applicable to corruption offenses, see Chapter 7, Section 4 of this book.

[19] For a more detailed analysis of the offences and defences to domestic bribery and illegal gratuities, see 18 USC. Annotated 456-562 (West Group, 2000 and Cumulative Annual Pocket Part), and C Dixou, J Krisch and C Thedwall, "Public Corruption" (2009) 46 Am Crim L Rev 928.

[20] See 18 USC § 3282.

[21] See United States Sentencing Commission, "Guidelines Manual", s 2C1.1 (2013), online: <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/Chapter_2_A-C.pdf> and the discussion of aggravating factors in C Dixou, J Krisch & C Thedwall, "Public Corruption" (2009) 46 Am Crim L Rev 928 at 942-949.

2.4 UK Law

2.4.1 Introduction

The *Bribery Act 2010* (hereinafter referred to as the *Bribery Act*) came into force on July 1, 2011. It is the culmination of 10 to 12 years of study, consultation and debate.[22] The *Bribery Act* constitutes a codification of the law of bribery in England which prior to that time was a complex amalgamation of statute and common law.[23] The new Act creates four bribery offences. There are two general offences: (1) offering or giving a bribe and (2) accepting a bribe. There is also a third offence of bribing a foreign public official and a new fourth offence of failure of a "commercial organization" to prevent bribery by one of its associates.

The *Bribery Act* is broad in several respects. Both domestic and foreign bribery are covered in this one statute. And as will be discussed in Chapter 3, the extra-territorial reach of the *Bribery Act* is quite extensive. Further, apart from the offence of bribing a foreign public official, the other three offences apply to giving or taking a bribe in both the public *and the private* sectors. This lack of distinction between public and private or commercial bribery has been criticized by Stuart P. Green. Green advocates treating commercial bribery as a crime, but also argues that its treatment should be distinguished from that of public bribery due to the distinct "moral and political character" of public bribery.[24] As explained by Peter Alldridge, commercial or private bribery "distort[s] the operation of a legitimate market," while public bribery creates "a market in things that should never be sold."[25]

It is rather artificial to divide the offences under the *Bribery Act* into domestic and foreign offences since, with the exception of bribery of a foreign public official, the other three offences apply to both domestic and foreign activities over which the UK asserts fairly wide jurisdiction. In this section, I cover these latter three offences which apply both domestically and to certain foreign activities. The offence of bribery of a foreign official will be dealt with in Section 3.4 below.[26]

---

[22] GR Sullivan notes in "The *Bribery Act* 2010: An Overview" (2011) Crim L Rev 87 at 87, n9, that "the reform process was initiated by the publication of the Law Commission, *Legislating the Criminal Code: Corruption* 1997, Consultation Paper No. 145, followed by a final report, then another consultation paper, another final report, various interventions by the Home Office, the Ministry of Justice, several parliamentary select committees' reports, and parliamentary debates along the way." For an analysis of the *Bribery Act 2010*, see C Nicholls et al, *Corruption and Misuse of Public Office* (Oxford University Press, 2011).

[23] For a detailed description of the law before the *Bribery Act 2010*, see C Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011).

[24] Stuart P Green, "Official and Commercial Bribery: Should They Be Distinguished?" in Jeremy Horder and Peter Alldridge, eds, *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press, 2013) at 65.

[25] *Ibid.*

[26] For a detailed analysis of the UK *Bribery Act* offences, see Nicholls et al (2011).

2.4.2 Offences

(i) Offence of Bribing another Person: Section 1

Section 1 of the UK *Bribery Act* sets out two cases or scenarios in which a person will be guilty of the offence of "bribing another person" or "active bribery." In both cases, section 1(5) specifies that it does not matter whether the bribe is made by a person directly or through a third party. Furthermore, it does not matter if the bribe is actually completed; the offer or promise is enough to make out the offence.

The offence of bribing another person in Case 1 (section 1(2)) occurs where a person "offers, promises or gives a financial or other advantage to another person," and intends that advantage to either "induce a person to perform improperly a relevant function or activity," or "reward a person for the improper performance of such a function or activity." This means the parties must intend acts beyond the offering or receiving of the bribe. Section 1(4) stipulates that it does not matter whether the person who has been bribed is the same person who is to perform (or has already performed) the activity in question.

Section 1(3) describes Case 2 as a situation where a person "offers, promises or gives a financial or other advantage to another person," and "knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity." The receiver need not behave improperly nor even intend to do so; in this case, the receipt of the advantage is itself improper.

Note also that "person," as defined by the UK *Interpretation Act* 1976, extends to "a body of persons corporate or incorporate" and thus a body corporate can be liable if its "directing mind and will" was implicated in the wrongdoing.[27]

The expression "a relevant function or activity," which is a component of the offence in all cases, is described in section 3 of the *Bribery Act* as:

(a) any function of a public nature,
(b) any activity connected with a business [which includes a trade or profession],
(c) any activity performed in the course of a person's employment, and
(d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

The activity, if one of the above, must then meet one or more of the following conditions:

- Condition A is that a person performing the function or activity is expected to perform it in good faith.
- Condition B is that a person performing the function or activity is expected to perform it impartially.

[27] *Ibid* at para 4.27.

- Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.

A function or activity can be "relevant" even if it has no connection with the UK at all and is performed outside of the UK. This question of the jurisdictional reach of the UK *Bribery Act* is more fully examined below in Section 1.8 of Chapter 3.

Section 4 of the *Bribery Act* explains that a relevant function or activity is performed "improperly" if it is performed in breach of a relevant expectation or where there is a failure to perform the function in circumstances where that failure is itself a breach of a relevant expectation. Relevant expectations are described in Conditions A, B and C above. Therefore, a person exercising a relevant function will be expected to act in good faith, to perform their function impartially or to avoid breaching trust. This means that the performance of the function in Case 1, or the mere acceptance of the financial advantage in Case 2, might be improper if it demonstrates bad faith, partiality or a breach of trust.[28]

Finally, section 5(1) states that "the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned." Section 5(2) adds that if the performance is not part of the law of the UK, then local customs and practices must be disregarded unless they are part of the written law (either legislative or judicially created) applicable to the country or territory in question. Ultimately this extends UK norms and standards to foreign sovereign nations, a position which will undoubtedly prove controversial. According to the Joint Committee on the Draft Bribery Bill, the UK Government's deliberate intention is to "encourage a change in culture in emerging markets" by eliminating local custom from a criminal court's considerations.

(ii) Offences Relating to Being Bribed: Section 2

Section 2 of the *Bribery Act* sets out four cases in which a person will be guilty of offences related to being bribed. The offence of "being bribed" is sometimes referred to as "passive bribery" despite the fact that section 2 also includes active conduct on the part of a government official or other person "requesting" a bribe. The offences are formulated in a rather complex way and often appear to overlap, but the drafter's intention is to ensure that the provisions will cover all the ways in which being bribed might occur.[29] In all cases, it does not matter if the person actually receives the bribe; the offence may be made out simply by requesting or agreeing to receive the bribe.

[28] GR Sullivan points out that such a finding would be easy to prove in cases where an individual takes a bribe in advance of some decision he or she is due to make in their capacity as a judge, civil servant, agent, etc, where the briber has an interest that may be affected by the individual's decision. Evidence of taking this advantage may be proof in and of itself of improper performance even before a decision is made; GR Sullivan (2011) at 90, n 15.

[29] James Maton, "The UK *Bribery Act* 2010" (2010) 36:3 Employee Rel LJ 37 at 38; Maton states that the need for such detail was suggested by the Law Commission when publishing draft legislation.

There are four possible routes to liability:

> **Section 2(2):** The first offence is described as "Case 3" (Cases 1 and 2 are dealt with in section 1). In this scenario, the person "requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly" (whether by the person mentioned or another person). The key in this case is that the recipient of the bribe intends improper performance to follow as a consequence of the bribe. The improper performance may be done by the receiver or by another person.
>
> **Section 2(3):** In Case 4, a person is guilty where he or she "requests, agrees to receive or accepts a financial or other advantage" and "the request, agreement or acceptance itself constitutes the improper performance by the person of a relevant function or activity." In this case, the taking of the bribe in and of itself amounts to improper performance of the relevant function. As described above with regard to Case 2, for this case to be made out the request, agreement or acceptance must itself prove bad faith, partiality, or a breach of trust. For example, the offence would be made out if a civil servant requested $1000 in order to process a routine application.[30]
>
> **Section 2(4):** Case 5 deals with a person who requests, agrees to receive or accepts the bribe "as a reward for the improper performance… of a relevant function or activity." The performance can be done by the person being bribed or another person.
>
> **Section 2(5):** Finally, Case 6 deals with a situation where, "in anticipation of or in consequence of a person requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly" (either by that person or by another person at the culpable receiver's request or with the receiver's assent or acquiescence). According to section 2(8), if a person performing the function or activity is someone other than the receiver, it "does not matter whether that performer knows or believes that the performance of the function or activity is improper."

In all cases, it does not matter whether the bribe is accepted directly by the receiver or through a third party, and it does not matter if the bribe is for the benefit of the receiver or another person.

The descriptions in Section 2.4.2(i) above pertaining to the definitions of "relevant function or activity," "improper performance" and "expectation" apply equally to section 2 offences.

In Cases 4, 5 and 6, according to section 2(7), "it does not matter whether the person knows or believes that the performance of the function or activity is improper." This section has resulted in a lack of clarity concerning the *mens rea* for the various cases in both sections 1 and 2. Section 2(7) seems to create a distinction between sections 1 and 2: in section 1, the

[30] Nicholls et al (2011) at para 4.46.

"briber" must intend improper performance or improper receipt, whereas the "bribee" in section 2 can be guilty even if he or she did not know his or her performance was improper.[31] G.R. Sullivan has considered the varying interpretations and suggests that section 2(7) was included for the sake of certainty, in order to confirm that normative awareness of wrongfulness is not necessary for those who accept advantages.[32] The goal, according to the Joint Committee on the Draft Bribery Bill, is to encourage people to "think twice" when seeking or taking an advantage.[33] Sullivan further suggests that the same concept can be taken for granted in Cases 1-3, which would mean a briber is not required to know that the behaviour they intend to induce in the bribee is improper. Put another way, ignorance of the law is not a defence.

(iii) Commercial Organization Failing to Prevent Bribery: Section 7

Section 7 of the *Bribery Act* creates a new strict liability offence of failure of a commercial organization to prevent bribery. Section 7 defines the scope of this new offence in the following words:

> (1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated 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.[34]

For more information on section 7, refer to Section 2.6.1 of Chapter 3.

(iv) Offence by Consent or Connivance of Senior Officers: Section 14

If any of the bribery offences under sections 1, 2 or 6 are committed by a body corporate or a Scottish partnership, section 14 of the *Bribery Act* mandates that a "senior officer" or someone purporting to act in that capacity will be personally criminally liable (as will the body corporate) if the offence was committed with the officer's consent or connivance.

Senior officer is defined in section 14(14) as a "director, manager, secretary or other similar officer." While the word "manager" is not defined and could be broadly interpreted, Nicholls et al. note that it was narrowly defined in a somewhat similar provision in *R v. Boal* to include only "decision-makers within the company who have the power and responsibility to decide corporate policy and strategy. It is to catch those responsible for

[31] *Ibid* at para 4.44.
[32] GR Sullivan (2011). In respect to the offences which section 2 of the *Bribery Act* replaces, see Nicholls et al (2011).
[33] Cited in Nicholls et al, *ibid* at paras 4.44, 189, n 52.
[34] Interestingly, there is no corresponding offence of failure to prevent the taking of a bribe.

putting proper procedures in place."[35] I question whether the narrow *Boal* definition is consistent with the purpose of putting a duty on "managers" in general to not consent or connive in the commission of bribery by those under their supervision.

The words "consent and connive" are also not defined in the *Bribery Act*. Nicholls et al. suggest that section 14 will be satisfied by knowledge or "willful blindness" to the conduct that constitutes bribery along with remaining silent or doing nothing to prevent that conduct from occurring or continuing.[36] See also Chapter 3, Section 3.4.

Finally, a "senior officer" will only be liable for a bribery offence committed by the corporation if that senior officer has a "close connection" to the UK as defined in section 12(4) of the *Bribery Act*.

2.4.3 Defences

Section 5(2) of the *Bribery Act* indicates that no bribery offence is committed if the payment of a financial or other advantage "is permitted or required by the written law applicable to the country or territory concerned." In some countries, the law or government policies require the appointment of a commercial agent as a condition of doing business in that country. The agent is appointed by or associated with persons in high places and demands large agent fees for little or no work.[37] The agent's fees are shared with the high officials. This practice is a form of bribery, but it is not defined as corruption in such countries and is in fact legally required in those countries.

Section 13 of the *Bribery Act* provides a defence for persons whose conduct, which would otherwise constitute a bribery offence, is proven on a balance of probabilities to be necessary for the proper exercise of intelligence or armed services functions. Where the conduct that comprises the bribery offence is necessary for the proper exercise of any function pertaining to UK intelligence or armed services, the defence is made out. The head of the intelligence service or Defence Council must also ensure that arrangements are in place to ensure that any conduct constituting an offence will be necessary. Subsection (5) provides that where a bribe is paid by a member of the intelligence service or armed forces and they are able to rely on the section 13 defence, the receiver of that bribe is also covered by the defence. In England, legally impossible attempts are not generally recognized as crimes.

Sullivan criticizes section 13 for its potential to provide space for "what may be highly questionable conduct."[38] Although Sullivan recognizes the utility of such a defence, he worries "it might encourage payments made in circumstances far removed from matters of

[35] *R v Boal* (1992), 95 Cr App R 272.
[36] Nicholls et al (2011) at 113.
[37] GR Sullivan (2011) at 100.
[38] Bob Sullivan, "Reformulating bribery: a legal critique of the Bribery Act 2010" in Jeremy Horder and Peter Alldridge, eds, *Modern Bribery Law* (Cambridge University Press, 2013) 13 at 35.

vital national security," especially since the duties of the Intelligence Service include protecting the UK's economic wellbeing.[39]

No other bribery-related defences are specifically set out in the *Bribery Act*, such as committing bribery under duress or by necessity. While the requirements for these defences are rather stringent, there is no reason why they should not apply if the defence requirements are present. The Ministry of Justice Guidance states explicitly that duress may be available if a bribery offence was committed to prevent loss of life, limb or liberty.[40] Since duress, which includes duress by threat or by circumstances, only applies when the defendant is under threat of immediate or nearly immediate death or serious bodily harm, the defence would not cover less pressing health and safety concerns.[41] As a result, Sullivan expresses concern regarding the potential of the *Bribery Act* to catch payments extracted through extortion, especially in light of the Act's broad jurisdiction in areas where extortionate demands are common.[42] The defence of necessity has the potential to assist defendants under the Act, but is still uncertain and relatively novel in the UK. Necessity acts as a justification for the defendant's conduct in UK law, unlike duress, which is an excuse for wrongful acts committed under pressure. Necessity is based on the idea that sometimes the benefits of breaking the law outweigh the benefits of compliance. The defence is more likely to succeed for property offences, such as bribery, than offences involving the infliction of physical harm.[43]

Other defences such as honest mistake of fact, incapacity and diplomatic immunity should also be available if the requirements for those defences are met. Immunity from the criminal law applies to foreign visiting sovereigns, foreign diplomats and members of the foreign armed forces. Entrapment is another defence available to a charge of bribery. The scope of the entrapment defence in England is set out by the House of Lords in *R. v. Loosely* and *Attorney General's Reference (No. 3 of 2000)*.[44] It is a non-exculpatory defence and therefore does not exonerate the accused. There is no verdict of not guilty, but rather a stay of proceedings on the basis that the investigative activities of the state were unfair and that prosecution of the offence would tarnish the integrity of the court and be an affront to the public conscience. The test for entrapment is whether the state activity goes beyond providing an opportunity to commit a crime and instead has actually instigated the offence. The details of this test are set out in *Loosely.* Nicholls et al. suggests that the test "is practical, secures the balance of fairness for all interests, and is 'ECHR-centric' in approach and formulation… [and] will be applicable across the range of covert investigations from a corrupt petty official… suspected of taking small bribes to long-term infiltration into commercial corruption, fraud/money laundering, or corrupt networks centered around

[39] *Ibid*.
[40] United Kingdom, Minister of Justice, *The Bribery Act 2010: Guidance*> [UK *Bribery Act* Guidance (2010)], online: <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf .
[41] AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th ed (Hart Publishing, 2010) at 725.
[42] B Sullivan (2013) 13 at 14–15.
[43] AP Simester et al (2010).
[44] *R v Loosely*, [2002] Cr App R 29.

organized crime."[45] Random-virtue testing (offering a person an opportunity to commit a crime in circumstances in which there is no reasonable suspicion that the person intended to engage in the commission of a crime) is not permitted. Entrapment and integrity testing are also discussed in Chapter 6, Section 4.6.3.

(i) Section 7 – Adequate Procedures Defence

The "adequate procedures" defence applies to section 7 of the *Bribery Act*. Section 7(2) states that a full defence to the charge is available if the commercial organization can prove on a balance of probabilities that it had adequate procedures in place and followed those procedures at the time the bribery occurred in order to prevent associated persons from engaging in bribery. As is more fully argued by Stephen Gentle, this defence has proven to be contentious.[46]

Section 9 requires the Secretary of State to publish guidance for commercial organizations regarding the "adequate procedures" that companies should implement to prevent persons associated with the company from bribing.

After much debate, lobbying and consultation, the Secretary of State for Justice (head of the Ministry of Justice) on March 30, 2011 issued the *Bribery Act 2010 Guidance* (*Guidance,* or *UK Guidance* where required for clarity).[47] On the same day, the Serious Fraud Office (SFO) and the Crown Prosecution Service (CPS) published their *Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP* (*Joint Guidance*) to ensure consistency between police and prosecutors and to indicate that police and prosecutors will have careful regard for the *Guidance* issued by the Secretary of State.[48]

The *Guidance* is organized around six principles for establishing adequate procedures to prevent corruption. After each principle is set out, the *Guidance* provides commentary on the meaning and scope of each principle. The six principles are as follows:

Principle 1: Proportionate procedures

> A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities.

[45] Nicholls et al (2011) at 200.
[46] Stephen Gentle, "The *Bribery Act* 2010: (2) The Corporate Offence" (2011) 2 Crim L Rev 101 at 106.
[47] UK *Bribery Act* Guidance (2010).
[48] United Kingdom, Minister of Justice, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* [Joint Prosecution Guidance (2010)], online: <https://www.compliance-instituut.nl/wp-content/uploads/SFO-UK-BRIBERY-ACT-2010-JOINT-PROSECUTION-GUIDANCE.pdf>.

Principle 2: Top-level commitment

> The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Principle 3: Risk assessment

> The commercial organisation 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.

Principle 4: Due diligence

> The commercial organisation 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 organisation, in order to mitigate identified bribery risks.

Principle 5: Communication (including training)

> The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.

Principle 6: Monitoring and Review

> The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Appendix A of the *Guidance* is composed of eleven case studies for further illustration and clarification of the six principles for "adequate procedures." For example, case study 1 focuses on the problem of facilitation payments and discusses what a company can do when faced with demands for them.

Transparency International UK has also provided guidance on the *Bribery Act*. It produced a 100-page *Guidance on Adequate Procedures* and an 80-page *Adequate Procedures Checklist*, as well as publications on *Due Diligence, Diagnosing Bribery Risk and Assessment of Corruption in (Ten) Key Sectors*. These guidance documents are designed to assist companies to comply with the *Bribery Act* by providing clear, practical advice on good practice anti-bribery systems that in Transparency International's opinion constitute "adequate procedures" for

compliance with the *Bribery Act*.[49] Other useful documents, policies and recommended anti-bribery strategies exist and are outlined by Nicholls et al.[50]

2.4.4 Limitation Periods

In accordance with general principles of UK criminal law, the offences in the UK *Bribery Act* are not subject to any limitation periods in respect to laying charges. Applicable human rights legislation mandates that once charges have been laid, defendants are entitled to receive a public hearing within a "reasonable time" — see for example the UK *Human Rights Act 1998* and the *European Convention on Human Rights,* Article 6(1).

2.4.5 Sanctions

Section 11 describes the penalties for all of the above offences. It states:

> (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.
>
> (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 section 154(1) of the Criminal Justice Act 2003, and
>
> (b) in its application to Northern Ireland, as a reference to 6 months.

The statutory maximum fine is £5000 in England and Wales or £10,000 in Scotland, if the conviction is summary. If convicted on indictment, the amount of the fine is unlimited under the *Act*. Companies convicted of bribery are also liable to exclusion from obtaining future public contracts in the EU (Article 57 of Directive 2014/24/EU of the European Parliament and of the Council on public procurement (repealing Directive 2004/18/EC)).

---

[49] Transparency International UK, "Adequate Procedures Guidance", online: <https://www.transparency.org.uk/our-work/business-integrity/bribery-act/adequate-procedures-guidance/>.

[50] Nicholls et al (2011) at 139.

A section 7 offence can only be tried on indictment, and thus an organization convicted of a section 7 offence is subject to an unlimited fine, provided that fine is fair and proportionate in the circumstances of each case.

For a detailed description of sentencing principles and practices applicable to corruption offences, see Chapter 7, Section 5 of this book.

2.5 Canadian Law

2.5.1 Offences

The Canadian *Criminal Code* contains eight specific offences relating to corruption and bribery committed in Canada:

- s. 119 Bribery of Judges or Members of Parliament or Provincial Legislative Assemblies
- s. 120 Bribery of Police Officers or other Law Enforcement Officers
- s. 121 Bribery/Corruption of Government Officials [Influence Peddling]
- s. 122 Fraud or Breach of Trust by a Public Official
- s. 123 Municipal Corruption
- s. 124 Selling or Purchasing a Public Office
- s. 125 Influencing or Negotiating Appointments to Public Offices
- s. 426 Giving or Receiving Secret Commissions

The offences are in part overlapping, so the same conduct can sometimes constitute an offence under more than one provision. The offences apply to both individuals and corporations. The offences concerning bribery of judges, politicians and police officers (sections 119-120) are considered to be the most serious offences and are punishable by a maximum of 14 years imprisonment. The other bribery and corruption offences (sections 121-125 and 426) are punishable by a maximum of 5 years imprisonment.

These offences are largely unchanged since their incorporation into Canada's first criminal code in 1892. Several of these offences are loosely related to the common law offence of misconduct in public office. Canada abolished common law offences in 1955 and therefore the common law offence of misconduct in public office is of no force or effect in Canada.[51] However, this common law offence recently underwent a major resurgence in some common law jurisdictions[52] such as Hong Kong, Victoria and New South Wales in Australia, and the UK, even after the enactment of the UK's *Bribery Act 2010*.[53]

---

[51] But see reference to it in *R v Boulanger,* [2006] 2 SCR 49 at paras 1, 52.

[52] D Lusty, "Revival of the Common Law Offence of Misconduct in Public Office" (2014) 38 Crim LJ 337.

[53] Nicholls et al (2011) at c 6.

The following description of domestic bribery and corruption offences in Canada is taken from G. Ferguson, "Legislative and Enforcement Framework for Corruption and Bribery Offences in Canada," a paper presented at the First ASEM Prosecutors General Conference (as part of the Canada-China Procuratorate Reform Cooperation Program) in Shenzhen, China, December 9-12, 2005. This paper has been updated to December 2016.

BEGINNING OF EXCERPT

(i) Bribery of Judges, Members of Parliament or Provincial Legislative Assemblies

Section 119 of the *Criminal Code* creates offences which apply both to the person who accepts or obtains a bribe and to the person who offers the bribe. Anyone committing this offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Elements of the Offence: With regard to the person accepting or obtaining the bribe, the following elements constitute the full offence:

- The accused must be the holder of a judicial office, or be a member of Parliament or the legislature of a province;
- The accused must accept or obtain, agree to accept or attempt to obtain any money, valuable consideration, office, place or employment for himself or herself or another person;[54]
- This must be done *corruptly*, and must relate to anything done or omitted or to be done or omitted by the accused in the accused's official capacity.

The offence for the person *offering* the bribe is essentially the mirror-image of that outlined above: the accused must corruptly give or offer any money, valuable consideration, office, place or employment to the holder of a judicial office or a member of Parliament or of the legislature of a province. The bribe must relate to anything done or omitted by that person in their official capacity, and may be for that person or any other person.

With respect to ministerial officers, the distinction between political and non-political officers has no significance, and includes ministers of the Crown.[55]

[54] The bribe must be proven in unequivocal terms: *R v Phillipponi*, [1978] 4 WWR 173 (BCCA).
[55] *R v Sommers,* [1959] SCR 678.

"Corruptly"

As noted, the only specifically required mental element is that the accused act *corruptly*. "Corruptly" does not mean "wickedly" or "dishonestly"; rather, it refers to an act performed in bad faith, designed wholly or partially for the purpose of bringing about the effect forbidden by this section.[56] The accused's conduct need not amount to a bribe to perform a specific act, or a reward for its accomplishment.[57]

"Official Capacity"

Provided the accused corruptly received money for influence "in his official capacity," the use to be made of the money is irrelevant.[58] It is not necessary that the corrupt act of a Member of Parliament relate to their legislative duties; rather, it may be connected to their participation in an administrative act of government.[59] Similarly, a cabinet minister, in absence of contrary evidence, acts in their official capacity as a member of the legislature when taking ministerial actions connected with the administration of the ministry.[60]

In a highly publicized trial, Senator Michael Duffy was charged with 31 counts relating to allegations of breach of trust, fraudulent practices and accepting a bribe, and was ultimately acquitted on all charges. A charge under section 119(a) of the *Criminal Code* involved allegations that Senator Duffy improperly claimed residency expenses and repaid $90,000 using money received from Nigel Wright, Chief of Staff to then Prime Minister Harper, that the $90,000 was a corruptly received bribe. Justice Vaillancourt found that Senator Duffy did not accept the funds voluntarily but was forced to accept them so the government could manage a political fiasco. Therefore, the acceptance of funds was not done corruptly. Justice Vaillancourt found the charge would have otherwise been stayed as a result of an officially induced error.[61]

[56] *R v Brown* (1956), 116 CCC 287 (Ont CA) and *R v Gross* (1945), 86 CCC 68 (Ont CA), cited in *R v Kelly* (1992), 73 CCC (3d) 385 (SCC).
[57] *R v Gross* (1945), 86 CCC 68 (Ont CA), cited in *R v Kelly* (1992), 73 CCC (3d) 385 (SCC).
[58] *R v Yanakis* (1981), 64 CCC (2d) 374 (Que CA) (No defence that the money was used for non-reimbursable expenses incurred by the accused).
[59] *R v Bruneau*, [1964] 1 CCC 97 (Ont CA) (accused MP acting "in official capacity" when agreeing to accept money for the use of his influence to effect the purchase of the constituent's land by the government).
[60] *Arseneau v The Queen* (1979), 45 CCC (2d) 321 (SCC) (accused's capacity as a member cannot be severed from the functions he performed as a minister).
[61] *R v Duffy*, 2016 ONCJ 220 at 1111, 1112, 1163.

(ii) Bribery of Police Officers or other Law Enforcement Officers

Section 120 of the *Criminal Code* creates offences similar to those outlined in section 119, but in relation to a different group of public officers: police officers, justices, and others involved in the administration of criminal law.

Elements of the Offence: As in section 119, the offence can be committed in two general ways. First, the accused must be a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or be employed in the administration of criminal law. The accused must corruptly accept or obtain, agree to accept, or attempt to obtain for himself or herself or any other person, any money, valuable consideration, office, place or employment.

The offence may also be committed where the accused corruptly gives or offers any money, valuable consideration, office, place or employment to a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or a person employed in the administration of justice. There must be an intention that the person bribed will interfere with the administration of justice, procure or facilitate the commission of an offence or protect from detection or punishment a person who has committed or who intends to commit the offence. Importantly, the individual bribing the officer must know or believe the person accepting the bribe is in fact an officer, or the requisite intent is not made out.[62]

Anyone committing this offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(iii) Bribery/Corruption of Government Officials [Influence Peddling]

Section 121 of the *Criminal Code* outlines seven different offences relating to fraud on the government, each briefly discussed below. The commission of any of these offences is an indictable offence punishable by imprisonment for a term not exceeding five years. Care must be taken in interpreting whether section 121 includes municipal corruption, since section 118 states that "government" means federal or provincial government, and therefore does not include municipal governments. However, the definitions of "office" and "official" have been interpreted widely to include municipal offices and officials. In any event, section 123 criminalizes municipal corruption.

[62] *R v Smith* (1921), 38 CCC 21 (Ont CA).

(a) Giving or Accepting a Benefit

Section 121(1)(a) provides that it is an offence for a government official[63] to demand, accept, or offer to accept from any person a loan, reward, advantage or benefit of any kind as consideration in respect to the government official's duties.[64] It also creates a reciprocal offence where a person gives, offers or agrees to give or offer to an official or any member of the official's family, or to anyone for the benefit of the official, an item of the same description.

In either case, the action may be performed directly or indirectly, and must be done as consideration for cooperation, assistance, exercise of influence, or an act or omission.[65] This action must be in connection with the transaction of business with, or any other matter of business relating to, the government or a claim against Her Majesty or any other benefit that Her Majesty is entitled to bestow. It is legally irrelevant whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be. There is no requirement that the official be acting in their official capacity when contravening this section.[66]

R v Cogger[67] clarified the *mens rea* element of this offence: the accused must intentionally commit the prohibited act with knowledge of the circumstances that are necessary elements of the offence. Where the accused is an official, they must be aware that they are an official; they must intentionally demand or accept a loan, reward, advantage or benefit of any kind for themself or another person; and they must know that the reward is in consideration for their cooperation, assistance or exercise of influence in connection with the business transaction or in relation to the government.[68] However, it is irrelevant that accused did not know their act constituted a crime or that they did not intend to accept a bribe by their definition of that term.[69] Furthermore, willful blindness is a sufficient substitute for knowledge.[70]

(b) Commissions or Rewards

Section 121(1)(b) of the *Criminal Code* provides that it is an offence for anyone having dealings of any kind with the government[71] to pay a commission or reward to or confer an advantage or benefit of any kind[72] with respect to those dealings on an employee or official of the government with which the accused deals, or any member of their family, or anyone whose involvement will benefit the employee or official. Although no mental element is specified, the jurisprudence suggests that the accused must intend to confer a benefit with respect to the dealings with the government.[73] It is an offence if a gift is given for an ulterior purpose, even if no return is ultimately given and even if there is no acceptance by the official.[74]

(c) Officials and Employees

Pursuant to section 121(1)(c) of the *Criminal Code*, it is an offence for an official or employee of the government[75] to demand, accept or offer or agree to accept a commission, reward, advantage or benefit[76] from a person who has dealings with the government.[77] This may be accomplished directly or indirectly by the accused, or

[63] Section 118 of the *Criminal Code* defines an "official" as a person who holds an office (an office or appointment under the government, a civil or military commission or a position of employment in a public department) or is appointed to discharge a public duty.
[64] "Commission" and "reward" connote compensation for services rendered. "Advantage" and "benefit" are not so limited in scope and include gifts not related to any service provided by the recipient. A government employee receives an "advantage" or "benefit" when the employee receives something of value that, in all the circumstances, the trier of fact is satisfied constitutes a profit to the employee (or family member), obtained at least in part because the employee is employed by the government, or because of the nature of the employee's work for the government: *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA); *R v Vandenbussche* (1979), 50 CCC (2d) 15 (Ont Prov Ct).
[65] "Influence" requires the actual affecting of a decision, such as the awarding of a contract. "Cooperation" and "assistance" are broader in scope and include the opening of doors or arranging of meetings (which would not constitute exercises of influence): *R v Giguere*, [1983] 2 SCR 448.
[66] *Martineau v R*, [1966] SCR 103.
[67] [1997] 2 SCR 842 (corruption not a necessary element of *actus reus* or *mens rea*).
[68] In *R v Terra Nova Fishery Co* (1990), 84 Nfld & PEIR 13 (Nfld TD), the accused company was acquitted since reasonable doubt existed as to whether the government official upon whom the benefit was conferred was aware that it was in hope of his assistance in altering export certificates.
[69] *R v Cogger*, [1997] 1 SCR 842.
[70] *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA).
[71] Formerly, under section 110 the term "person dealing with the government" referred to a person who, at the time of the commission of the alleged offence, had specific dealings or ongoing dealings in the course of their business with the government, where the gift could have an effect on those dealings: *R v Reid*, [1982] 3 WWR 77 (Man Prov Ct). The current, more expansive language, may encompass a wider range of dealings. "Government" is defined in s. 118 of the *Criminal Code* as the Government of Canada, the government of a province, or Her Majesty in right of Canada or a province.
[72] *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA).
[73] *R v Cooper*, [1978] 1 SCR 860.
[74] *R v Pilarinos* (2002), 167 CCC (3d) 97.
[75] "Official... of the government" is an officer of the executive who can be terminated by the executive without reference to the legislature: *Roncarelli v Duplessis*, [1959] SCR 121; *R v Despres* (1962), 40 CR 319 (SCQ).
[76] These words are further described in *United States v Sun-Diamond Growers*, 526 US 398 at 404-405. The offence is committed even where the benefit derived only represents the true value of services rendered outside working hours: *Dore v Canada (A-G)* (1974), 17 CCC (2d) 359 (SCC).
[77] *R v Hinchey* (1996), 3 CR (5th) 187 (SCC) held that section 121(1)(c) only applies where a person with specific or ongoing commercial dealings with the government at the time of the offence confers material or tangible gain on a government employee.

through a member of the accused's family[78], or through anyone for the benefit of the accused.

Although no mental element is specified, *R v Greenwood*[79] held that the offence is committed where the employee makes a conscious decision to accept a gift, knowing at the time of receipt that the giver has dealings with the government. There is no requirement that the accused actually intended to exercise some undue influence in the giver's favour.

(d) Influence Peddling/Pretending to Have Influence

Section 121(1)(d) of the *Criminal Code* relates to offers of influence in return for a benefit. In order to establish the elements of the offence, it must be shown that the accused had or pretended to have influence with the government or an official, and demanded, accepted or offered or agreed to accept a reward, advantage or benefit of any kind for himself or herself or another person. This acceptance must be in consideration for cooperation, assistance, exercise of influence or an act or omission in connection with the transaction of business with, or any matter of business relating to, the government, a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, or the appointment of any person, including the accused, to office. No mental element is specified, but as a true crime, there is a presumption of *mens rea* which can be established by proof of intent, recklessness, or wilful blindness.

The Supreme Court of Canada in *R v Giguere*[80] emphasized that this subsection is limited to persons who have (or pretend to have) a significant nexus with government. "Influence" involves being able to actually affect a decision (or pretending to be able to do so), such as influencing the awarding of a contract.

The element that "the transaction of business with or any matter of business relating to the government" was considered in *R v Carson*[81] …. The accused, Carson, worked as a Senior Advisor to former Prime Minister Stephen Harper in the years 2006-2009. In 2010-2011, Carson attempted to influence the department of Indian and Northern Affairs Canada [INAC] to purchase water treatment products from a company called H20, in part to try to benefit a romantic partner. Carson admitted he had influence with the Government at the time of the alleged offence and used this influence to benefit his partner. Justice Warkentin found that INAC did not have power to

[78] *R v Mathur* (2007), 76 WCB (2d) 231, affirmed by the Ontario Court of Appeal, 2010 ONCA 311, 256 CCC (3d) 97, held that a client fee received *indirectly* by the wife of the accused was still a "benefit" to the accused and contravened section 121(1)(c).
[79] *R v Greenwood* (1991), 67 CCC (3d) 435 (Ont CA).
[80] *R v Giguere,* [1983] 2 SCR 448.
[81] *R v Carson*, 2015 ONCJ 7127.

purchase systems; that decision was left to individual First Nation communities. Therefore, the accused's conduct did not involve a matter of business relating to the government and the accused was acquitted. In a comment on the case, Steve Coughlan suggests, properly in my mind, that a conviction for attempting to commit the offence should have been entered instead.[82]

A majority of the Court of Appeal set aside the acquittal and entered a verdict of guilty. The majority stated

> Section 121 (1) provides that it matters not "whether or not, in fact, the official is able to cooperate, render assistance, exercise influence, or do or omit to do what is proposed." Accepting a benefit in exchange for exercising influence on government officials in order "to push through their water treatment products to First Nation Bands" is a "matter of business related to the government."[83]

On further appeal, a majority of the Supreme Court of Canada dismissed Mr. Carson's appeal, stating:

> In my view, the offence under s. 121(1)(d) requires that the promised influence be in fact connected to a matter of business that relates to government. Furthermore, a matter of business relates to the government if it depends on or could be facilitated by the government, given its mandate. The phrase "any matter of business relating to the government" therefore includes publicly funded commercial transactions for which the government *could* impose or amend terms and conditions that would favour one vendor over others. Governments are not static entities – legislation, policies, and structures delimiting the scope of government activity evolve constantly. "Any matter of business relating to the government" must not be considered strictly with reference to existing government operational and funding structures.[84]

[82] Steve Coughlan, Case Comment on *R v Carson* (2016), 25 CR (7th) 353. The Ontario Court of Appeal did not discuss the issue of an impossible attempt in this case. A majority of the Supreme Court (at paras 29 and 41) indicated a verdict of attempted influence peddling would have been appropriate if they had held that Carson's conduct was not "related to government business." Côté J, dissenting at the SCC (at para 83) declined to resolve that issue since "it was not raised in the lower courts and the Crown confirmed before this Court that the offence of attempt did not form part of its theory of the case."

[83] *R v Carson*, 2017 ONCA 142 at para 50.

[84] *R v Carson*, 2018 SCC 12 at para 5.

(e) Providing Reward

Section 121(1)(e) of the *Criminal Code* provides that it is an offence for anyone to give, offer or agree to give or offer a reward, advantage or benefit of any kind to a minister of the government or an official in consideration for cooperation, assistance, exercise of influence or an act or omission. This conduct must be in connection with the transaction of business with, or any matter of business relating to, the government, a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, or the appointment of any person, including the accused, to office. No mental element is specified, but the normal presumption that *mens rea* (intent, recklessness or wilful blindness) is required for a true crime should apply to this offence.

(f) Tender of Contract

Section 121(1)(f) of the *Criminal Code* relates to tenders to obtain contracts with the government. The offence may be committed in two ways. First, it is an offence for anyone, having made a tender to obtain a contract with the government, to give, offer or agree to give or offer a reward, advantage or benefit of any kind to another person. That person must be someone who has made a tender, or a member of their family, or another person where that person's involvement will benefit someone who has made a tender. This must be done as consideration for the withdrawal of the other person's tender.

The offence is also committed where the accused demands, accepts, or offers or agrees to accept a reward, advantage or benefit of any kind from another person as consideration for the withdrawal of the accused's tender.

No mental element is specified for either way of committing the offence, but once again *mens rea* will be presumed.

(g) Contractor with Government Contributing to an Election Campaign

Section 121(2) of the *Criminal Code* provides that it is an offence for anyone, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, to directly or indirectly subscribe or give, or agree to subscribe or give, to any person valuable consideration for one of two purposes:

- promoting the election of a candidate or a class or party of candidates to Parliament or the legislature of a province; or
- to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in Parliament or the legislature of the province.

Consequently, the required mental element of the offence is to act with the purpose of effecting one of the two objectives listed above. If the accused acts pursuant to a term of a contract with the government, no further mental element is required. Otherwise, the accused must also act "in order to" obtain or retain a contract with the government.

Section 121(1)(f) and 121(2) are public procurement offences, but they do not appear to be used. Instead, public procurement offences are prosecuted as frauds under the *Criminal Code* or as bid-rigging under section 47 of the federal *Competition Act*.

(iv) Breach of Trust by Public Officer

Section 122 is specifically directed at fraud or breach of trust committed by public officials. It is punishable by a maximum of five years imprisonment. The term "official" is defined in section 118 and was interpreted in *R v Sheets*[85] to include:

> … a position of duty, trust or authority, esp. in the public service or in some corporation, society or the like' (cf. The New Century Dictionary) or 'a position to which certain duties are attached, esp. a place of trust, authority or service under constituted authority' (cf. The Shorter Oxford Dictionary).[86]

The Supreme Court of Canada in *R v Boulanger*[87] reviewed the common law authorities relating to misfeasance in public office in order to clarify the elements of the section 122 offence. Chief Justice McLachlin for the court concluded at para 58 that the Crown must prove the following elements:

(1) The accused was an official;[88]

(2) The accused was acting in connection with the duties of his or her office;

[85] *R v Sheets*, [1971] SCR 614.

[86] *R v Sheets*, [1971] SCR 614 at para 16. This expansive definition extends to positions of public authority in Indigenous nations: *R v Yellow Old Woman*, 2003 ABCA 342.

[87] *R v Boulanger*, 2006 SCC 32.

[88] It does not matter whether the official is elected, hired under contract or appointed: *R c Cyr* (1985), 44 CR (3d) 87 (CS Que). An accused who assists an officer with the breach of trust becomes a party to the offence and can be found guilty of the offence even if he is not himself a public officer: *R v Robillard* (1985), 18 CCC (3d) 266 (Que CA). A municipal official can be charged under this section: *R v Sheets*, [1971] SCR 614; see also *R v McCarthy*, 2015 NLTD(G) 24 (town clerk's falsification of property taxes she was in charge of receiving and depositing).

(3) The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;[89]

(4) The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust;[90]

(5) The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.[91]

The court's interpretation ultimately infuses section 122 with a subjective *mens rea*, adding that mere mistakes or errors of judgment do not suffice.

In *R v Vandenbussche*, (1979) 50 CCC (2d) 15, the Ontario Court of Justice held that a municipal officer, although performing his official duties in an appropriate manner, was guilty of breach of trust because he still accepted benefits and rewards for his work. Using the language in *Boulanger*, this would constitute a breach of the standard of responsibility required of the officer. As the court succinctly put it, "Need I elaborate further on the erosion of public trust which would ensue if the proper duties of a municipal official were offered for sale on the block in the marketplace?" In *R v Ellis*, 2013 ONCA 739, the Court upheld a conviction for breach of trust where an Immigration and Refugee Board adjudicator strongly implied that he would change his preliminary negative decision on the applicant's refugee status to a positive decision if she entered into an intimate relationship with him.

In *R v Cosh*, 2015 NSCA 76, the Court examined the meaning of "official", defined in section 118 within the context of section 122 of the *Criminal Code.* The accused worked as a paramedic for a private company that contracted its services with the government. After becoming addicted to narcotics, he stole morphine and falsified records to cover up his theft. He pled guilty to fraud, theft and unlawful possession of morphine but disputed the breach of trust charge. The Court held that as a paramedic employed by

[89] In order to determine the appropriate standard of conduct against which to assess the accused's conduct, expert opinion may be tendered as evidence: *R v Serré*, 2011 ONSC 5778, [2011] SJ No 6412.
[90] The court adds at paragraph 52 that "The conduct at issue… must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour." In paragraph 54 they described the test as "analogous to the test for criminal negligence" but different in that it involves a subjective mental element: *R v Boulanger*, 2006 SCC 32. Section 122 is often used when police officers engage in dishonest or deceptive behaviour for personal gain, contrary to their duty to honestly uphold or follow the law: see, e.g. *R v Watson*, 2015 ONSC 710; *R v Whitney*, 2015 BCPC 27; *R v Mahoney-Bruer*, 2015 ONSC 1224; and *R v Kandola*, 2014 BCCA 443 (border services officer facilitating importation of cocaine).
[91] "The fact that a public officer obtains a benefit is not conclusive of a culpable *mens rea"*; conversely, "the offence may be made out where no personal benefit is involved": see *R v Boulanger,* 2006 SCC 32 at para 57.

a private company, the accused was not an "official" within the meaning of sections 118 and 122 of the *Criminal Code* and upheld the accused's acquittal on this count.

(v) Municipal Corruption

Section 123 of the *Criminal Code* creates two offences relating to municipal corruption, each of which will be discussed in turn. Both offences are indictable and subject to imprisonment for a term not exceeding five years.

(a) Loan/Reward/Advantage accepted by Municipal Officer

Section 123(1) provides that it is an offence for a municipal official[92] to demand, accept, or offer, or agree to accept, a loan, reward, advantage or benefit of any kind from any person. Conversely, it is an offence for anyone to give, offer, or agree to give or offer, a loan, reward, advantage or benefit to any kind of municipal official.[93]

In either case, the act must be done as consideration for the official performing one of four acts:

- abstaining from voting at a meeting of the municipal council or a committee thereof;
- voting in favour of or against a measure, motion or resolution;
- aiding in procuring or preventing the adoption of a measure, motion or resolution; or
- performing or failing to perform an official act.[94]

No mental element is specified, but *mens rea* will be presumed.

(b) Influence a Municipal Officer

Section 123 of the *Criminal Code* provides that it is an offence to influence or attempt to influence a municipal official to perform one of the four acts listed above by:

- suppression of the truth, in the case of a person who is under a duty to disclose the truth;
- threats or deceit; or
- by any unlawful means.

No mental element is specified; therefore, subjective *mens rea* will be presumed (which includes intent, recklessness or willful blindness).

(vi) Selling or Purchasing a Public Office

Section 124 targets conduct that goes beyond purchasing the influence of an officer or municipal official, and instead seeks to purchase the "office" itself.[95] The section criminalizes both the sale of an appointment or resignation from office or the receipt of a reward from such a sale, as well as the purchase or giving of a reward to secure such an appointment or resignation. This offence is punishable by a maximum of five years' imprisonment.

(vii) Influencing or Negotiating Appointments to Public Offices

Closely related to the above two offences is the offence of influencing or negotiating appointments to public offices. It involves the giving or receiving of bribes in order to cooperate, assist, exercise influence, solicit, recommend or negotiate with respect to the appointment or resignation of any person from office. It also prohibits keeping without lawful authority "a place for transacting or negotiating any business relating to (i) the filling of vacancies in offices, (ii) the sale or purchase of officers, or (iii) appointments to or resignations from offices."

The acts of the accused should include something of a corrupt nature, as discussed above.[96]

The offence is punishable by indictment. If convicted, a person is liable to imprisonment for a maximum of 5 years.

(viii) Section 425.1 – Threats and Retaliations Against Employees

Section 425.1, enacted in 2004, makes it an offence for an employer or a person acting on behalf of an employer to "take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of an employee" who has provided or is going to provide information with respect to any offence committed or going to be committed by the employer (or an officer, employee, or corporate director of the employer). The information has to be reported or will be reported to a person whose duties include the enforcement of federal or provincial law. The purpose of the section

---

[92] *R v Krupich* (1991), 116 AR 67 (Prov Ct) held that the supervisor of the Property Standards Section in the Buildings Regulation Division was a "municipal official," since he occupied a position under the authority of the municipal government involving duties of authority and service.
[93] *R v Leblanc* (1982), 44 NR 150 (SCC) held that preferential treatment of a town planner by a municipal treasurer, in exchange for money, constituted an "advantage or benefit".
[94] Acts performed by a "municipal official" in that capacity are "official acts": *Belzberg v R* (1961), 131 CCC 281 (SCC).
[95] *R v Hogg* (1914), 23 CCC 228 (Sask CA).
[96] *R v Melnyk*, [1938] 3 WWR 425.

is essentially to encourage employees to assist the state in the suppression of unlawful conduct and to protect employees who do report information about offences from being disciplined for doing so.[97]

The offence is punishable by indictment with a maximum of five years' imprisonment or by summary conviction (punishable under section 787).

(ix) Offering or Accepting Secret Commissions

Section 426 of the *Criminal Code* under Part X dealing with "fraudulent transactions" makes it an offence [punishable by a maximum of 5 years imprisonment] for an agent or employee[98] to corruptly (i.e. secretly) offer, give or accept a reward, advantage or benefit in respect to the affairs or business of his/her principal (the principal can be either a government or a private company or business). Thus this corruption offence can relate solely to the private sphere, with no government official involved. In that sense, it is sometimes referred to as private corruption as opposed to public corruption.

The elements of the offence are summarized in *R v Kelly* (1992), 73 CCC (3d) 385 (SCC), at p. 406 as follows:

> There are then three elements to the *actus reus* of the offence set out in s. 426(1)(a)(ii) as they apply to an accused agent/ taker with regard to the acceptance of a commission:
>
> (1) the existence of an agency relationship;
> (2) the accepting by an agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal, and
> (3) the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit.
>
> The requisite *mens rea* must be established for each element of the *actus reus*. Pursuant to s. 426(1)(a)(ii), an accused agent/ taker:
>
> (1) must be aware of the agency relationship;
> (2) must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal, and
> (3) must be aware of the extent of the disclosure to the principal or lack thereof.

[97] *Merk v IABSOI Local 77*, 2005 SCC 70 at para 14.

[98] The provisions do not apply to independent contractors: *R v Vici* (1911), 18 CCC 51 (Que SP).

> If the accused was aware that some disclosure was made then it will be for the court to determine whether, in all the circumstances of the particular case, it was in fact adequate and timely.
>
> The word "corruptly" in the context of secret commissions means "secretly" or "without the requisite disclosure". There is no "corrupt bargain" requirement. Thus, it is possible to convict a taker of a reward or benefit despite the innocence of the giver of the reward or benefit. Non-disclosure will be established for the purposes of the section if the Crown demonstrates that adequate and timely disclosure of the source, amount and nature of the benefit has not been made by the agent to the principal.

The offence is made out by the acceptance of the benefit; that acceptance need not actually influence the agent in the manner he or she conducted affairs with the principal. The offence is established where the agent has, by accepting the benefit in secret, placed his or herself in a position of a conflict of interest, without informing the principal.[99] Furthermore, the agent need not actually have a specific principal at the time the offer was made.[100]

Section 426(2) elaborates that "every one commits an offence who is knowingly privy to the commission of an offence under subsection (1)". As the British Columbia Court of Appeal pointed out in *R v Tran*, the word "privy" in section 462(2) criminalizes conduct by "persons who through their own acts, participate in the prohibited conduct".[101]

END OF EXCERPT

2.5.2 Defences

An accused charged with one of the above mentioned bribery or corruption offences is entitled to the same general defences as persons charged with other offences. This includes mistake of fact, officially induced error, incapacity due to mental disorder, duress, necessity,

[99] *R v Saundercook-Menard*, 2008 ONCA 493 at para 1.
[100] *R v Wile* (1990), 58 CCC (3d) 85 (Ont CA).
[101] *R v Tran*, 2014 BCCA 343.

entrapment, diplomatic immunity and *res judicata*.[102] The scope and requirements of these defences can be found in a standard Canadian criminal law textbook.[103]

2.5.3 Limitation Periods

Where an offence is punishable by indictment in Canada, there is no limitation period. This also applies where the offence is a hybrid offence and the Crown chooses to proceed indictably. Where the offence is punishable on summary conviction, or the Crown chooses to proceed summarily, the information must be laid within 6 months of the date of the offence (see section 786 of the *Criminal Code*). All the corruption offences in the *Criminal Code* are classified as indictable offences (except 425.1), and therefore there are no limitations on when a charge for corruption/bribery may be laid. Once a charge is laid, the accused is entitled to a "trial within a reasonable time" under section 11(b) of the *Canadian Charter of Rights and Freedoms.* In *R v Jordan*, 2016 SCC 27, the Supreme Court of Canada established a new framework for s. 11(b) delay.[104]

2.5.4 Sanctions

The *Criminal Code* classifies offences as indictable (i.e., major offence) or summary conviction (i.e., less serious offence). All corruption offences in the *Criminal Code* are classified as indictable offences (except section 425.1, which can be indictable or summary conviction at the prosecution's discretion). Indictable offences are further classified into varying degrees of seriousness based upon the maximum punishment available for each offence (life, 14, 10, 5 or 2 years imprisonment). The maximum punishment is set at a very high level and is designed to deal with the "worst imaginable case" for that type of offence. The *Criminal Code* does not include any minimum punishment for corruption offences, nor does it indicate an average or common punishment for the particular offence involved. Thus individual judges have a lot of discretion in determining an appropriate penalty for each case.

---

[102] See for example *R v Rouleau* (1984), 14 CCC (3d) 14 (Que CA), in which the accused deputy minister was acquitted of breach of trust on the *res judicata* doctrine after being convicted of benefitting from firms having dealings with the government.

[103] Don Stuart, *Canadian Criminal Law*, 7th ed (Carswell, 2014) at 311-656; E Colvin & S Anand, *Principles of Criminal Law,* 3rd ed (Carswell, 2007) at 553-584; and M Manning & P Sankoff, *Criminal Law,* 5th ed (Lexis Nexis, 2015) chs 8-13.

[104] *R v Jordan*, 2016 SCC 27. *Jordan* establishes a presumptive ceiling for cases, 15 months in summary matters and 30 months in indictable matters, after which delay is presumptively unreasonable. The Crown must then rebut the presumption on the basis of exceptional circumstances (at paras 46-47). Discussing exceptional circumstances, the Court notes where there is "voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time" exceptional circumstances may be found (at para 77). As these types of circumstances often occur in corruption cases, a trial may need to exceed the presumptive ceiling by some measure before it could be subject to a stay of proceedings. The new framework will encourage the Crown to consider carefully whether to bring multiple charges for the same conduct and try multiple co-accused together (see generally para 79).

For a description of sentencing principles and practices applicable to corruption offences, see Chapter 7, Section 6 of this book.

3. BRIBERY OF FOREIGN PUBLIC OFFICIALS

3.1 UNCAC

3.1.1 Offences

Article 16 of UNCAC requires each State Party to create a criminal offence in respect to bribery of foreign public officials. Article 16 states:

> *Article 16. Bribery of foreign public officials and officials of public international organizations*
>
> 1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
>
> 2) Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(i) Foreign Public Official

Like the definition provided for "public official," the meaning of "foreign public official" is broad and focuses on function and influence rather than official status. "Foreign pubic official" is defined in Article 2(b) as meaning: "any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise."

(ii) Officials of IPOs

In addition to prohibiting bribery of foreign public officials, the bribery of officials of international public organizations is also prohibited. An "official of a public international organization" refers to international civil servants or other persons authorized to act on behalf of public international organizations (Article 2(c)). This would include organizations such as the World Bank or International Monetary Fund. Article 16(1) also applies to corruption in the context of international aid.[105]

(iii) Active and Passive Bribery

While Article 16(1) requires criminalization of active bribery of foreign public officials, Article 16(2) only requires a State to consider criminalization of passive bribery (i.e., solicitation or acceptance of a bribe by foreign public officials). In other words, Article 16(2) does not require States to criminalize the corrupt behaviour of foreign public officials. Such conduct by foreign public officials is, or should be, a criminal offence of bribery under that public official's own state law, as required by Article 15(b) of UNCAC. However, a State's failure to enact legislation reflecting Article 16(2) would result in that State being unable to prosecute a foreign public official for passive bribery. For example, because Canada has not enacted provisions reflecting Article 16(2), Canada is unable to prosecute foreign public officials for soliciting or accepting bribes and can only prosecute Canadian legal entities for bribing foreign public officials. Prosecution of foreign public officials must be left, if at all, to the foreign public officials' State.

(iv) For Business or other Undue Advantage

Kubiciel notes another significant difference between Articles 15 and 16: namely, Article 16(1) only prohibits acts of bribery intended to "obtain or retain business or other undue advantage in relation to the conduct of international business." Article 15(a) and (b) has no similar clause. Similarly, Article 1 of the OECD Convention only requires State Parties to criminalize the offering or giving of bribes "in order to obtain or retain business or other improper advantage in the conduct of international business." For example, a Canadian citizen who bribes a police officer in Mexico to avoid being charged with drunk driving in Mexico is not subject to prosecution for bribing a foreign public official under Canada's *CFPOA*.

(v) Undue Advantage

Kubiciel also highlights the vagueness of the term "undue advantage" which appears in both Articles 15 and 16 of UNCAC (as well as Article 1 of the OECD Anti-Bribery Convention). Kubiciel states:[106]

[105] Legislative Guide (2012) at 67.
[106] Kubiciel (2009) at 153.

> The interpretation of the term "undue advantage" is even more complicated when national courts and law enforcement agencies have to evaluate whether an advantage offered or granted abroad is undue or not. Generally speaking, courts can apply the standards of their own legal order, so that they are not bound to the perceptions abroad. Thus, local traditions or the tolerance by foreign authorities are no excuse per se for offering or giving advantages to foreign public officials or officials of international organizations. However, advantages whose acceptance is permitted or even required by the foreign law are not criminalized by Article 16. [Footnotes omitted]

3.1.2 Defences

The defences available for bribery of a foreign public official are the same as those for bribery of a domestic public official, already discussed at Section 2.1.2 above.

3.1.3 Limitation Periods

The limitation periods for bribery of a foreign public official are the same for bribery of a domestic public official, already discussed at Section 2.1.3 above.

3.1.4 Sanctions

The sanction provisions in UNCAC for foreign bribery are the same as the sanctions for domestic bribery, discussed at Section 2.1.4 above.

3.2 OECD Convention

3.2.1 Offences

Article 1(1) of the OECD Convention requires that state parties make it a criminal offence under domestic law for:

> any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

(i) Active but Not Passive Bribery

Like UNCAC, the OECD Convention *requires* state parties to criminalize active bribery, but not passive bribery, and also *requires* that the bribe be in relation to "the conduct of

international business." The OECD Convention does not require states to consider the criminalization of passive bribery like Article 16(2) of UNCAC.

(ii) Liability for Accomplices, Attempts and Conspiracy

Article 1(2) mandates that "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence." The OECD Commentary clarifies that a foreign company that pays a bribe while bidding for a foreign contract is still committing the offence of bribery even if that company obtained the contract because they presented the best proposal rather than because of the bribe. In addition, Article 1 requires state parties to ensure that "[a]ttempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official" is an offence domestically. Inchoate offences and party liability are further explored later in Sections 3 and 4 of Chapter 3.

(iii) Definitions of Foreign Public Official and Official Duties

Article 1 also sets out the following definitions (paragraph 4):

a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

b) "foreign country" includes all levels and subdivisions of government, from national to local;

c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorized competence.

(iv) State Flexibility in Enacting OECD Convention Provisions

Pacini, Swingen and Rogers discuss the impact of the OECD Convention in their article "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials."[107] They note that, unlike some earlier criminal law conventions, the OECD Convention is not "self-executing." This means that the prohibitions contained within the provision are not automatically part of domestic law. It is up to signatory nations to incorporate the elements of the prohibition of the bribery of foreign public officials into domestic law. The goal is "functional equivalency" (Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions "OECD Commentary," para

[107] Carl Pacini, Judyth A Swingen & Hudson Rogers, "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials" (2002) 37 J Bus Ethics 385.

2). In effect, Pacini et al. state that the Convention allows state parties "to pass legislation at different ends of a rather broad spectrum."[108]

3.2.2 Defences

As already noted, Article 1 of the OECD Convention requires State Parties to the Convention to make it "a criminal offence for any person intentionally to offer, promise or give an undue pecuniary or other advantage… to a foreign public official… in order to obtain or retain… advantage in the conduct of international business." The Convention deals with "bribes" and leaves punishment of the foreign public official who requests or receives a bribe to the general corruption laws of the foreign state. Obviously failure to prove the elements of Article 1 constitutes a defence. The briber must (1) act "intentionally," (2) the person being bribed must meet the broad definition of "foreign public official" defined in Article 1, paragraph 4, (3) the "bribe" must constitute "an undue pecuniary or other advantage and (4) the advantage must be offered "in the conduct of international business."

(i) The Conduct of International Business

On its face, bribery by an NGO or a private company for charitable rather than business purposes may not be covered by Article 1. However, a brief on the OECD Convention (prepared by the OECD) notes that "bribes that benefit a foreign public official's family or political party, or another third party (e.g., a charity or company in which the official has an interest) – are also illegal."[109] Any uncertainty around the scope of Article 1 does not of course prevent countries from prohibiting bribes to more effectively pursue charitable purposes. Several countries, such as Canada, the US and the UK have done so in their domestic law. Canada updated its *CFPOA* in 2013 to include the "charitable sector" (see Section 3.5.1 of this chapter). Previously, the word "business" was limited by section 2 of the *CFPOA* to for-profit endeavours. The post-2013 definition of "business" is not limited in this way and applies to bribery by NGOs and other non-profit organizations.

In the US, the provisions of the *FCPA* are broader than those set out in Article 1 of the OECD Convention. According to the *FCPA* guidance released by the US Department of Justice and Securities Exchange Commission, "[i]n general, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business."[110] The Guide goes on to note that "[t]he FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens. Companies, however, cannot

---

[108] *Ibid* at 390.

[109] OECD, "The OECD Anti-Bribery Convention and the Working Group on Bribery", online: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Anti-Bribery_Convention_and_Working_Group_Brief_ENG.pdf>.

[110] Department of Justice and Security Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), [DJSEC Resource Guide (2012)], online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

use the pretense of charitable contributions as a way to funnel bribes to government officials."[111]

In the UK, the *Bribery Act* also provides a slightly more encompassing definition than that provided in Article 1 of the OECD Convention. Section 6 of the *Bribery Act* deals with bribery of foreign public officials. The person doing the bribing must intend to obtain or retain "business" or "an advantage in the conduct of business". This is quite similar to the wording used in Article 1 of the OECD Convention. However, under UK law the term "business" includes "what is done in the course of a trade or profession".[112] This broad definition of business suggests that it may include the activities of a charitable organization or an NGO.

Further, in its *Guidance* document, the UK Ministry of Justice addresses the meaning of "carrying on a business" (in the context of section 7, which deals with the failure of commercial organizations to prevent bribery) as follows:

> As regards bodies incorporated, or partnerships formed, in the UK, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.[113]

This excerpt suggests that charities and other NGO non-profit organizations are considered to be engaging in "business". If a charity is considered a "business" for the purpose of section 7 of the *Act*, it follows that the charity's activities are considered to be "business" for the purpose of section 6 of the *Act*, given the presumption of consistent usage of terms in legislation.

(ii) Undue Advantage

Article 1 also refers to "undue… advantage." Does the word "undue" permit facilitation payments? Facilitation payments are relatively small bribes paid to induce a foreign official to do something (such as issue a licence) that the official is already mandated to do. In order for a payment to be properly classified as a facilitation payment, "[t]he condition must be that these transfers really are of a *minor nature not exceeding the social norm* pertaining to them

[111] *Ibid* at 16.
[112] Nicholls et al (2011) at 87.
[113] UK *Bribery Act* Guidance (2010).

in the society in question."[114] The OECD Convention does not clearly permit or forbid facilitation payments. The *FCPA* does not prohibit facilitation payments, but the UK *Bribery Act* does prohibit them. The 2013 amendments of the Canadian *CFPOA* also propose to prohibit facilitation payments, but the new provision was not proclaimed in force until October 31, 2017. The issue of facilitation payments is more fully analyzed in Section 4 of this chapter.

There are no special or specific defences under the OECD Convention for bribery of foreign public officials. The general assumption is that this offence will be subject to the same defences that apply to other such crimes in the State Party's criminal law.

3.2.3 Limitation Periods

Article 6 of the OECD Convention addresses statutes of limitations. It states:

> Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

The meaning of an "adequate" period of time is not clear. The OECD has not provided any further guidance to signatories regarding Article 6 in the Convention itself or in the Commentaries. There is some discussion of its meaning elsewhere.[115]

The UK and Canada have no statutory limitation periods for their bribery and corruption offences. For a discussion of US statutory limitation periods, see Section 3.3.3 below.

3.2.4 Sanctions

The OECD Convention has very few provisions on sentences and sanctions for corruption of foreign public officials. Article 3 of the OECD Convention is entitled "Sanctions." Paragraph 1 requires bribery of foreign officials to "be punishable by effective, proportionate and dissuasive criminal penalties comparable to the penalties for corruption of domestic officials."

Paragraph 2 requires State Parties which do not recognize "corporate criminal liability" to ensure that legal persons are "subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions for bribery of foreign public officials."

---

[114] Ingeborg Zerbes, "Article 1 – The Offence of Bribery of Foreign Public Officials" in Mark Pieth, Lucinda A Low & Nicola Bonucci, eds, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press, 2014) 59 at 171.

[115] See Christopher K Carlberg, "A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards" (2003) 26 BC Intl & Comp L Rev 95, online: <http://lawdigitalcommons.bc.edu/iclr/vol26/iss1/5/>.

Paragraph 3 and 4 of Article 3 also provide as follows:

> 3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
>
> 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.

3.3 US Law

The United States *Foreign Corrupt Practices Act* (*FCPA*) represents the first attempt by a State to criminalize the bribery of foreign public officials. First enacted in 1977, it is significant in scope and application and has led to numerous high profile prosecutions. The very broad jurisdictional reach of the *FCPA* will be analyzed in Chapter 3, Section 1.7. For now, suffice it to say, it applies not only to American citizens and corporations, but to all foreign corporations doing business (widely defined) in the US or traded on a US stock exchange. The *FCPA* has often served as a model for other countries wishing to implement similar legislation. It was amended in 1998 in order to conform to the requirements of the OECD Convention.

For an in-depth guide to the *FCPA*, see Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners* (*Handbook*)[116]; see also: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (*Resource Guide*) and Koehler, *The Foreign Corrupt Practices Act in a New Era*.[117]

3.3.1 Offense of Bribing a Foreign Official

The following brief comments on § 78dd-1 are based on Tarun's *Handbook* and the *Resource Guide* (both cited above).

(i) Provision

Section 78dd-1 of the *FCPA* prohibits the bribing of foreign officials or political parties. As highlighted in Tarun's *Handbook*, the *FCPA*'s bribery offense contains five elements:

---

[116] Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (American Bar Association, 2013).

[117] DJSEC Resource Guide (2012). See also Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar, 2014).

1. A payment, offer, authorization, or promise to pay money or anything of value, directly or through a third party;
2. To (a) any foreign official, (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any official of a public international organization, or (e) any other person while "knowing" that the payment or promise to pay will be passed on to one of the above;
3. Using an instrumentality of interstate commerce (such as telephone, telex, email, or the mail) by any person (whether US or foreign) or an act outside the United States by a domestic concern or US person, or an act in the United States by a foreign person in furtherance of the offer, payment, or promise to pay;
4. For the corrupt purpose of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit doing any act in violation of his or her lawful duty, (c) securing an improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision;
5. In order to assist the company in obtaining or retaining business for or with any person or directing business to any person.[118]

It is important to note that the *FCPA* criminalizes active bribery (the person offering the bribe), but does not address passive bribery (the person receiving the bribe), and the scope of the offense is restricted to bribes made for the purpose of "obtaining or retaining business," which parallels the provisions of UNCAC and the OECD Convention. The *FCPA* also does not criminalize commercial bribery, although accounting offenses may catch commercial bribery. Deferred prosecution agreements also might require companies to refrain from commercial bribery.[119]

(ii) Authorization

Authorization can be explicit or implicit. In some circumstances, acquiescence might be sufficient to indicate authorization.[120]

(iii) Anything of Value

The phrase "anything of value" is interpreted broadly by the SEC and includes both tangible and intangible benefits. The thing of value will often be less direct than cash. There is no

[118] Tarun (2013) at 3.
[119] *Ibid* at 19.
[120] Stuart H Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (Oxford University Press, 2014) at 201.

minimum threshold amount, but the SEC will generally only target small payments or gifts if they form part of a larger pattern of bribery.[121]

(iv) Foreign Official

Under the *FCPA*, "foreign official" is defined as an officer or employee of "a foreign government or any department, agency or instrumentality thereof, or of a public international organization," or any person working for or on behalf of any of those entities. Foreign governments are not included in the provisions. As a result, when the Iraqi government received kickbacks during the UN Oil-for-Food program, the DOJ was obliged to turn to the accounting offenses to charge the companies involved.[122]

According to Koehler in his book, *The Foreign Corrupt Practices Act in a New Era*, the definition of "foreign official" is in dispute, but enforcement agencies tend to interpret the phrase broadly.[123] This means that "FCPA scrutiny can arise from business interactions with a variety of individuals, not just bona fide foreign government officials."[124] According to Deming, "[a] critical factor in determining whether someone is a foreign public official is whether the individual occupies a position of public trust with official responsibilities."[125]

Whether a state-owned enterprise is an "instrumentality" is particularly open to dispute. According to the *Resource Guide*, to determine whether an entity is an "instrumentality," an entity's ownership, control, status and function should be considered. Generally, an entity will not be included in the definition of "instrumentality" if foreign government ownership is less than 50%, unless the government has special shareholder status.[126]

Public international organizations include the World Bank, International Monetary Fund, World Trade Organization, OECD, Red Cross and African Union.[127]

(v) Knowledge

Payments or offers cannot be made through third parties if the defendant knows the payment or offer will be passed on as a bribe. Actual knowledge is not required. Although carelessness or foolishness is not sufficient, knowledge includes wilful blindness towards or

[121] DJSEC Resource Guide (2012).
[122] Tarun (2013) at 4. Note that the DOJ may also turn to the *Travel Act* in cases where the bribe receiver is not a public official. The *Act* prohibits travel in interstate or international commerce that carries out unlawful activity, which includes activity in violation of state commercial bribery laws. See Tim Martin, "International Bribery Law and Compliance Standards" (Independent Petroleum Association of America, 2013) at 7, online: <http://www.ipaa.org/wp-content/uploads/downloads/2013/08/IPAA_BriberyLawPrimer_v10.pdf>.
[123] Koehler (2014).
[124] *Ibid* at 89–90.
[125] Deming (2014) at 211.
[126] DJSEC Resource Guide (2012).
[127] Tarun (2013) at 4.

awareness of a high probability that the payment will be used to bribe a foreign official.[128] This means companies must be alert to "red flags," such as close relations between a third party and a foreign public official or a request by the third party to make payments to offshore bank accounts.[129]

(vi) Application

The anti-bribery provisions of the *FCPA* apply to three categories of legal entities and all officers, directors, employees, agents and shareholders thereof:

1. "issuers": any company listed on a US stock exchange
2. "domestic concerns": any citizen, national, or resident of the US or any company that is organized under the laws of the US
3. "persons or entities acting within the territory of the US": any foreign national or non-issuer who engages in any act in furtherance of corruption while in the territory of the US.

As already noted, the jurisdictional reach of the *FCPA* will be dealt with in greater depth in Section 1.7 of Chapter 3.

(vii) Business Purpose Test

For a bribe to constitute an offence under the *FCPA*, the prosecution must show that the defendant bribed a foreign official intending the official to act in a manner which would assist the defendant in "obtaining or retaining business." Though this wording appears restrictive on its face, US courts have given a broad interpretation to "obtaining and retaining." For example, in *US v. Kay* (2004), the Fifth Circuit Court of Appeals held that bribes paid to obtain favorable tax treatment—which reduced a company's customs duties and sales taxes on imports—could constitute "obtaining and retaining business" within the meaning of the *FCPA*.[130] The court ruled that avoidance of taxes can provide a company with an improper advantage over its competitors, which necessarily allows the company a greater probability of obtaining and retaining business.

Bribes in the conduct of business or to gain a business advantage also satisfy the business purpose test. Other examples of prohibited actions include bribe payments to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, to influence the adjudication of lawsuits or enforcement actions, or to circumvent a licensing or permit requirement. As the *Resource Guide* puts it:

---

[128] *Ibid* at 12.

[129] Tim Martin, "International Bribery Law and Compliance Standards" (Independent Petroleum Association of America, 2013) at 7, online: <http://www.ipaa.org/wp-content/uploads/downloads/2013/08/IPAA_BriberyLawPrimer_v10.pdf>.

[130] *US v Kay*, 359 F.3d 738 (2004).

> In short, while the FCPA does not cover every type of bribe paid around the world for every purpose, it does apply broadly to bribes paid to help obtain or retain business, which can include payments made to secure a wide variety of unfair business advantages.[131]

It should also be noted that UNCAC has expanded the definition of "international business" to include the provision of international aid. This means that nonprofit organizations "should be presumed to be fully subject to the anti-bribery provisions."[132]

(viii) Corrupt and Willful Intent

To violate the *FCPA*, a bribe must be made "corruptly," which focuses on the intention of the defendant; there must be an "evil motive" or intent to wrongfully influence the recipient. Under the *FCPA*, it is not necessary that a bribe succeed in its purpose (i.e., actually influence a foreign official to act corruptly). If the prosecution can prove that the defendant intended to induce the foreign official to misuse his or her position of power, then the burden of proof is met, regardless of the foreign official's actual conduct or the effect on the defendant's business. Practically speaking, however, even though there is no legal requirement that the defendant benefit from the corrupt bribe, the DOJ is less likely to take enforcement action where the defendant has not personally benefitted.

The prosecution must also prove that the defendant acted "willfully." This is generally construed by courts to mean an act committed "deliberately and with the intent to do something that the law forbids, that is, with a bad purpose to disobey or disregard the law."[133] It is not necessary that the defendant knew the specific law that he or she was breaking (i.e., that their conduct violated the *FCPA*), but merely that the defendant knew that his or her actions were unlawful.[134] It should be noted, however, that proof of willfulness is not required to establish corporate or civil liability.[135]

Intent is often a difficult element for the prosecution to prove beyond a reasonable doubt in relation to bribery offences. Tarun points out that the search for intent "will frequently turn on the transparency of a payment or relationship, direct or indirect, with a foreign government official. While some transactions or relationships will be fully concealed and thus likely corroborative of a corrupt plan or scheme, others will reveal a confounding mixture of visibility and secrecy that can defeat a conclusion of evil motive beyond a reasonable doubt."[136] Tarun also notes that related accounting offenses are often "telltale" indications of corrupt intent.[137]

---

[131] DJSEC Resource Guide (2012).
[132] Deming (2014) at 219–220.
[133] *United States v Bourke*, 582 F Supp 2d 535 (SDNY 2008).
[134] DJSEC Resource Guide (2012).
[135] *Ibid*.
[136] Tarun (2013) at 257.
[137] *Ibid*.

(ix) Gifts, Entertainment and Charitable Contributions

Gifts are often used to foster cordial business relationships and promote products, especially in countries where gift-giving is culturally mandated, such as China. If a gift is given with no corrupt intent, the *FCPA* will not apply. However, gifts and charitable donations often disguise bribes and the line between proper and improper gifts is fuzzy, creating a compliance minefield for companies. The *Resource Guide* states that larger, more extravagant gifts are more likely to indicate corrupt motives, although small gifts might be part of a larger pattern of bribery. For example, in *SEC v Veraz Networks, Inc* (2010), the SEC settled with Veraz for violations relating to improper gifts. According to Tarun, "[t]he Veraz gift allegations – down to the detail of giving flowers for an executive's wife – represent an extreme SEC charging example and would not by themselves have likely resulted in an enforcement action. Still, the case demonstrates that the SEC will charge even minor gift abuses if they are part of a scheme."[138] Not everyone agrees with the SEC and DOJ's line-drawing; for example, the recent decision to fine BHP Billiton $25 million for hosting foreign officials at the 2008 Olympics, despite the absence of evidence of any specific *quid pro quo*, has been criticized for going too far.[139]

According to the *Resource Guide*, the "hallmarks of appropriate gift-giving" are transparency, proper recording, a purpose of showing esteem or gratitude and permissibility under local law.[140] The DOJ has approved charitable donations, but will consider whether companies carry out proper due diligence and implement control measures to ensure that donations are unrelated to business purposes and used properly.[141]

3.3.2 Defenses

In 1988, Congress added two affirmative defenses to the *FCPA*. In order to defend against a charge of foreign bribery, the defendant must prove either that:

(a) the payment was lawful under the written laws of the foreign country, or

(b) the payment was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by a foreign official and was directly related either to (i) the promotion, demonstration or explanation of products or services, or (ii) the execution or performance of a contract (for example, this could include travel and expenses incurred for training or meetings, or to visit company facilities or operations).

The fact that an act would not be prosecuted in a foreign country is not enough to invoke the local law defense. The payment itself must be lawful under foreign law.[142] Because no foreign

[138] *Ibid* at 168.
[139] "The World's Lawyer: Why America, and Not Another Country, Is Going after FIFA", *The Economist* (6 June 2015).
[140] DJSEC Resource Guide (2012).
[141] Martin (2013).
[142] *US v Bourke*, 582 F Supp 2d 535 (SDNY 2008).

countries permit bribery in their written laws, the local law defense is "largely meaningless," according to Koehler.[143] However, Tarun points out that the defense could be useful in the context of political campaign contributions.

The reasonable and bona fide expenditure defense can absolve a company of liability for providing gifts, travel, hospitality and entertainment for foreign officials. However, if carried too far, these expenditures can become improper and lead to *FCPA* scrutiny. For example, the defense will not cover side trips to tourist destinations with the sole purpose of personal entertainment.[144]

In addition, situations of extortion or duress afford a defense by negating "corrupt intent." That being said, "economic coercion" does not amount to extortion. In other words, the argument that the bribe was required in order to gain entry into the market or to obtain a contract will fail – see *United States v Kozeny*.[145] In addition, if extortion payments are not recorded properly, the SEC may pursue accounting offenses.[146] See Tarun for a list of potential defenses to bribery and accounting offenses under the *FCPA*.[147] See also the discussion of other criminal law defenses in Section 2.3.2.

The case of James Giffen provides an example of a unique defense, nick-named the "spy defense." Giffen was charged with violating the *FCPA* after he allegedly used $84 million from US oil companies to bribe Kazakhstan's president and various officials. However, the prosecution failed. Giffen claimed he was an informant for the CIA and argued that the US government was supporting his actions all along. The court agreed, and New York judge William Pauley called Giffen a "hero" for advancing US strategic interests in Central Asia.[148]

3.3.3 Limitation Periods for Bribery of a Foreign Official

According to the *Resource Guide*, the *FCPA* does not specify a statute of limitations and accordingly the general five-year limitation period set out in 18 USC § 3282 ("Offences not capital") applies.

However, as the *Resource Guide* points out, there are several ways to extend the limitation period. For example, if the case is one of conspiracy, the prosecution need only prove that one act in furtherance of the conspiracy occurred during the limitations period. Thus, the

[143] Koehler (2014).
[144] Tarun (2013) at 18.
[145] *United States v Kozeny*, 582 F Supp 2d (SDNY 2008).
[146] See complaint, *SEC v NATCO Group*, No. 4:10-cv-00098 (SD Tex, January 11, 2010).
[147] Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (American Bar Association, 2013) at 257-259.
[148] Aaron Bornstein, "The BOTA Foundation Explained (Part Three): The Giffen Case", *The FCPA Blog* (8 April 2015), online: <http://www.fcpablog.com/blog/2015/4/8/the-bota-foundation-explained-part-three-the-giffen-case.html>.

prosecution may be able to "reach" bribery or accounting offenses occurring prior to the five year limitation if the offenses contributed to the conspiracy.[149]

The limitation period can also be extended if the company or individual is cooperative and enters into a tolling agreement that voluntarily extends the limitation (i.e., waives the right to claim the litigation should be dismissed due to expiration of the limitation period). Koehler points out that, in practice, enforcement actions against corporations usually involve conduct outside the scope of the limitations period, since corporations are given the choice of extending the limitation or being charged by the DOJ. Koehler criticizes this tactic, pointing out that enforcement agencies face no time pressure, which means "the gray cloud of *FCPA* scrutiny often hangs over a company far too long."[150]

Finally, if the government is seeking evidence from foreign countries, the prosecutor may apply for a court order suspending the statute of limitations for up to three years.

3.3.4 Sanctions

For violation of the anti-bribery provisions, corporations and other business entities are liable to a fine of up to $2 million while individuals (including officers, directors, stockholders and agents of companies) are subject to a fine of up to $100,000 and imprisonment for a maximum of 5 years.[151]

However, the *Alternative Fines Act* 18 USC § 3571(d) provides for the imposition of higher fines at the court's discretion. The increased fine can be up to twice the benefit that the defendant obtained in making the bribe. The same Act specifies that the maximum fine for an individual charged under the *FCPA* is $250,000 (see § 3571(e)). Actual penalties are determined by reference to the US Sentencing Guidelines (§ 1A1.1 (2011). Chapter 7, Section 4 contains a detailed discussion of US sentencing practices.

3.3.5 Facilitation Payments

The *FCPA* contains a narrow exemption in § 78dd-1(b) for "facilitating or expediting payment[s]… made in furtherance of a 'routine governmental action' that involves non-discretionary acts. According to the *Resource Guide*, such governmental actions could include processing visas, providing police protection and mail service and the supply of utilities. It would not include such actions as the decision to award or continue business with a party, or any act within the official's discretion that would constitute the misuse of the official's office. The general focus is on the purpose of the payment rather than its value. The *Resource Guide* recommends companies discourage facilitating payments despite their legality under

---

[149] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Department of Justice and Securities Exchange Commission, 2012) at 35, online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

[150] Koehler (2014) at 129.

[151] 15 USC. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A)), 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A).

the *FCPA*, since they may still violate local laws in the country where the company is operating, and other countries' foreign bribery laws may not contain a similar exception (such as the UK). As a result, American individuals and companies may find they still face sanctions in other countries despite the *FCPA*'s facilitation payment exception.

Finally, facilitation payments must be properly recorded in the issuer's books and records. A discussion of the *FCPA*'s facilitation payments exemption and its pros and cons is provided in Section 4.

3.4 UK Law

For a detailed analysis of the UK *Bribery Act* offences see: Nicholls et al, *Corruption and Misuse of Public Office*.[152] For a comparison of the *FCPA* and the UK *Bribery Act*, see: Nicholas Cropp, "The Bribery Act 2010: (4) A Comparison with the *FCPA*: Nuance v Nous" [2011] Crim L Rev 122.

3.4.1 Offences

As noted above in Section 2.4.2, the UK *Bribery Act* addresses both foreign and domestic bribery and applies to individuals and other legal entities. In addition to its general anti-bribery prohibitions, the *Bribery Act* also contains a discrete offence in section 6 that applies to bribery of foreign public officials. The reach of sections 1, 2 and 7 is very broad, subject only to jurisdictional constraints. As a result, it is difficult to envisage conduct falling within the foreign bribery offence that would not already be covered by the other offences. Sullivan posits that the primary role for the offence of bribing foreign public officials is to "flag clearly that the United Kingdom is compliant with its treaty obligations to combat the bribery of public officials."[153]

Section 6 criminalizes the giving or promising of an advantage to a foreign public official in order to gain or retain business or a business advantage. Importantly, the offence only covers "active bribery" and not the acceptance of bribes. The briber must know the receiver is a public official and must intend to influence the official in the performance of his or her functions as a public official. Unlike section 1, the briber need not intend to influence the recipient to act improperly. This is very different from the *FCPA*, which requires corrupt intent. Under section 6, the intention to influence the foreign official in and of itself makes out the offence, regardless of whether the briber knows their conduct is improper or unlawful. This means that a reasonable belief in a legal obligation to confer an advantage does not provide a defence.[154] Cropp criticizes this minimal *mens rea* requirement and illustrates its absurdity by describing trivial, *de minimis* scenarios that meet all the requirements of a section 6 offence. Although the Director of Public Prosecutions and the SFO are unlikely to allow prosecution of such *de minimis* allegations, Cropp argues that

[152] Nicholls et al (2011).
[153] GR Sullivan (2011) at 94.
[154] Nicholls et al (2011) at 87.

prosecutorial discretion should not be the only check on "overbreadth of application."[155] According to Cropp, businesses should not have to depend on the whims of the prosecutor to avoid liability, but rather should be able to determine what conduct will result in prosecution from the *Act* itself. He further notes that this "unusual reliance on official discretion ... raises serious concerns about the extent to which the Act will be applied consistently and transparently."[156]

A bribe can be made directly or through a third party, and can be received by the foreign public official or by another person at the official's request or with their assent. Because the official must have assented or acquiesced to the bribe, section 6 captures less peripheral and preliminary conduct than the *FCPA*.[157] Instead, the UK regime relies on inchoate offences to capture such conduct.

"Foreign public officials" are defined in subsection (5) as individuals who hold legislative, administrative, or judicial positions, as well as individuals who are not part of government, but still exercise a public function on behalf of a country, public enterprise or international organization. The definition does not include political parties or political candidates.

Corporate hospitality presents a challenge for companies trying to comply with the foreign bribery provisions, especially in light of the absence of a corrupt intent requirement in section 6. Corporate hospitality is a legitimate part of doing business, but can easily cross the line to bribery. The Ministry of Justice *Guidance* states that the *Bribery Act* does not intend to criminalize "[b]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organization, better to present products and services or to establish cordial relations."[158] The *Guidance* also states that "some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match" are unlikely to trigger section 6.[159] According to the *Guidance*, the more lavish the expenditure, the stronger the inference that the expenditure is intended to influence the official.

3.4.2 Defences

If the foreign public official is permitted or required by the written law applicable to that official to be influenced by an offer, promise, or gift, then the offence is not made out (see section 6(3)(b)). The official must be specifically entitled to accept the payment or offer; the silence of local law on the matter is not sufficient to ground the defence. Section 6(7) addresses this defence in more detail. It clarifies that where the public official's relevant function would be subject to the law of the UK, the law of the UK is applicable. If the performance of the official's actions would not be subjected to UK law, the written law is

[155] *Ibid.*
[156] *Ibid* at 34.
[157] Nicholas Cropp, "The Bribery Act 2010: (4) A Comparison with the FCPA: Nuance v Nous" (2011) Crim L Rev 122 at 135.
[158] UK *Bribery Act* Guidance (2010).
[159] *Ibid* at 14.

either the rules of the organization or the law of the country or territory for which the foreign public official is acting (including constitutional or legislative laws as well as published judicial decisions).

The *Bribery Act* 2010 contains no other specific defences. For a discussion of general criminal law defences, see Section 2.4.3 above.

3.4.3 Limitation Periods

As described in Section 2.4.4, the UK *Bribery Act* is not subject to any limitation periods.

3.4.4 Sanctions

The applicable penalties have already been discussed above at Section 2.4.5 under domestic bribery.

3.4.5 Facilitation Payments

The UK *Bribery Act*, unlike the American *FCPA*, does not provide an exemption for facilitation payments. However the *Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* state that whether it is in the public interest to prosecute for bribery in the case of facilitation payments will depend on a number of factors set out in the *Joint Prosecution Guidance*. The pros and cons of exempting facilitation payments from the scope of bribery offences is examined in some detail in Section 4 of this chapter.

3.5 Canadian Law

3.5.1 Offences

The *Corruption of Foreign Public Officials Act* (*CFPOA*) came into force in 1999 in order to meet Canada's obligations under the OECD Anti-Bribery Convention. Section 3(1) of the *CFPOA* states:

> Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or through a third party 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.

As pointed out by Deming, the inclusion of the words "in order to obtain or retain an advantage" indicates a quid pro quo element.[160] Since no particular *mens rea* is specified for this crime, Canadian law presumes that the necessary mental element is subjective. There is nothing in the context of this offence to displace that presumption. Proof of negligence will not be enough; to be held liable the accused person must have committed the offence with the intention of doing so or with recklessness or willful blindness to the facts. The definition of "person" in the *Criminal Code* also applies to the bribery offences in section 3 of the *CFPOA*, by reason of section 34(2) of the *Interpretation Act*.[161] The definition of "person" in section 2 of the *Criminal Code* includes both individuals and other organizations, including corporations.

In *R v Niko Resources Ltd* (2011), the court demonstrated that gifts of significant value are liable to be considered a "reward, advantage or benefit" under the *CFPOA*.[162] Niko, an oil and gas company, gave the Bangladeshi Minister for Energy and Mineral Resources an expensive SUV and a trip to Calgary and New York in order to influence ongoing business dealings. The minister attended an oil and gas exposition in Calgary, but the trip to New York was purely to visit family. These benefits were provided after an explosion at one of Niko's gas wells in Bangladesh, which had caused bad press and legal problems for Niko. The court imposed a fine of almost $9.5 million, in spite of the relatively small value of the gifts in comparison to the size of the fine and Niko's cooperation during the investigation.[163]

"Foreign public official" is defined in section 2 of the *CFPOA* as follows:

> (a) a person who holds a legislative, administrative or judicial position of a foreign state;
>
> (b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
>
> (c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

This definition does not include political party officials or political candidates.

In response to criticism from a number of commentators as well as the OECD Working Group, Canada amended the *CFPOA*. Bill S-14, *An Act to Amend the Corruption of Foreign Public Officials Act* received royal assent and subsequently came into force in June, 2013. Previously, the word "business" was limited by section 2 of the *CFPOA* to for-profit

[160] Deming (2014) at 53.
[161] *Interpretation Act*, RSC 1985, c I-21.
[162] *R v Niko Resources Ltd*, [2011] AJ 1586, 2011 CarswellAlta 2521 (ABQB).
[163] Norm Keith, *Canadian Anti-Corruption Law and Compliance* (LexisNexis, 2013) at 121–130.

endeavours. This has since been replaced by a definition of "business" that is not limited in this way. Thus it also applies to bribery by NGO's and other non-profit organizations, although according to Norm Keith, RCMP investigations remain focused on for-profit businesses.[164] In addition, the jurisdictional provisions under the former *CFPOA* were amended in 2013 and the *CFPOA* now applies to the acts of Canadian citizens, permanent residents and Canadian corporations while they are outside of Canadian territory. Previously, Canada's ability to prosecute those engaged in bribery of foreign officials was limited by the concept of "territoriality": in order for a person to be held liable under the *CFPOA* there had to be a real and substantial link between the acts which constituted the offence and Canada (discussed in detail in Chapter 3, Section 1.9). The 2013 amendments also establish accounting offences, which make it a crime to falsify accounting records for the purpose of facilitating or concealing the bribery of a foreign public official.

As noted by Deming, the secret commissions offence under section 426 of the *Criminal Code* may be used to supplement the *CFPOA* if Canada has territorial jurisdiction over the conduct at issue. The secret commissions offence covers any situation involving an agency relationship and is not limited to situations in which the recipient of a bribe is a public official. Section 426 could therefore be useful when dealing with recipients who do not meet the definition of a foreign public official or when commercial bribery is at issue.[165]

3.5.2 Defences

An accused charged with an offence under the *CFPOA* is entitled to the same general defences as persons charged with other offences. These include mistake of fact, incapacity due to mental disorder, duress, necessity, entrapment, diplomatic immunity and *res judicata*.

In addition, section 3(3) states that no person is guilty of an offence under section 3(1) where the loan, reward, advantage or benefit is "permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions." Further, no person will be guilty where the benefit was "made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official" where those expenses "are directly related to the promotion, demonstration, or explanation of the person's products and services" or to "the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions." According to Canada's 2013 Written Follow-Up to the OECD Phase 3 Report, the defence of "reasonable expenses incurred in good faith" has not yet been considered by any Canadian courts.

Keith pointed out the peculiarity of the wording of the defences in section 3(3). Both defences use the words "loan, reward, advantage or benefit," but Keith argues these words "tend to imply a potential questionable or even inappropriate payment to a foreign public official."[166] Keith points out that providing "personal loans, special rewards, specified advantages or

[164] *Ibid* at 21.

[165] Deming (2014) at 48.

[166] Norm Keith, *Canadian Anti-Corruption Law and Compliance* (LexisNexis, 2013) at 25–26.

other benefits" to a foreign public official will rarely "appear ethical, lawful or permitted by the laws of a foreign government,"[167] and will rarely be appropriate as reimbursement for expenses incurred by the official. As a result, Keith argues that the wording of section 3(3) is difficult for businesses to interpret.

3.5.3 Limitation Periods

Because the offences in the *CFPOA* are punishable by indictment, there are no limitation periods in respect to laying a charge after an offence is alleged to have occurred. However, since there was no offence in Canada of bribing a foreign public official prior to the enactment of the *CFPOA*, there can be no prosecution of such conduct which occurred prior to 1999.

3.5.4 Sanctions

Bribing a foreign public official under section 3(1) is an indictable offence which was punishable by a maximum of 5 years imprisonment until amendments were enacted in 2013 raising the maximum penalty to 14 years imprisonment. The accounting offences under section 4 are also indictable and punishable by imprisonment for a maximum of 14 years.

Pursuant to recent *Criminal Code* amendments, conditional and absolute discharges or conditional sentences served in the community are no longer available sentencing options for any offence with a 14-year maximum penalty. Accused persons may also face forfeiture of the proceeds of *CFPOA* offences, and Public Works and Government Services Canada will not contract with businesses convicted under the *CFPOA*.[168] These and other consequences of a *CFPOA* conviction are dealt with in Chapter 7, Sections 7 to 10 of this book.

3.5.5 Facilitation Payments

As part of the 2013 amendments discussed above, facilitation payments, meaning those payments made to either ensure or expedite routine acts that form part of a foreign public official's official duties or functions, will no longer be exempt from liability under the *CFPOA.* This provision was proclaimed in force as of October 31, 2017. The pros and cons of facilitation payments are discussed in greater detail in Section 4, below.

4. FACILITATION PAYMENTS AND THE OFFENCE OF BRIBERY

Facilitation or "grease" payments are relatively small bribes paid to induce a foreign public official to do something (such as issue a licence) that the official is already mandated to do. As Nicholls et al. point out, "those facing demands for such payments often feel there is no

[167] *Ibid* at 25.
[168] Deming (2014) at 63.

practical alternative to acceding to them."[169] In almost every case the payment will be illegal in the public official's home state. Yet such payments are a routine way of life in most of the countries listed in the bottom half or quarter of the TI Corruption Perception Index. Some of the most developed nations do not prohibit their own nationals from making these payments to public officials elsewhere. Other nations prohibit facilitation payments, but make no effort to enforce that prohibition. There is significant disagreement among international players as to whether facilitation payments should be prohibited, although the current trend is towards their prohibition.[170] UNCAC and the OECD Convention do not expressly accept or reject exempting facilitation payments from the definition of offences of bribery.

Zerbes notes that in order for a payment to be properly classified as a facilitation payment, "[t]he condition must be that these transfers really are of a *minor nature not exceeding the social norm* pertaining to them in the society in question."[171] While some facilitation payment exemptions may be focused on payments of "a minor value," under the US *FCPA* the focus is on the purpose of the payment rather than its value (see Section 3.3.5 above). In addition, the payment must not be in exchange for a breach of duty or involve a discretionary decision; its purpose may only be for the inducement of a lawful act or decision on the part of the foreign public official that does not involve an exercise of discretion.

In her review of the ways in which Canada could improve its response to corruption of foreign public officials, Skinnider states the following in regard to facilitation payments:[172]

> A review of States' practice appears to show that the tolerance for small bribes or facilitation payments is fading. Twenty years ago, when the OECD Convention was negotiated and countries passed relevant domestic legislation, such payments were common and even legal in many countries. However, now times have changed. There is no country anywhere with a written law permitting the bribery of its own officials. The only countries that permit facilitation payments to foreign public officials are the US, Canada, Australia, New Zealand and South Korea. The Australian government has recently proposed removing the facilitation payment defence. Australian lawyers support the government's plan to ban

[169] Nicholls et al (2011) at para 4.119.

[170] As pointed out by Tim Martin, in practice, facilitation payments are not necessarily treated differently in jurisdictions with prohibitions on facilitation payments as opposed to those without. For example, in the US, the exception for facilitation payments has been substantially narrowed, while in the UK, where facilitation payments are banned, prosecutorial policies make charges for small facilitation payments less likely. See Martin (2013).

[171] Ingeborg Zerbes, "Article 1 – The offence of bribery of foreign public officials" in Mark Pieth, Lucinda A. Low and Peter J. Cullen, eds, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press, 2007) 45 at 139.

[172] Eileen Skinnider, *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response* (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, 2012) at 19. See also updated version by Skinnider and Ferguson (2017), online: <https://icclr.law.ubc.ca/publication/test-publication/>.

> facilitation payments, saying the changes would bring the country into line with international best practices and address the 'weakest link' in the existing legislation". Many practitioners increasing believe that US authorities have simply read the exception for facilitation payments out of the statute. Others are calling for the US to repeal the exception. [footnotes omitted]

This section on facilitation payments begins by canvassing the major arguments for and against treating facilitation payments as bribes. Following this, the treatment of facilitation payments under the major international instruments as well as under US, UK and Canadian domestic law will be examined.

4.1 Arguments for and Against Facilitation Payments

Skinnider, in her paper *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response*, reviews the arguments for and against not treating facilitation payments as bribery as follows:[173]

BEGINNING OF EXCERPT

Arguments to support eliminating the defence of facilitation payments

Every bribe of a government official, regardless of size, breaks the law of at least one country.[174] A lack of resources, political will or interest has meant violations are rarely prosecuted, but that is changing. Permitting the citizens of one country to violate the laws of another corrodes international standards and marginalizes the global fight against corruption. It is also a double standard. The few countries that allow for facilitation payments to be made to foreign public officials prohibit their own officials from accepting them.[175]

[173] *Ibid* at 19–21.

[174] [131] A. Wrage "The Big Destructiveness of the Tiny Bribe" (Ethisphere, 2010), retrieved from http://www.forbes.com/2010/03/01/bribery-graft-law-leadership-managing-ethisphere.html.

[175] [132] Jon Jordan "The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception under the Foreign Corrupt Practices Act" (2011) 13 U. Pa. J. Bus. L. 881. According to TRACE, of the countries that permit these small bribes overseas, none permits them at home: A. Wrage "One Destination, Many Paths: The Anti-Bribery Thicket" (TRACE, November 2009).

Companies are concerned that paying facilitation payments could lead to costly legal complications.[176] [In countries where facilitation payments are permitted as an exception, s]ome describe it as a very limited and complicated defence and [one that] is frequently misunderstood, thus exposing businesses operating offshore to criminal liability in circumstances where they might genuinely believe they are acting lawfully.[177] It also can make it difficult for companies to follow the laws in their domestic jurisdiction if they are required to record such payments that are illegal in the country where it is being made. Furthermore, with countries like the UK prohibiting facilitation payments, there is an increasing risk that a multinational company with foreign subsidiaries will violate the laws of the country where the subsidiary is based. Companies with offices in more than one country expressed concern that if they do not abolish the use of small bribes altogether, they must undertake different compliance programs based not only upon the location of each office, but the citizenship of the people working there.[178] According to TRACE, many multinational companies are taking steps to eliminate "facilitation payments".[179]

[176] [133] TRACE Oct 2009 facilitation payments benchmark survey. Almost 60% report that facilitation payments posed a medium to high risk of books and records violations or violations of other internal controls. Over 50% believe a company is moderately to highly likely to face a government investigation or prosecution related to facilitation payments in the country in which the company is headquartered. Representatives of the legal profession in Canada have expressed concern that this defence creates a large area of uncertainty, see OECD, "Canada: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions" (March 2011), retrieved from [updated link: http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf].

[177] [134] FCPA Professor Blog by Mike Koehler, "No – The Consistent Answer in DoJ Responses to Senator Questions Regarding FCPA Reform" (April 14, 2011), retrieved at [updated link: http://fcpaprofessor.com/no-the-consistent-answer-in-doj-responses-to-senator-questions-regarding-fcpa-reform/].

[178] [135] A 2008 survey by the law firm of Fulbright and Jaworski found 80% of companies in the US prohibited the use of FP. Majority of domestic companies felt that it was better to ban facilitation payments altogether than "explore a gray area inviting costly and embarrassing investigations for *FCPA* violations". KPMG survey came up with similar results. Jon Jordan "The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception under the Foreign Corrupt Practices Act" (2011) 13 U. Pa. J. Bus. L. 881.

[179] [136] TRACE "The High Cost of Small Bribes" (TRACE, 2009), retrieved from [updated link: https://www.traceinternational.org/Uploads/PublicationFiles/TheHighCostofSmallBribes2015.pdf]. Results show a definitive move by corporations to ban facilitation payments, coupled with an awareness of the added risk and complexity presented by facilitation payments. See also A. Wrage "The Big Destructiveness of the Tiny Bribe" (Ethisphere, 2010), retrieved from http://www.forbes.com/2010/03/01/bribery-graft-law-leadership-managing-ethisphere.html.

TRACE asks why governments are not following what is already the practice of many major companies.[180]

Prior to the passing of the 2010 UK Bribery Act, the UK Law Commission Consultation Report listed a number of arguments against exempting facilitation payments:[181]

- Inherent difficulties in determining when a payment crosses the line (does "routine" mean "frequently" or "commonplace").[182]
- Blurs the distinction between legal and illegal payments and floodgates argument.[183]
- Weakens the corporation's ability to implement its anti-bribery programme.
- Sends confusing messages to employees.
- Creates a "pyramid scheme of bribery."[184]

Another argument supporting the prohibition of facilitation payments is the accounting dilemma. A business may be required to record a facilitation payment in its accounts by one jurisdiction, but this may then formalize an illegal act which, if concealed, may amount to tax evasion in another jurisdiction. It has been observed that often companies must opt between "falsifying their records in violation of their own laws or recording the payments accurately and documenting a violation of local law".[185]

[180] [137] A. Wrage "One Destination, Many Paths: The Anti-Bribery Thicket" (TRACE, November 2009).
[181] [138] UK Law Commission Consultation Paper (2007) Appendix F from the UK Law Commission report: Facilitation Payments, Commission Payments and Corporate Hospitality. UK Law Commission Consultation Report notes the Association of Chartered Accountants 2007 study which stated that only 46% of its respondents felt able to differentiate between a facilitation payment and a bribe.
[182] [139] UK Law Commission Consultation Report notes the Association of Chartered Accountants 2007 study which stated that only 46% of its respondents felt able to differentiate between a facilitation payment and a bribe.
[183] [140] Floodgate argument is further discussed in Rebecca Koch, "The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance" 28 BC Int'l & Comp L. Rev. 389 (2005).
[184] [141] Junior officials who look for small bribes rise to higher positions by paying off those above them. Corruption creates pyramids of illegal payments flowing upward. Legalizing the base of the pyramid gives it a strong and lasting foundation.
[185] [142] UK Law Commission Consultation Paper (2007) Appendix F from the UK Law Commission report: Facilitation Payments, Commission Payments and Corporate Hospitality.

Facilitation payments can have a negative impact on society.[186] Such payments can interfere with the proper administration of government, impede good governance and result in social unrest. This may even go as far as encouraging governments to fix their employees' salaries in expectation of these payments. Security concerns have also been raised. "If you pay government officials to manage differently, you shouldn't be surprised if criminals and terrorists are doing the same."[187] If visas can be bought, borders won't be safe.[188]

Arguments to support retaining the defence of facilitation payments

The most cited argument is that business will "lose out" to rival foreign companies that do … make facilitation payments.[189] They will experience competitive disadvantages because prohibiting facilitation payments will result in an uneven playing field. Such payments are seen as a necessary and acceptable part of business [in many parts of the world]. Since other jurisdictions permit such payments, to exclude them would be detrimental to businesses and competitive enterprise. Another argument is that the laws permit only payments that are minor in nature, so it is argued that they will have minimal detrimental consequences. In response to the argument that business will "lose out" to rival foreign companies that do not make facilitation payments, the UK Trade and Investment Department argues that "UK companies may lose some business by taking this approach, but equally there will be those who choose to do business with UK companies precisely because we have a no-bribery reputation, and the costs and style of doing business are more transparent."[190] Research conducted by the World Bank demonstrated that in fact payment of bribes results in firms spending "more, not less, management time… negotiating regulations and facing higher, not lower, costs of capital".[191] Further it may be more difficult then to resist subsequent demands for payment. A TRACE study revealed that none of the companies that approached the issue carefully and comprehensively reported significant or prolonged disruption in their business activities.

[186] [143] A. Wrage "The Big Destructiveness of the Tiny Bribe" (Ethisphere: 2010), retrieved from http://www.forbes.com/2010/03/01/bribery-graft-law-leadership-managing-ethisphere.html.
[187] [144] ibid.
[188] [145] As TRACE noted, "the practice of bribing immigration officials can lead to serious entanglements with the enhanced security laws of the company's home country". See A. Wrage, "One Destination, Many Paths: The Anti-Bribery Thicket" (TRACE: November 2009).
[189] [146] Charles B. Weinograd "Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception" (2010) 50 Va. J. Int'l L. 509.
[190] [147] UK Law Commission Consultation Report cites examples of BP and Shell, UK Law Commission Consultation Paper (2007) Appendix F from the UK Law Commission report: Facilitation Payments, Commission Payments and Corporate Hospitality.
[191] [148] Daniel Kaufmann and Shang-Jin Wei "Does 'grease money' speed up the wheels of commerce?" (World Bank).

A concern has been raised that banning facilitation payments would prove impractical and ineffective. One scholar argues that in many cultures, payment for routine governmental action is a widespread practice, engrained within social norms and local mores.[192] Inadequate wages abroad and foreign custom make such payments necessary. As he notes "it would be far better to have a provision that is workable and can be enforced, rather than have one which looks good on the statute books but is totally unenforceable".[193]

END OF EXCERPT

4.2 Facilitation Payments and Culture

According to Strauss, the basic rationale for anti-bribery legislation is the belief that bribery is immoral.[194] In her view, the essence of bribery is that it involves a payment for an advantage that one does not deserve. This violates the principle of equality, as it allows some persons to be treated preferentially and skip ahead of others in the same queue. However, some commentators have argued that this principle of equality is not universal. Or even if it is, in many cultures facilitation payments are not viewed as violating the principle of equality. There are some that argue that imposing a ban on the payment of facilitation payments by US (or UK or Canadian) corporations in foreign countries amounts to a form of cultural imperialism. Strauss argues, however, that since facilitation payments are illegal under the written domestic laws of most countries, the normative ideal in most countries around the world is to eliminate these types of payments. As well, Strauss characterizes the legislative objective of the *FCPA* as improving the ethical standards of American firms, and points out that the *Act* neither intends to nor imposes ethical standards on foreign nations.

Bailes reviews the cultural and practical arguments in favour of permitting facilitation payments.[195] Ultimately, he concludes that the credibility of these arguments is diminishing as new approaches to combating bribery are gaining in acceptance and use. He argues that the distinction between bribes and facilitation payments is widely accepted as "hazy."[196] There is growing awareness that facilitation payments are not so easily separated from bribery and its accompanying debilitating economic impacts on developing and corruption-rife nations. However, the artificial separation between facilitation payments and bribery has

[192] [149] Charles B. Weinograd "Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception" (2010) 50 Va. J. Int'l L. 509.
[193] [150] Ibid.
[194] Emily Strauss, "Easing Out the *FCPA* Facilitation Payment Exception" (2013) 93 BUL Rev 235.
[195] Robert Bailes, "Facilitation Payments: Culturally Acceptable or Unacceptably Corrupt?" (2006) 15 Bus Ethics: Eur Rev 293.
[196] *Ibid* at 295.

been institutionalized within many multinational corporations.[197] Within these corporations, facilitation payments are viewed as a simple cost of doing business in non-Western cultures.

Unlike Strauss, Bailes does not dismiss the cultural arguments for permitting facilitation payments. The "cultural absolutism" argument suggests that it is wrong for multinational corporations and foreign states to impose western-centric views on corruption and facilitation payments on countries where these payments are embedded within local customs. He notes that "practical attempts by multinationals to develop and prescribe codes of ethics that prescribe how their employees behave are misguided and do fall into the trap of cultural absolutism."[198] Instead, Bailes suggests a more culturally sensitive approach that allows individual actors to make judgement calls based on the specific issue and context.

He acknowledges the practical difficulties faced by multinational corporations; in some cases, it may not be possible to operate in a certain location without paying facilitation payments. However, he concludes that evolving methods of curbing bribery, such as industry-wide associations that prohibit bribery, or campaigns focused on encouraging transparency and accountability in financial reporting, have the potential to assist in overcoming these practical hurdles. As pressure mounts on investors to "set the rules of the game with regard to social, economic and environmental issues such as bribery and corruption" the "first mover disadvantage"—the disadvantage faced by the first company to take a zero tolerance approach when there are other firms willing to step in and continue making facilitation payments—is disappearing.[199]

As Robert Barrington, the Executive Director of Transparency International UK, puts it: "When a company pays a bribe of any size, it reinforces a culture of graft which is exceptionally damaging to the economies and societies in which they are paid."[200]

4.3 The Economic Utility of Facilitation Payments

The real economic utility of facilitation payments is also being increasingly questioned. According to Strauss, despite the views of some economists, facilitation payments are economically inefficient. These payments distort market forces and reduce economic growth by lowering both the volume and the efficiency of investment.[201] As well, as a form of bribery, facilitation payments facilitate the abuse of public office for private gain. This damages the government's credibility with both its own citizens and foreign investors.

---

[197] *Ibid* at 295.

[198] *Ibid* at 296.

[199] *Ibid* at 297.

[200] Transparency International UK, "Small Bribes, Big Problem: New Guidance for Companies) (24 November 2015), online: <http://www.transparency.org.uk/press-releases/small-bribes-big-problem-new-guidance-for-companies/>.

[201] For a detailed explanation of this concept, see Hiren Sarkar & M Aynul Hasan, "Impact of Corruption on the Efficiency of Investment: Evidence from a Cross-Country Analysis" (2001) 8:2 APDJ 111.

The contrary view is that facilitation payments can actually be economically efficient. Some commentators argue that facilitation payments permit firms to navigate more quickly through the unnecessary and time-consuming red tape that exists in certain highly bureaucratic states. However, Strauss notes that there is evidence that tolerance of facilitation payments creates incentives for bureaucrats to purposely create delays in order to increase the bribe prices firms are willing to pay.

Evidence from a study conducted by Kaufmann and Wei for the World Bank concluded that "there is no support for the 'efficient grease' hypothesis.[202] In fact, a consistent pattern is that bribery and measures of official harassment are positively correlated across firms."[203] "Official harassment" refers to "management time wasted with bureaucracy, regulatory burden, and cost of capital." Therefore, while a facilitation payment may initially appear enticing to a multinational firm, it is questionable whether such a payment makes economic sense in the long term.

In her discussion regarding the phasing out of the facilitation payments exemption from the US *FCPA*, Strauss discusses another argument against doing so: it would enable foreign corporations based in countries that do not prohibit facilitation payments to gain an advantage over American corporations. Strauss acknowledges the validity of this argument, although she notes that the reputational costs to a country that knowingly violates international anti-bribery agreements may mitigate this effect. For instance, in 2011, China passed new anti-bribery legislation that does not provide for a facilitation payment exception. But, to date, China has not prosecuted any foreign bribery cases, whether big or small.[204]

Others argue that in certain situations, demands for facilitation payments are truly extortionate, and if corporations from countries barring facilitation payments are unable to comply they will be prevented from doing business in many countries. However, research conducted by TRACE International, a non-profit association that provides anti-bribery training and education to multinational corporations and their associates, suggests that this situation is rare. Strauss argues that allowing firms to acquiesce to these demands only increases the frequency and price of future demands. Ultimately, the only real solution is "a truly global anti-corruption regime in which companies that do not cave to extortionate bribe demands cannot be supplanted by those that do."[205] Until such a regime is truly established and enforced, however, Strauss argues that any revision to the US facilitation payments exemption should recognize the difficulties firms face when confronted with truly extortionate demands.

---

[202] "Does 'Grease Money' Speed Up the Wheels of Commerce" (World Bank Institute, 1999), online: <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-2254>.
[203] *Ibid* at 16.
[204] Gerry Ferguson, "China's Deliberate Non-Enforcement of Foreign Corruption: A Practice that Needs to End" (2017) 50:3 Intl Lawyer 503.
[205] Strauss (2013) at 263.

4.4 UNCAC and OECD Convention

(i) Facilitation Payments and the OECD Convention

The Convention does not prohibit "small facilitation payments." However, Paragraph 6(i) of the OECD's 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* states that, "in view of the corrosive effect of small facilitation payments," member countries should "undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon."[206] In addition, member countries should "encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records" (para 6(ii)).

(ii) Facilitation Payments and UNCAC

There is some question as to whether facilitation payments paid to foreign public officials are prohibited under UNCAC. Article 16(1) prohibits the promising, offering or giving of an "undue advantage" to a foreign public official "in order to obtain or retain business or other advantage in relation to the conduct of international business." The phrase "other advantage in relation to the conduct of international business" is ambiguous and could encompass the advantages garnered through making facilitation payments. Kubiciel addresses the issue of facilitation payments under the OECD Convention and UNCAC as follows:

> The Commentaries on the OECD Convention suggest that these payments do not constitute advantages made to obtain or retain business or other improper advantage and, therefore, are not a criminal offence under the OECD Convention. The reason for this exemption lies in the fact that the OECD Convention primarily tackles corruption as a distortion of free competition. As small facilitation payments do not impede free trade they are not covered by the *ratio legis* of the OECD Convention. States which follow the interpretation of the OECD may abstain from criminalizing cases in which grease payments are paid to hasten the completion of a non-discretionary routine action. However, the wording of the UNCAC does not require such a wide exemption from criminalization. Rather, the facilitation of proceedings can be conceived as an "other advantage in relation to the conduct of international business". More importantly, the aim of the UNCAC suggests a comprehensive penalization of bribery, including grease payments: Unlike the OECD Convention, the UNCAC does not focus on corruption as an obstacle for fair and free trade. Rather, the preamble of

[206] OECD "Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions", online: <https://www.oecd.org/daf/anti-bribery/44176910.pdf>.

> the UNCAC stresses "the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law". As facilitation payments can be a first move in a game that leads to grand corruption and since all forms of bribery can, in the long run, affect institutions and legal values, states should, as a general rule, criminalize facilitation bribes.[207]

Many organizations, such as the UK Serious Fraud Office, maintain that UNCAC is unequivocal in its prohibition of all corrupt payments, including facilitation payments. Skinnider also interprets UNCAC as prohibiting facilitation payments. Other scholars, however, interpret the failure of UNCAC to specifically address facilitation payments as a deliberate attempt to leave the decision on whether to criminalize facilitation payments up to signatory states. Brunelle-Quraishi suggests that the lack of a specific provision on facilitation payments leads to two possible conclusions:

> The first is that by refusing to acknowledge facilitation payments' legality, the UNCAC was inherently meant to leave a measure of discretion to the Member States. The second is that there was no consensus on the matter during negotiations and a broad definition of corruption was necessary in order to ensure that as many states as possible would adhere to the UNCAC.[208]

Indeed, as will be discussed in further detail below, the US *FCPA* continues to include an exemption for facilitation payments while the UK's new *Bribery Act* prohibits them. Canada enacted legislation in 2013 criminalizing facilitation payments, but that provision was not proclaimed in force until October 31, 2017.

4.5 US Law

As noted above, the *FCPA* does not prohibit firms operating under its jurisdiction from making facilitation payments to foreign public officials. The prosecution has the burden of negating this exception. However, companies may still be liable under the *FCPA*'s accounting provisions if they make facilitation payments but fail to properly record the payments as such. Firms are often unwilling to properly record facilitation payments as they are generally prohibited under the domestic legislation of the foreign public official's home state. The *FCPA* provides a more detailed description of what qualifies as a facilitation

[207] Kubiciel (2009) at 154.
[208] Ophelie Brunelle-Quraishi "Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis" (2011-2012) 2 Notre Dame J Intl & Comp L 101 at 131-132.

payment than the OECD Convention; however, interestingly, the *FCPA* does not specifically require that the payment be "small."[209]

The facilitation payment exception under the *FCPA* has been called "illusory" by the SEC's former Assistant Director of Enforcement due to enforcement patterns:

> [T]he fact that the FCPA's twin enforcement agencies have treated certain payments as prohibited despite their possible categorization as facilitating payments does not mean federal courts would agree. But because the vast majority of enforcement actions are resolved through DPAs [deferred prosecution agreements] and NPAs [non-prosecution agreements], and other settlement devices, these cases never make it to trial. As a result, the DOJ and the SEC's narrow interpretation of the facilitating payments exception is making that exception ever more illusory, regardless of whether the federal courts – or Congress – would agree.[210]

The following excerpt from the *FCPA*'s *Resource Guide* details the SEC and US DOJ's view on what type of payments qualify for the facilitation payments exemption:[211]

BEGINNING OF EXCERPT

What Are Facilitating or Expediting Payments?

The FCPA's bribery prohibition contains a narrow exception for "facilitating or expediting payments" made in furtherance of routine governmental action. The facilitating payments exception applies only when a payment is made to further "routine governmental action" that involves non-discretionary acts. Examples of "routine governmental action" include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party. Nor does it include acts that are within an official's discretion or that would constitute misuse of an official's office. Thus, paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment.

[209] OECD Working Group on Bribery, *United States Phase 3 Report* (October, 2010) at para 74.
[210] Richard Grime and Sara Zdeb, "The Illusory Facilitating Payments Exception: Risks Posed by Ongoing FCPA Enforcement Actions and the U.K. Bribery Act" (2011), quoted in Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar, 2014) at 120.
[211] Department of Justice and Security Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

Examples of "Routine Governmental Action"

An action which is ordinarily and commonly performed by a foreign official in—

- obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- processing governmental papers, such as visas and work orders;
- providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- actions of a similar nature.

Whether a payment falls within the exception is not dependent on the size of the payment, though size can be telling, as a large payment is more suggestive of corrupt intent to influence a non-routine governmental action. But, like the FCPA's anti-bribery provisions more generally, the facilitating payments exception focuses on the *purpose* of the payment rather than its value. For instance, an Oklahoma- based corporation violated the FCPA when its subsidiary paid Argentine customs officials approximately $166,000 to secure customs clearance for equipment and materials that lacked required certifications or could not be imported under local law and to pay a lower-than-applicable duty rate. The company's Venezuelan subsidiary had also paid Venezuelan customs officials approximately $7,000 to permit the importation and exportation of equipment and materials not in compliance with local regulations and to avoid a full inspection of the imported goods. In another case, three subsidiaries of a global supplier of oil drilling products and services were criminally charged with authorizing an agent to make at least 378 corrupt payments (totaling approximately $2.1 million) to Nigerian Customs Service officials for preferential treatment during the customs process, including the reduction or elimination of customs duties.

Labeling a bribe as a "facilitating payment" in a company's books and records does not make it one. A Swiss offshore drilling company, for example, recorded payments to its customs agent in the subsidiary's "facilitating payment" account, even though company personnel believed the payments were, in fact, bribes. The company was charged with violating both the FCPA's anti-bribery and accounting provisions.

Although true facilitating payments are not illegal under the FCPA, they may still violate local law in the countries where the company is operating, and the OECD's Working Group on Bribery recommends that all countries encourage companies to prohibit or discourage facilitating payments, which the United States has done

regularly. In addition, other countries' foreign bribery laws, such as the United Kingdom's, may not contain an exception for facilitating payments. Individuals and companies should therefore be aware that although true facilitating payments are permissible under the FCPA, they may still subject a company or individual to sanctions. As with any expenditure, facilitating payments may still violate the FCPA if they are not properly recorded in an issuer's books and records.

Hypothetical: Facilitating Payments

Company A is a large multi-national mining company with operations in Foreign Country, where it recently identified a significant new ore deposit. It has ready buyers for the new ore but has limited capacity to get it to market. In order to increase the size and speed of its ore export, Company A will need to build a new road from its facility to the port that can accommodate larger trucks. Company A retains an agent in Foreign Country to assist it in obtaining the required permits, including an environmental permit, to build the road. The agent informs Company A's vice president for international operations that he plans to make a one-time small cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously, as the agent has experienced delays of three months when he has not made this "grease" payment. The clerk has no discretion about whether to file and stamp the permit applications once the requisite filing fee has been paid. The vice president authorizes the payment.

A few months later, the agent tells the vice president that he has run into a problem obtaining a necessary environmental permit. It turns out that the planned road construction would adversely impact an environmentally sensitive and protected local wetland. While the problem could be overcome by rerouting the road, such rerouting would cost Company A $1 million more and would slow down construction by six months. It would also increase the transit time for the ore and reduce the number of monthly shipments. The agent tells the vice president that he is good friends with the director of Foreign Country's Department of Natural Resources and that it would only take a modest cash payment to the director and the "problem would go away." The vice president authorizes the payment, and the agent makes it. After receiving the payment, the director issues the permit, and Company A constructs its new road through the wetlands.

Was the payment to the clerk a violation of the FCPA?

No. Under these circumstances, the payment to the clerk would qualify as a facilitating payment, since it is a one-time, small payment to obtain a routine, non-discretionary governmental service that Company A is entitled to receive (i.e., the stamping and filing of the permit application). However, while the payment may qualify as an exception to the FCPA's anti-bribery provisions, it may violate other

laws, both in Foreign Country and elsewhere. In addition, if the payment is not accurately recorded, it could violate the FCPA's books and records provision.

Was the payment to the director a violation of the FCPA?

Yes. The payment to the director of the Department of Natural Resources was in clear violation of the FCPA, since it was designed to corruptly influence a foreign official into improperly approving a permit. The issuance of the environmental permit was a discretionary act, and indeed, Company A should not have received it. Company A, its vice president, and the local agent may all be prosecuted for authorizing and paying the bribe. [endnotes omitted]

END OF EXCERPT

Strauss argues that as other states intensify enforcement of domestic anti-bribery laws, it is becoming increasingly likely that American corporations will face criminal charges in foreign countries for offering or making facilitation payments. Strauss finds some merit in the argument that, as the chief enforcer of anti-bribery laws, the US must maintain the facilitation payment exemption to "bridge the gap between the aspirational norm of total intolerance for bribery, and the operational code in the field that actually determines how business gets done."[212] However, Strauss concludes that precisely because the US is the predominant enforcer of anti-bribery legislation, "it is even more important that its laws actually align with the aspiration norm it wishes to achieve, or the gap between norm and practice will not narrow."[213]

4.6 UK Law

The UK *Bribery Act* does not contain an exception for facilitation payments. Pursuant to section 6, a person will be found guilty of bribing a foreign public official if that person promises or gives any advantage to a foreign public official with the intention of influencing that person in his or her capacity as a foreign public official. To be convicted, the offender must also intend to obtain or retain business or "an advantage in the conduct of business" (section 6(2)).

In its *Guidance* document, the Ministry of Justice addresses facilitation payments as follows:

> Small bribes paid to facilitate routine Government action – otherwise called 'facilitation payments' – could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the

[212] Strauss (2013) at 267.
[213] *Ibid.*

> acceptance of such payments is itself improper, the section 1 offence and therefore potential liability under section 7.
>
> As was the case under the old law, the *Bribery Act* does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.
>
> The Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play and the guidance below offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.
>
> Issues relating to the prosecution of facilitation payments in England and Wales are referred to in the guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.[214]

Recognizing the practical difficulties potentially faced by UK businesses operating abroad, the Government reiterated the basic principles of UK prosecution policy, including the concept of proportionality (for example, it may not be in the public interest to prosecute where the payments made were very small) and stated that the outcome in any particular case will depend on the full circumstances of that case.[215] Nicholls et al. describe the factors prosecutors are likely to consider when deciding whether to prosecute:

- The amount of the payment
- Whether the payment was a "one-off"
- Whether the payment was solicited and, if so, whether it resulted from duress or some lesser form of extortion
- The options facing the payer

[214] UK *Bribery Act* Guidance (2010).

[215] Nicholls et al (2011) at paras 4.126-4.127.

- Whether the payment was reported to the police or a superior
- The likely penalty[216]

The *Joint Prosecution Guidance* from the SFO and Ministry of Justice notes that "[f]acilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated," which favours prosecution.[217] On the other hand, if the payer was in a "vulnerable position arising from the circumstances in which the payment was demanded," this militates against prosecution.[218]

Additionally, the common law defence of duress would likely apply where individuals are faced with no alternative but to make a payment to protect against loss of life, limb, or liberty. However, the defence has not been adapted or expanded to include non-physical pressure.[219] On the other hand, the less well recognized defence of necessity in England has no similar restriction and might therefore be a viable defence.

Despite the prosecutorial policies in place and common law defences available, individuals and businesses making facilitation payments do legally face the risk of prosecution. In fact, in 2012, the Director of the SFO issued a letter reiterating in no uncertain terms that "[f]acilitation payments are illegal under the *Bribery Act* 2010 regardless of their size or frequency."[220] Predictably, the prohibition of facilitation payments in the *Bribery Act* has received significant criticisms from the business community, many of whom fear that it will have a negative and chilling effect on small and medium-sized UK firms engaged in the export business. In May 2013, there were reports that the British government planned to review the *Bribery Act* and its position on facilitation payments specifically, but no changes have been made to date.[221] Although organizations such as Transparency International UK remain firmly in support of a zero tolerance position towards facilitation payments, it is clear that the issue remains a divisive one.[222]

4.7 Canadian Law

Section 3(2) of Bill S-14 (2013) eliminates the exception for facilitation payments that previously existed in the *CFPOA*. However, unlike the other amendments to the *CFPOA* prescribed in Bill S-14, section 3(2) did not come into force on the date the Bill received royal

---

[216] *Ibid* at para 4.129.
[217] Joint Prosecution Guidance (2010).
[218] *Ibid*.
[219] Nicholls et al (2011) at paras 131, 4.124.
[220] United Kingdom, Serious Fraud Office, "Enforcement of the UK's Bribery Act – Facilitation Payments" (6 December 2012).
[221] Caroline Binham & Elizabeth Rigby, "Relaxation of UK Bribery Law on Government Agenda", *Financial Times* (28 May 2013), online: <https://www.ft.com/content/cab2111c-c6c8-11e2-a861-00144feab7de>.
[222] See for example Robert Barrington, "The Bribery Act Should Not be Watered Down", *Transparency International UK News* (28 May 2013), online: <http://www.transparency.org.uk/the-bribery-act-should-not-be-watered-down/>.

assent. It was finally proclaimed in force as of October 31, 2017. The former facilitation payment exemption reads as follows:

> **Facilitation payments**
>
> (4) For the purpose of subsection (1), a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage in the course of business, if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including
>
> (a) the issuance of a permit, licence or other document to qualify a person to do business;
>
> (b) the processing of official documents, such as visas and work permits;
>
> (c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and
>
> (d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.
>
> **Greater certainty**
>
> (5) For greater certainty, an "act of a routine nature" does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision.

Although Canada now has a "books and records" provision in the *CFPOA*, it is questionable whether it applies to facilitation payments which occurred prior to October 31, 2017 since facilitation payments remained lawful under the *CFPOA* until that date. Section 4 of the *CFPOA* criminalizes the actions of anyone who, "for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery," misrepresents bribe payments in books and records or takes other steps to misrepresent or hide illicit bribery payments. Since section 3(4) excludes facilitation payments from the ambit of benefits given in order "to obtain or retain an advantage in the course of business," it does not appear that section 4 would apply to a misrepresented or hidden facilitation payments made prior to October 31, 2017. Note that this is in contrast to the accounting provisions in the USA under their *FCPA*, which require accurate records be kept by issuers irrespective of what the payments are actually for.

4.8 Eliminating Facilitation Payments

Wynn-Williams argues that the removal of the facilitation payments exemption in the *CFPOA* puts charities "between a rock and a hard place."[223] Wynn-Williams also claims that charities will be unable to fulfill their mandates if they are unable to make facilitation payments, since such payments are frequently demanded in countries where charities are attempting to deliver humanitarian aid. For example, if a charity is trying to deliver critically needed food or medication and timely delivery of the goods is dependent on a facilitation payment to a customs official, what is the charity to do? The trouble is largely with provisions of the *Income Tax Act* allowing the Canada Revenue Agency to revoke charitable status to organizations which are not abiding by Canadian law and public policy. This power operates independently of the criminal law and therefore revocation could occur whether or not the charity is successfully prosecuted under the *CFPOA*.

The author offers a number of potential solutions, including a governmental guidance advising against the prosecution of charities (as in the UK), a tying together of the CRA and criminal law such that revocation is only allowed upon conviction (so that charities might have the opportunity to argue necessity, for example), the assignment of an Ombudsperson from whom charities could seek guidance, or, most significantly, an exemption in the *CFPOA* for organizations delivering humanitarian aid.

Since the facilitation payments exemption has been removed from the *CFPOA*, charities will have to comply like any Canadian company. Recognizing the difficulties facing businesses and charities alike, in June 2014 Transparency International UK published a practical guide for companies entitled *Countering Small Bribes: Principles and Good Practice Guidance for Dealing with Small Bribes including Facilitation Payments.*[224] The guidance contains, among other things, a set of ten basic principles for countering small bribes, a model of negotiation steps for resisting demands for bribes and practical examples and case studies.

In the following excerpt from Skinnider's paper *Corruption in Canada: Reviewing Practices from Abroad to Improve Our Response,* Skinnider reviews some measures Canada could adopt in order to discourage or prohibit Canadians from paying facilitation payments to public officials abroad.[225]

---

[223] Vanessa Wynn-Williams, "Removing the Exception for Facilitation Payments from the Corruption of Foreign Public Officials Act: Putting Charities Between a Rock and a Hard Place" (20 March 2014), online at: <https://www.oba.org/Sections/International-Law/Articles?author=Wynn-Williams>.

[224] Transparency International UK, *Countering Small Bribes: Principles and Good Practice Guidance for Dealing with Small Bribes Including Facilitation Payments* (June 2014), online: <http://www.transparency.org.uk/publications/countering-small-bribes/>.

[225] Skinnider (2012) at 21–24. See also updated version, Skinnider and Ferguson (2017).

Discussion Question:

As you read this excerpt, consider whether in your view Canada has taken the proper approach to facilitation payments. (Note that at the time Skinnider wrote her paper, the Bill to repeal facilitation payment had not yet been introduced in Parliament.)

BEGINNING OF EXCERPT

Should Canada Prohibit Facilitation Payments?

As noted, although the Fighting Foreign Corruption Act[226] provided for the elimination of the facilitation payments defence by repealing s. 3(4) of the CFPOA, this provision remains unproclaimed and thus Canada remains one of the few countries to continue to permit these payments. If the defence of facilitation payments is eliminated, one helpful suggestion that has been made is to incorporate a scaled penalty system for acts of lower-level bribery.[227] Even without an express scaled-down penalty system, judges in Canada have a wide discretion to select a penalty for offences like bribery where no mandatory minimum penalty is specified. The general sentencing principles state that the penalty is to be "proportionate" to the nature and scope of the harm and to the culpability of the offender. These small facilitation payments would normally result in very small penalties if facilitation payments were criminalized.[228] However, the high maximum penalty of 14 years imprisonment does eliminate the use of some sentencing options such as absolute and conditional discharges and conditional sentences. This elimination of these sentencing options for minor incidents of otherwise serious offences such as bribery occurred under the Conservative government's so-called "law and order" policy. Hopefully those laws will soon be repealed. Enacting a scaled-down version (e.g. a summary conviction offence of bribery) would also necessitate a consideration of whether automatic mandatory debarment from federal procurement contracts is suitable for conviction of small scale bribery offences.

Another alternative that falls short of a total prohibition on all facilitation payments is to amend the CFPOA to provide a clear definition of facilitation payments with a monetary threshold. An American commentator has reviewed the possibilities of amending the FCPA to clarify the facilitation payment exception.[229] He argues for an amendment that refines the exception's current purpose-focused paradigm and adopts a complementary, regionally tailored monetary cap. According to his proposal,

[226] [178] Fighting Foreign Corruption Act, S.C. 2013, c. 26, s. 3(2).
[227] [179] Jacqueline L. Bonneau, supra note 54.
[228] [180] See also s.718.21 of the Criminal Code for additional sentencing factors where the accused is an organization.
[229] [181] Charles B. Weinograd, supra note 173.

facilitation payments that fall below this monetary threshold will enjoy a rebuttable presumption of legality, while those in excess will presumptively stand outside the exception's shelter.[230] This would allow corporations, prosecutors and courts a manageable and flexible standard to analyze these payments. US Congress has considered and rejected the imposition of a cap in the past. A concern raised regarding this proposal is that a cap would create an environment for abuse.[231]

Ways to Discourage the Use of Facilitation Payments

If the government does not see it as practical to eliminate facilitation payments at this time, they should at least follow the OECD Guidance to "encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' book and financial records".[232]

1. A "Books and Records" Provisions in the CFPOA

One way to address the concern of facilitation payments is through a "books and records" provision, an approach enacted into the CFPOA with the 2013 amendments. A company paying a bribe to a foreign public official must accurately record such a payment in its books, and if it does not, then the company violates a "books and records' provision. Representatives from Canadian business who were interviewed by the OECD Working Group noted that it is not uncommon for companies to make a payment to expedite or secure the performance of some act by a foreign public official and that "facilitation payments" are rarely recorded in corporate books and records.[233] Accountants believe these are often not recorded (despite the defence) because of concerns by a company of criminal liability. Auditors also state that they do not pay close attention to "facilitation payments" when auditing a corporation because those payments usually do not materially affect the corporation's financial statements.

With the adoption of a "books and records" offence, the Canadian law now poses the same challenges that commentators have been describing regarding the American system for years. That is, since almost every country outlaws facilitation payments under their respective domestic bribery laws, corporations are hesitant to properly

[230] [182] Legislature should craft a two-pronged conjunctive test, which considers both the subjective purpose of the payment and an objective application of a threshold payment amount. Ibid.
[231] [183] By using a cap to define bribery, Congress might create a floor price for doing business abroad. Corrupt officials would persistently demand the exact amount of the threshold, see Charles B. Weinograd, supra note 173.
[232] [184] OECD Recommendations (2009), supra note 107.
[233] [185] OECD Phase 3 Report, supra note 12.

record such payments as doing so essentially is tantamount to confessing to bribes in violation of a relevant foreign law.[234] But failing to make the proper recording also violates a books and records provision.

2. "Publish What You Pay" Legislation

"Publish what you pay" legislation requires companies to disclose any payments made to a foreign government, including legal payments such as taxes and facilitation payments. The NGO Publish What You Pay, which advocates for increasing transparency in the extractive sector, suggests that because "companies and developed countries profit hugely from the global extractive sector, they have a responsibility to diminish the opportunities for corruption or mismanagement".[235]

In the United States, such a requirement for the extractive industry was introduced as part of the Dodd-Frank Act following the 2008 global financial crisis.[236] In the UK, Reports on Payments to Government Regulations 2014 came into force on December 1, 2014, and apply to any company or partnership that is either a large undertaking or a public interest entity (PIE), and is engaged in extractive industries (mining, oil and gas) or logging.[237] The ESTMA, which came into force in Canada on June 1, 2015, applies to a corporation or a partnership that is engaged in the commercial development of oil, gas or minerals, and (1) is 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.[238] The threshold for reporting single or multiple

[234] [186] Jon Jordan, supra note 148.
[235] [187] Publish What You Pay "Mandatory Disclosures", retrieved from http://www.publishwhatyoupay.org/our-work/mandatory-disclosures/.
[236] [188] Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 2010) requires issuers in the extractive industry reporting to the US Securities and Exchange Commission (SEC) to disclose any payments made to a foreign government or the US federal government for the purpose of commercial resource development. Legislation is found at http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf. The SEC first adopted the rules implementing this section in August 2012 and a revised version in June 2016. See 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, retrieved from https://www.sec.gov/rules/final/2016/34-78167.pdf and "SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act" (June 27, 2016), retrieved from https://www.sec.gov/news/pressrelease/2016-132.html
[237] [189] Reports on Payments to Government Regulations 2014, 2014 No. 3209, s. 4.
[238] [190] ESTMA, ss. 2 (entity), 8(1).

payments made by an entity to any government in Canada or in a foreign state is set at $100,000.[239]

3. Promulgation of Guidelines Defining Permissible Facilitation Payments

The FCPA Resource Guide[240] explains the US DOJ's and SEC's view on what type of payments qualify for this exemption. They are detailed and helpful [and are reproduced in Section 4.5 of this chapter].

The UK Ministry of Justice has addressed the facilitation payments issue[241] [See Section 4.6 of this chapter]

…

The OECD Working Group recommended that Canada "consider issuing some form of guidance in the interpretation" of the defence as there is lack of clarity as to the threshold for facilitation payments and other bribes.[242] However, Canada has noted its long standing practice not to issue guidelines on the interpretation of criminal law provisions. Courts are responsible for interpreting the application of the law in individual cases. But that principle does not preclude Parliament from amending the definition of facilitation by giving it a more precise definition or authorizing an agency to issue regulations in respect to the meaning or scope of facilitation payments.

4. Raise Awareness for Corporate Activism and Institutional Reform

Representatives from the business sector indicated that the government of Canada has not encouraged them to prohibit or discourage the use of facilitation payments.[243] More and more companies are, however, introducing institutional reform. According to TRACE, increasingly companies are adopting a zero-tolerance approach to facilitation payments. For example, the Royal Bank of Canada has banned facilitation payments.[244] Some companies conclude that it is sufficient to stay on the right side of the enforcement agencies in the country in which they are headquartered. Others conclude that the US authorities are the most active internationally, so they work to

---

[239] [191] Ibid, s. 2 (payment).
[240] [192] Department of Justice and Security Exchange Commission "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (2012), retrieved from http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.
[241] [193] UK Minister of Justice "The Bribery Act 2010: Guidance", retrieved from https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
[242] [194] OECD Phase 3 Report, supra note 12.
[243] [195] OECD Phase 3 Report, supra note 12.
[244] [196] "RBC bans facilitation payments" (The Blog of Canadian Lawyers and Law Times: November 2011), retrieved from http://www.canadianlawyermag.com/legalfeeds/528/RBC-bans-facilitation-payments.html. This news article notes that the RBC is opting to follow the UK Bribery Act and adapts to the highest standard.

comply with the US legal framework. Still others try to comply with the laws of all countries in which they operate.[245]

END OF EXCERPT

5. ACCOUNTING (BOOKS AND RECORDS) OFFENCES RELATED TO CORRUPTION

5.1 UNCAC

Creating criminal offences to punish false, deceptive or incomplete accounting of the payment or receipt and use of money or other assets is seen as an essential and necessary tool in fighting the hiding of corruption payments. Article 12 of UNCAC provides:

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.
2. Measures to achieve these ends may include, inter alia:
   (a) Promoting cooperation between law enforcement agencies and relevant private entities;
   (b) 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;
   (c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;
   (d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;

[245] [197] A. Wrage "One Destination, Many Paths: The Anti-Bribery Thicket" (Nov 2009).

(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;

(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

(a) The establishment of off-the-books accounts;

(b) The making of off-the-books or inadequately identified transactions;

(c) The recording of non-existent expenditure;

(d) The entry of liabilities with incorrect identification of their objects;

(e) The use of false documents; and

(f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

The UNCAC *Legislative Guide* highlights the following features of Article 12:

(1) Paragraph 1 of article 12 requires that States parties take three types of measures in accordance with the fundamental principles of their law. The first is a general commitment to take measures aimed at preventing corruption involving the private sector. The second type of measure mandated by paragraph 1 aims at the enhancement of accounting and auditing standards. Such standards provide

transparency, clarify the operations of private entities, support confidence in the annual and other statements of private entities, and help prevent as well as detect malpractices. The third type of measure States must take relates to the provision, where appropriate, of effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with the accounting and auditing standards mandated above.[246]

(2) Article 12, paragraph 2, outlines in its subparagraphs a number of good practices, which have been shown to be effective in the prevention of corruption in the private sector and in the enhancement of transparency and accountability.[247]

(3) Risks of corruption and vulnerability relative to many kinds of illicit abuses are higher when transactions and the organizational structure of private entities are not transparent. Where appropriate, it is important to enhance transparency with respect to the identities of persons who play important roles in the creation and management or operations of corporate entities.[248]

5.2 OECD Convention

Article 8 of the OECD Convention stipulates that:

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

The OECD Convention's implementation has immediate consequences. Commentary 29 states that "one immediate consequence of the implementation of this Convention by the

[246] Legislative Guide (2012).
[247] *Ibid* at para 120.
[248] *Ibid* at para 124.

Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery."[249]

Pacini, Swingen and Rogers discuss the impact of the OECD Convention in their article "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials."[250] In addition to commenting on the contents of Commentary 29, they note that Article 8 has implications for auditors, who "may be liable if they have not detected bribery of a foreign public official by properly examining a company's books and records."[251]

Commentary 29 also points out that "the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention."

5.3 US Law

5.3.1 Accounting Provisions Offenses

Accounting provisions in the *FCPA* are designed to prohibit off-the-books accounting. Traditionally, enforcement of the provisions has been via civil actions filed by the Securities Exchange Commission.[252] The standard for imposing criminal liability is set out in § 78m(b)(5), which states that no person shall "knowingly" circumvent or fail to implement a system of controls or "knowingly" falsify their records. This full *mens rea* of "knowingly" removes liability for inadvertent errors, while willful blindness would still satisfy the requisite intent.[253] When prosecuted as a crime by the DOJ, the burden of proof is on the prosecutor beyond a reasonable doubt. When dealt with as a civil offense by the SEC, the burden of proof is the lower standard of balance of probabilities. In practice, most of the books and records violations are dealt with as civil offenses by the SEC.

FCPA provisions operate independently of the bribery provisions, and also amend the *Securities Exchange Act,* meaning the accounting provisions apply to far more situations than bribery, including accounting fraud and issuer disclosure cases. Furthermore, companies engaged in bribery may also be violating the anti-fraud and reporting provisions found in

[249] OECD Convention (1997), Commentary 29.
[250] Carl Pacini, Judyth A Swingen & Hudson Rogers, "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials" (2002) 37 J Bus Ethics 385.
[251] *Ibid.*
[252] James Barta & Julia Chapman, "Foreign Corrupt Practices Act" (2012) 49 Am Crim L Rev 825.
[253] *Ibid* at 832.

the *Securities Exchange Act*. The DOJ and SEC also may turn to accounting offenses when the elements of a bribery offense cannot be made out.[254]

Only one judicial decision directly addresses the accounting provisions. However, the provisions are common in enforcement actions that never make it to trial. As pointed out by Koehler, "the [accounting] provisions, as currently enforced by enforcement agencies, are potent supplements to FCPA's more glamorous anti-bribery provisions."[255] The enthusiastic use of accounting offenses in SEC settlements creates compliance challenges for companies.

There are two general accounting provisions in the *FCPA*: the books and records provision and the internal controls provision. Unlike the *FCPA*'s anti-bribery provisions, the accounting provisions do not apply to private companies. Instead, they apply to publicly held companies that are "issuers" under the *Securities Exchange Act*. An issuer is a company that has a class of securities registered pursuant to § 12 of the *Securities Exchange Act* or that is required to file annual or other periodic reports pursuant to § 15(d) of the *Securities Exchange Act* (244), regardless of whether the company has foreign operations.

The reach of the accounting provisions is quite broad. As the *Resource Guide* emphasizes:

> Although the FCPA's accounting requirements are directed at "issuers," an issuer's books and records include those of its consolidated subsidiaries and affiliates. An issuer's responsibility thus extends to ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions.[256]

To be strictly responsible for a subsidiary for the purposes of the accounting provisions, the issuer must own more than 50% of the subsidiary stock. Where the issuer owns 50% or less of the subsidiary, they must only use "good faith efforts" to cause the subsidiary to meet the obligations under the *FCPA* (§ 78m(b)(6)).

For a detailed discussion of the nature, reach and implications of the accounting provisions, see: Stuart H. Deming, "The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act."[257]

(i) Books and Records

The books and records provision (§ 78m(b)(2)(A)) states that every issuer shall "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." Section 78m(b)(6) defines "reasonable detail" as a "level of detail and degree of assurance that would satisfy prudent

[254] Tarun (2013) at 20.
[255] Koehler (2014) at 166.
[256] DJSEC Resource Guide (2012).
[257] Stuart H Deming, "The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act" (2006) 96:2 J Crim L & Criminology 465.

officials in the conduct of their own affairs." The SEC Chairman's 1981 advice provided that a company should not be "enjoined for falsification of which its management, broadly defined, was not aware and reasonably should not have known."[258]

The *Resource Guide* notes that "bribes are often concealed under the guise of legitimate payments."[259] According to a Senate Report, "corporate bribery has been concealed by the falsification of corporate books and records", and the accounting provisions are designed to "remove this avenue of coverup."[260] The books and records provision can provide an avenue for prosecution where improper payments are inaccurately recorded, even if an element of the related anti-bribery provision was not met.

(ii) Internal Controls

The "internal controls" provision at § 78m(b)(2)(B) states that every issuer (as above) shall:

> Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—
>
> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets
>
> (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
>
> (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Again, "reasonable assurances" is defined in § 78m(b)(7) as a "level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs." The provision allows companies the flexibility to implement a system of controls that suits their particular needs and circumstances. Reflective of the *Guidance* published pursuant to section 9 of the UK *Bribery Act*, the *Resource Guide* points out that "good internal controls can prevent not only *FCPA* violations, but also other illegal or unethical conduct by the company, its subsidiaries, and its employees."[261] Compliance with the provision will therefore depend on the overall reasonableness of the internal controls in the circumstances of the company,

---

[258] Koehler (2014) at 149.
[259] DJSEC Resource Guide (2012).
[260] US, Senate Committee on Banking, Housing and Urban Affairs, *Domestic and Foreign Investment: Improved Disclosure Acts of 1977* (95-144) at 6, online: <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/senaterpt-95-114.pdf>.
[261] DJSEC Resource Guide (2012).

including the risks of corruption in the country and sector of operation.[262] In *SEC v World-Wide Coin,*[263] the court indicated that the costs of devising a system of internal controls should not exceed the expected benefits. The court further noted that the occurrence of improper conduct does not necessarily mean internal controls were unsatisfactory.[264]

Koehler argues that enforcement patterns potentially conflict with the reasonableness qualifications built into the books and records and internal control provisions and promoted in the Guidance and in *SEC v World-Wide Coin.*[265] For example, in a 2012 SEC enforcement action, Oracle Corporation was held liable for failing to conduct audits of its subsidiary in India, even though such audits would not have been "practical or cost-effective *absent* red flags suggesting improper conduct. The SEC did not allege any such red flag issues. In fact, the SEC alleged that Oracle's Indian subsidiary 'concealed' ... the conduct from Oracle."[266] Koehler argues that such enforcement actions are edging towards strict liability, in spite of the inclusion of "reasonable detail" and "reasonable assurances" in the accounting provisions. Koehler goes on to state:[267]

> Based on the enforcement theories, it would seem that nearly all issuers doing business in the global marketplace could, upon a thorough investigation of their entire business operations, discover conduct implicating the books and records and internal controls provisions. For instance, the SEC alleged in an FCPA enforcement action against pharmaceutical company Eli Lilly that the company violated the books and records and internal controls provisions because sales representatives at the company's China subsidiary submitted false expense reports for items such as wine, specialty foods, a jade bracelet, visits to bath houses, card games, karaoke bars, door prizes, spa treatments and cigarettes. If the SEC's position is that an issuer violates the FCPA's books and records and internal controls provisions because some employees, anywhere within its world-wide organization, submit false expense reports for such nominal and inconsequential items, then every issuer has violated and will continue to violate the FCPA. [footnotes omitted]

5.3.2 Defenses/Exceptions

There are two exceptions to criminal liability under the accounting provisions. The first (§ 78m(b)(4)) states that criminal liability will not be imposed where the accounting error is merely technical or insignificant. The second (§ 78m(b)(6)) discharges an issuer of their responsibility for a subsidiary's accounting violations when the issuer owns 50% or less of the subsidiary and the issuer "demonstrates good faith efforts" to encourage the subsidiary

[262] Barta & Chapman (2012).
[263] *SEC v World-Wide Coin,* 567 F Supp 724 (ND Ga 1983).
[264] Koehler (2014) at 147.
[265] *Ibid* at 164.
[266] *Ibid* at 166.
[267] *Ibid*.

to comply with the *FCPA*. However, in practice, Koehler points out that enforcement agencies have eroded this good faith defense for parent companies and essentially created strict (no fault) liability.[268] For example, the SEC charged Dow Chemical with accounting offenses committed by its fifth-tier subsidiary, even though Dow had no knowledge of the improper conduct, and even though the SEC did not allege a lack of good faith on Dow's part.[269]

5.3.3 Limitation Periods for Books and Record Offenses

The limitation periods for *FCPA* books and records offenses are the same as for the offense of bribery, discussed at Section 3.3.3.

5.3.4 Sanctions for Books and Records Offenses

§ 78ff(a) of the *FCPA* mandates that for violation of the accounting provisions, corporations and other business entities are liable for a fine of up to $25 million while individuals (including officers, directors, stockholders and agents of companies) are subject to a fine of up to $5 million and imprisonment for a maximum of 20 years. However, the *Alternative Fines Act* 18 USC. Section 3571(d) provides for the imposition of higher fines at the court's discretion. The increased fine can be up to twice the benefit obtained by the defendant in making the bribe.

Actual penalties are determined by reference to the US Sentencing Guidelines (§ 1A1.1 (2011)).

5.4 UK Law

There are no accounting offences in the UK *Bribery Act*. However, as pointed out by Martin, a compilation of existing UK corporate laws coupled with section 7 of the *Bribery Act* leads to similar requirements as those in *FCPA*.[270] Firstly, the *Companies Act 2006* requires every company in the UK to keep records that can show and explain their transactions, to accurately disclose their financial positions and to implement adequate internal controls. Secondly, the defence to section 7 requires companies have "adequate procedures" in place, which means in part that the companies will need to keep proper records and implement adequate internal controls.[271] Finally, accounting offences facilitating corruption or the hiding of the proceeds of corruption are covered in sections 17-20 of the *Theft Act, 1968*.[272]

---

[268] *Ibid* at 161.
[269] *Ibid* at 162.
[270] Martin (2013) at 11.
[271] UK *Bribery Act* Guidance (2010).
[272] For a detailed analysis of these offences see David Ormerod, *Smith & Hogan's Criminal Law*, 13th ed (Oxford University Press, 2011) at 927-938.

Section 17 of the *Theft Act* creates the offence of false accounting. Section 17(1)(a) criminalizes the conduct of a person who intentionally and dishonestly destroys, defaces, conceals or falsifies any account, record or document made or required for any accounting purpose. The falsification, etc., must be done with a view to gain or cause loss to another, but need not actually cause loss or gain. Authorities are inconsistent regarding the meaning of "accounting purpose," but a set of financial accounts is prima facie made for an accounting purpose. The defendant is not required to know that the documents are for an accounting purpose, creating an element of strict liability. Section 17(1)(b) also criminalizes the dishonest use of false or deceptive documents with a view to gain or cause loss.[273]

Section 17 overlaps with both forgery and fraud offences. The fraud offence is broader than section 17, since it is not restricted to documents made for accounting purposes, and also has a higher maximum sentence. As a result, the *Fraud Act* is sometimes used instead of the false accounting provisions.

Section 18 imposes liability on directors, managers, secretaries or other similar officers of a body corporate for an offence committed by the body corporate with their consent or connivance. The purpose of this section is to impose a positive obligation on people in management positions to prevent irregularities, if aware of them. Section 19 is intended to protect investors by making it an offence for directors to publish false prospectuses to members. Section 20 makes it an offence to dishonestly destroy, deface or conceal any valuable security, any will or other testamentary document, or any original document that is belonging to, filed in or deposited in any court of justice or government department.

5.5 Canadian Law

Before 2013, *CFPOA* had no accounting offences. False accounting allegations were dealt with under domestic criminal law or income tax laws in circumstances where Canada had jurisdiction over the commission of those offences.

Amendments to *CFPOA* in 2013 created new accounting offences. The accounting provisions must be proven beyond a reasonable doubt (unlike the similar provisions in the *FCPA*, which need only be proven on a balance of probabilities when used by the SEC). Section 4 of the *CFPOA* provides:

> 4.(1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,
>
> (a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;

[273] *Ibid* at 926–929.

(b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;

(c) records non-existent expenditures in those books and records;

(d) enters liabilities with incorrect identification of their object in those books and records;

(e) knowingly uses false documents; or

(f) intentionally destroys accounting books and records earlier than permitted by law.

(2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

Section 4 was brought into force on June 19, 2013. There have been no prosecutions under it. This section was added to the *CFPOA* to bring the *Act* into line with article 8 of the OECD Convention. Other existing *Criminal Code* offences support Canada's implementation of Article 8 of the OECD Convention. These include the offences of making a false pretence or statement (ss. 361 and 362), forgery and the use or possession of forged documents (ss. 366 and 368), fraud affecting public markets (s. 380(2)), falsification of books and documents (s. 397) and issuing a false prospectus (s. 400). Section 155 of the *Canada Business Corporations Act*, which addresses financial disclosure, may also be relevant in cases involving false accounting.

APPENDIX 2.1

Below is an overview table of UNCAC and OECD corruption offences and the equivalent offences in US, UK and Canadian law.

Table 2.1 Corruption Offences (Mandatory and Optional UNCAC and OECD Offences and Equivalent US, UK and Canadian Offences)

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
MANDATORY OFFENCES		
(1) Bribery of National Public Officials UNCAC Article 15 – includes two subsections: 15(1) – giving a bribe – promising, offering or giving a bribe to a public officer 15(2) – accepting a bribe – the solicitation or acceptance of a bribe by a public officer OECD No provisions on bribery of national public officials.	**US**	§201(b)(1) and (2), 18 USC
	UK	Ss. 1 and 2, *Bribery Act* 2010.
	Canada	Ss. 119-125, *Criminal Code*.
(2) Bribing a Foreign Public Official UNCAC Article 16(1) – promising, offering or giving a bribe to a foreign public official OECD Article 1 – promising, offering or giving a bribe to a foreign public official (Both articles only include the briber; but see optional offence in Article 16(2) of UNCAC.)	**US**	§§ 78dd-1, 78dd-2 and 78dd-3 of the *FCPA*, 15 USC.
	UK	S. 6, *Bribery Act 2010*.
	Canada	S. 3, *Corruption of Foreign Public Officials Act (CFPOA)* and s. 18, *Crimes Against Humanity and War Crimes Act*.

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
(3) Public Embezzlement UNCAC Article 17 – embezzlement, misappropriation or other diversion of property by a public official who has been entrusted with that property OECD No comparable provision	**US**	§§641, 645, 656 and 666, 18 USC.
	UK	No comparable provision in *Bribery Act*, but "fraud by abuse of position of trust", s. 4 *Fraud Act* would apply to public embezzlement.
	Canada	ss. 122 and 322, *Criminal Code.*
(4) Money Laundering UNCAC Articles 14 and 23 – laundering of proceeds of crime (including proceeds of corruption) OECD Article 7 – money laundering	**US**	§§1956 & 1957, *Money Laundering Control Act*, 18 USC.
	UK	Ss. 327-329 and 340(11), *Proceeds of Crime Act 2002.*
	Canada	S. 462.31, *Criminal Code*.
(5) Obstruction UNCAC Article 25 – obstruction of justice in respect to UNCAC offences or procedures OECD No comparable provision	**US**	§§1501, 1503, 1505, 1510, 1511, 1512 and 1519, 18 USC (dealing with obstruction in general).
	UK	A common law offence.
	Canada	Ss. 139(2) & (3) and 423.1(1), *Criminal Code.*
(6) Liability of Legal Entities UNCAC Article 26 – establish liability of legal entities (such as corporations) for UNCAC offences in accordance with each state's legal principles on criminal or civil liability of legal entities OECD Article 2 – responsibility of legal persons, in accordance with each state's legal principles on legal entities	**US**	Criminal liability of corporations is based on common law principles involving acts or omissions of corporate agents or employees acting within the scope of their employment for the benefit of the corporation.
	UK	S. 7, *Bribery Act 2010* creates a special offence of bribery by commercial organizations; for other offences, corporate liability is based on common law principles.
	Canada	Definition of "organization" in s. 2 of the *Criminal Code.* Criminal liability of organizations, ss. 22.1 and 22.2, *Criminal Code.*

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
(7) Accomplices and Attempt UNCAC Article 27 – establish criminal liability for participation (accomplices) in a UNCAC offence and for attempting to commit an UNCAC offence OECD Article 1(2) – establish criminal liability for complicity, and for attempts and conspiracy to the same extent that those concepts apply to domestic law	**US**	§2, 18 USC (aiding, abetting, counselling and procuring); no general provision on attempts of all federal offenses, but the wording of the bribery offense (§201) includes many attempts at bribery, i.e. "offering, authorizing or promising to pay a bribe".
	UK	S. 1, *Criminal Attempts Act 1981* – creates an offence to attempt to commit any indictable offence.
	Canada	Ss. 21 and 22 of the *Criminal Code* includes accomplices in participation of an offence (aiders, abettors, and counselors). S. 24 criminalizes attempting an offence.
(8) Conspiracy UNCAC Conspiracy is not a mandatory or optional offence except Article 23 (conspiracy to commit money laundering). OECD Article 2(1) – creates offence of conspiracy to bribe a foreign official, to the same extent that conspiracy is an offence in a state's domestic penal law.	**US**	§371, 18 USC (conspiracy to commit an offense)
	UK	S. 1(1), *Criminal Law Act 1977.*
	Canada	S. 465(1)(c), *Criminal Code.*

UNCAC & OECD OFFENCES	US, UK & CANADIAN EQUIVALENTS	
(9) Books and Records Offences UNCAC Article 12(3) – does not require state parties to "criminalize" books and records offences, but requires states to take necessary measures to prevent the creation and use of improper and fraudulent books and records for the purpose of assisting in the commission of UNCAC offences. Improper books and records conduct includes making off-the-books accounts, inadequately identifying transactions, creating non-existent transactions, creating or using false documents, or unlawful, intentional destruction of documents OECD Article 8 – shall provide effective civil, administrative or criminal penalties for improper books and records offences	**US**	§78(m)(2)(17) (books and records offenses) and §78(m)(b)(2)(B) (accounting/internal control offenses), 15 USC.
	UK	No comparable provision in UK *Bribery Act,* but ss. 17-20, *Theft Act, 1968* criminalizes false accounting.
	Canada	S. 4, *CFPOA* and other possible offences such as s. 361 (false pretences), s. 380 (fraud) and s. 397 (falsification of books and documents) of the *Criminal Code*, or s. 155 (financial disclosure) of the *Canada Business Corporations Act*.

OPTIONAL OFFENCES		
(1) Foreign Official Taking a Bribe UNCAC Article 16(2) – the solicitation or acceptance of a bribe by a foreign public official OECD No comparable provision.	**US**	The *FCPA* does not criminalize the offense of bribery committed by the foreign public official.
	UK	No comparable provision in *Bribery Act 2010.*
	Canada	No comparable provision in *CFPOA.*
(2) Giving a Bribe for Influence Peddling UNCAC Article 18(1) – promising, offering or giving a bribe to a public official to misuse his or her real or supposed influence for the benefit of the bribe offeror. OECD Article 1(1) & (4) – creates the offence of bribery of a foreign public official.	**US**	This offense would be prosecuted under §78dd-1, 15 USC.
	UK	S. 1, *Bribery Act 2010.*
	Canada	**S.** 121(1)(d) and (3), *Criminal Code.*
(3) Accepting a Bribe for Influence Peddling UNCAC Article 18(2) – the solicitation or acceptance of a bribe by a public official in exchange for promising to misuse his or her real or supposed influence for the benefit of the bribe giver OECD No comparable provision.	**US**	No comparable provision in the *FCPA*, but can be prosecuted under §201(b)(2) of 18 USC.
	UK	S. 2, *Bribery Act 2010.*
	Canada	**S**. 121(1)(d) and (3), *Criminal Code.*
(4) Abuse of Public Function to Obtain a Bribe UNCAC Article 19 – abuse of public functions of the purpose of obtaining an undue advantage OECD No comparable provision.	**US**	No comparable provision in *FCPA*, but can be prosecuted under §201(b)(2) of 18 USC.
	UK	S. 2, *Bribery Act 2010.*
	Canada	S. 122, *Criminal Code.*

(5) Illicit Enrichment UNCAC Article 20 – illicit enrichment, that is, a significant increase in the assets of a public official that cannot be reasonably explained in regard to the public official's lawful conduct OECD No comparable provision.	**US**	No comparable provision.
	UK	No comparable provision.
	Canada	No comparable provision.
(6) Private Sector Bribery UNCAC Article 21 – bribery in the private sector for both the person making the bribe and the person receiving the bribe OECD No comparable provision.	**US**	Could be prosecuted under the general offense of fraud.
	UK	Could be prosecuted under the general offence of fraud.
	Canada	S. 426 of the *Criminal Code* makes receiving or offering bribes as a company official an offence. Depending on the specific facts, fraud (s. 380) or extortion (s. 346) of the *Criminal Code* might also be applied.
(7) Embezzlement in the Private Sector UNCAC Article 22 – embezzlement of property in the private sector. OECD No comparable provision.	**US**	§§641, 18 USC.
	UK	S. 1 and related provisions, *Theft Act, 1968*, as amended.
	Canada	Theft under s. 322 of the *Criminal Code* or fraud under s. 380 of the *Criminal Code.*
(8) Concealing Bribery Property UNCAC Article 24 – the concealment or continued retention of property knowing such property is the result of an UNCAC offence. OECD No comparable provision.	**US**	§1962, 18 USC.
	UK	Ss. 329 and 340, *Proceeds of Crime Act, 2002.*
	Canada	Ss. 341 (concealing) and 354 (possessing), *Criminal Code.*