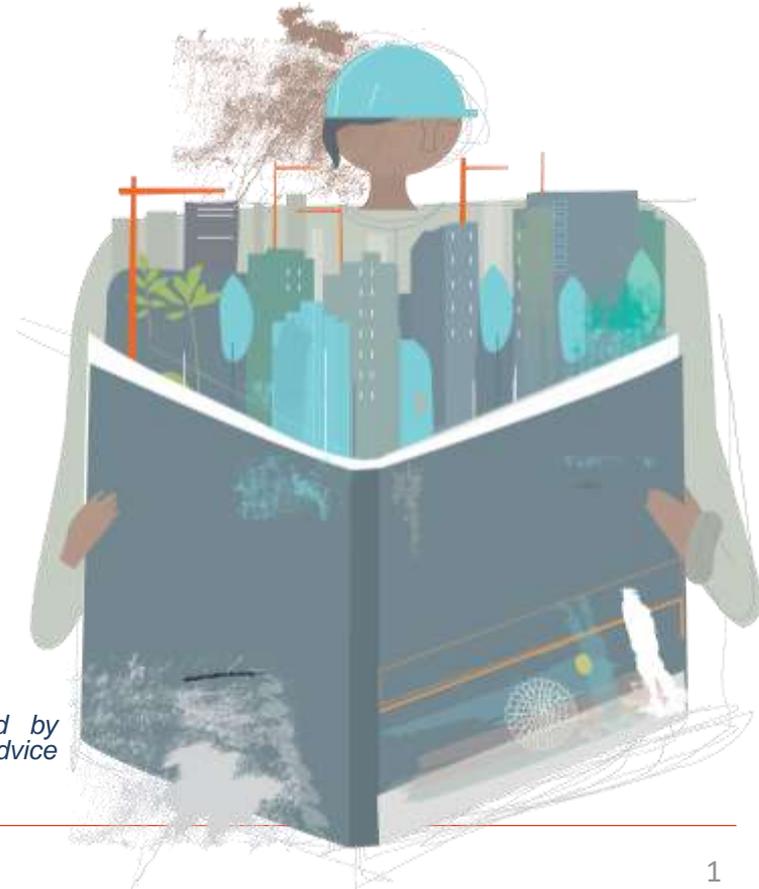


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Corruption in the North American Construction Industry

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Corruption in the Construction Industry

Statistics from the OECD's 2014 foreign bribery report:

- Two thirds of the cases occurred in 4 sectors: extractive (19%), **construction (15%)**, transportation and storage (15%); and information and communication (10%).
- 53% of cases involved corporate management or CEOs.
- 57% of cases involved bribes to obtain public procurement contracts.
- 1 in 3 cases came to the attention of authorities through self-reporting by defendant companies or individuals.
- Companies that self-reported became aware of the foreign bribery in their international operations primarily through internal audits (31%), and merger and acquisition due diligence procedures (28%).
- 13% of cases were initiated by law enforcement authorities.

The Charbonneau Commission of Inquiry

- Officially known as “The Charbonneau Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry”
 - Created October 9, 2011 by the Provincial government of Québec
 - Public inquiry chaired by Québec Superior Court Justice France Charbonneau
 - **Mandate:**
 1. to inquire into the existence of schemes that may have involved activities of collusion and corruption in the awarding and management of public contracts in the construction industry, including possible connections to the financing of political parties;
 2. to explore the possible infiltration of organized crime into the construction industry; and
 3. to examine potential solutions and to make recommendations aimed at establishing measures to identify, eliminate and prevent collusion and corruption in the awarding and management of public contracts in the construction industry, as well as infiltration of the construction industry by organized crime.

The Charbonneau Commission

- **The Commission of Inquiry led to:**
 - 263 days of hearings
 - 70,000 pages of transcripts
 - Testimony from approximately 300 witnesses
- **The Report of the Commission was tabled and released to the public on November 24, 2015:**
 - Comprised 1741 pages.
 - Found that corruption and collusion permeated the Québec construction industry, from the engineering consulting firms and contractors to the workers and labour unions.
 - Made **60 recommendations** to the Québec government.

The Charbonneau Commission

3 Categories of Schemes Identified in Québec's construction industry:

1. Schemes involving collusion and corruption;
2. Schemes linked to the financing of political parties; and
3. Schemes involving activities by organized crime to infiltrate the construction industry.

The Charbonneau Commission

- **Definitions of “collusion” and “corruption” used in the Report:**
 - **Collusion:** a secret agreement, implicit or tacit, between private sector actors (contractors, consulting engineering firms, suppliers) responding to a public call for tenders, or in some cases, an invitation to bid, with a view to reducing or eliminating competition in order to gain control over a public contract.
 - The secretive nature of collusion between private actors means that public actors are necessarily unaware of the arrangement in their official capacity.
 - **Corruption:** situations in which private actors obtain benefits (contract, payment of extras, confidential information) from public actors within the administrative or political apparatus. In exchange for the advantage provided to the “corrupter”, the “corrupted” receives consideration that can take various forms (bribes, employment, favours, gifts, etc.).

The Charbonneau Commission

1. Collusion and Corruption Schemes in Québec's Construction Industry

a) Simple collusion-based systems:

- Colluders rotating successful bidders among themselves, by having others submit “soft” bids (also referred to as “cover”, “courtesy”, or “complementary” bidding);
- Colluders rotating successful bidders by having other colluders not submit bids;
- Winning firm agreeing to subcontract to other colluders;
- Colluders dividing the market (by kind of work, client, geographic area), and agreeing not to bid competitively in other markets; and
- Preventing competitors outside the cartel from participating in a procurement through various schemes, such as: intimidation, vandalism, or sabotage on the competitor's job sites, and bidding very low to prevent the competitor from winning contracts.

The Charbonneau Commission

b) Simple corruption-based systems:

- **Political corruption:** for example, a firm would finance a specific municipal candidate's election to obtain quasi-exclusivity on municipal contracts after the election;
- **Bureaucratic corruption:** a bureaucrat or other member of the public service is corrupted, for example:
 - Agreement to provide the appointed or elected official with a specific kickback on the amount of the contract, as well as various gifts;
 - Officials influencing proposal/bid criteria so as to benefit a particular firm through directed tendering schemes; and
 - Officials manipulating the composition of selection committees by adding people in favour of a particular firm
- **Private corruption:** private actors (contractors) were found to charge a public contracting authority for work that had not been performed, or for quantities of material not used, while private engineering firms responsible for contract administration would approve false quantities or false extras.

The Charbonneau Commission

c) Complex schemes:

- The Commission identified complex schemes as combining both collusion and corruption practices.
- Complex schemes were mainly observed in large cities (e.g., Montréal) where the larger political and administrative machinery of government require a combination of collusion and corruption in order to maintain successful schemes and cartels.
- The Report confirmed that elected officials and public employees played a central role in protecting against the detection of complex schemes.

The Charbonneau Commission

2. Infiltration Activities by Organized Crime

The Commission identified 4 main types of infiltration by organized crime:

i. Infiltration of companies and industry sectors:

- where businesses in financial difficulty acquired sources of financing from criminal organizations, which eventually take over the company for their own purposes (money laundering);

ii. Control of territories

- where criminal organizations control a sector or territory by using intimidation and violence;

iii. Provision of mediation and intimidation services

- where organized crime groups assisted businesses in their schemes by intimidating other firms or businesses in the market;

iv. Access to trade union investment capital

- where individuals linked to the Hells Angels and the mafia sought to infiltrate the industry by obtaining access to the capital investments of a construction union.

The Charbonneau Commission

Causes of corruption and collusion

1. Public procurement of construction projects is extremely vulnerable to corruption due to the large amounts involved;
2. Lack of expertise of public bodies involved in procurement and use of certain processes that facilitate collusion (e.g., non-negotiable tariff contracts);
3. Foreseeability of criteria for awarding public contracts fosters collusion and the creation of cartels;
4. Unreasonably short deadlines for tenders set by corrupt public authorities (reduces competition, benefits a bidder with privileged or inside information);

The Charbonneau Commission

Causes of corruption and collusion (cont'd)

5. Lack of regulation of selection committees (allowing for conflicts of interest and undue interference in the decision-making process).
6. Disclosure of certain information by public authorities increases vulnerability to illegal schemes, for instance:
 - release on request of list of contractors who obtained or purchased specifications or tendering documents facilitates collusion among groups of firms.
 - disclosure of the amount of the bond security required facilitates bid rigging when the bond ratio used by the public authority is well-known.

The Charbonneau Commission

Recommendations on Key Issues

1. Creation of an Independent Authority to oversee public contracts – a “centre of expertise” that would:
 - analyze and verify procurement processes, and
 - support and oversee all public bodies that award contracts.
 - The Commission further recommended that the various public authorities be allowed to consolidate their internal expertise in construction matters.
2. Better protection for whistleblowers;
3. Requirement that construction companies report acts of intimidation or violence;

The Charbonneau Commission

Recommendations on Key issues (cont'd)

4. Reduce payment delays in the construction industry, given that payment delays:
- confer significant power on site supervisors, who can speed up or slow down approval of payments in order to intimidate or favour contractors (leading to private corruption schemes);
 - restrict contractors' ability to take on new projects, and thus contribute to restricting competition and facilitate the creation and continuation of collusive agreements; and
 - leads to “alternative” sources of financing – as the Commission noted, payment delays favour “infiltration of the construction industry by organized crime. A [contractor] faced with financial difficulties arising from excessive accounts receivable may be tempted to resort to sources of non-traditional financing. In fact, that is exactly what happens. Non-traditional financing is used by a significant proportion of construction firms as a result of payment delays.”

The Charbonneau Commission

Recommendations on Key Issues (cont'd)

5. Increased penalties for construction companies that break the law, up to and including cancelling their licence issued under Québec's building authority.
6. Increased penalties for those who make use of so-called “straw man schemes.”
7. Engineers and Consulting Engineers Firms
 - Amend the Professional Code so that firms operating in the construction industry are subject to regulatory power and sanctions;
 - Increase the role and powers of the regulatory body for engineers in Québec;
 - Implement measures to increase compliance (e.g., mandatory reporting of unethical practices, mandatory implementation of compliance system, etc.);
 - Implement mandatory training in ethics for all professionals, including engineers, and enhance ethics training for the directors of the professional orders.

The Charbonneau Commission

Some Key Recommendations (cont'd)

8. Share ownership of construction companies

- Lower the share ownership threshold from 20% to 10% in order for any shareholder to be considered an officer of a corporation, and attract scrutiny as to the company's integrity.
- Empower the Régie du bâtiment du Québec* to assess the integrity of officers who hold shares indirectly in any contracting firm.

(*Québec's building authority - enacts construction, safety and professional qualification standards and oversees enforcement through investigations and inspections.)

North American Guidelines – Canada and the U.S.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (The “Anti-Bribery Convention”)

- Adopted on November 21, 1997, in force on February 15, 1999.
- Drafted following the *Revised Recommendation on Combating Bribery in International Business Transactions*, adopted by the Council of the OECD on 23 May 1997, which, called for Member countries to **“take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions”**, and to **“criminalise the bribery of foreign public officials [...] by submitting proposals to their legislative bodies by 1 April 1998 [...] and seeking their enactment by the end of 1998.”**

North American Guidelines – Canada and the U.S.

- Canada and the U.S. were among the signatories when the Anti-Bribery Convention entered into force on February 15, 1999.

1. Canada

- Legislation enacted pursuant to the Convention:
 - The *Corruption of Foreign Public Officials Act*, SC 1998, c 34, which entered into force on February 14, 1999 (the “CFPOA”).
- Additional steps taken:
 - establishment of the RCMP International Anti-Corruption Unit in January 2008, comprised of 2 International Anti-Corruption Teams located in Ottawa and Calgary;
 - establishment of the Public Prosecution Service of Canada in 2006, which created a position in Ottawa for the purpose of advising the two RCMP teams on their investigations;
 - codification of corporate liability in the Criminal Code.

North American Guidelines – Canada and the U.S.

Offences under the CFPOA

Bribing a foreign public official

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

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

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

Punishment

3. (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.

Saving provision

3. (3) No person is guilty of an offence under subsection (1) if the loan, reward, advantage or benefit

(a) 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; or

(b) was made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to

(i) the promotion, demonstration or explanation of the person's products and services, or

(ii) the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.

North American Guidelines – Canada and the U.S.

Offences under the CFPOA (cont'd)

Accounting

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;
 - (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.

Punishment

4. (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.

North American Guidelines – Canada and the U.S.

Offences under the CFPOA (cont'd)

Offence committed outside Canada

5. (1) Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 [Bribing a foreign official] or 4 [Accounting] – or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under that section – is deemed to have committed that act or omission in Canada if the person is

(a) a Canadian citizen;

(b) a permanent resident as defined in subsection 2(1) of the *Immigration and Refugee Protection Act* who, after the commission of the act or omission, is present in Canada; or

(c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.

North American Guidelines – Canada and the U.S.

PSPC's Integrity Framework and Debarment

- In late 2012, Public Works and Government Services Canada (now Public Services and Procurement Canada) added the offence of bribing a foreign public official under the CFPOA to the list of offences that render companies and individuals ineligible to bid for Canadian government contracts.
- In 2014, the list was further extended to include foreign convictions for equivalent offences.
- The debarment period can be up to 10 years, and has a retroactive effect.

North American Guidelines – Canada and the U.S.

Offences under Canada's *Criminal Code*, RSC 1985 c C-46

- Sections 119(1), 121 and 426 create offences criminalizing:
 - the provision of bribes to Canadian judicial officers, members of Parliament or of the legislature of a province (s. 119(1));
 - the provision of bribes to a Canadian official (a person who holds an office or is appointed or elected to discharge a public duty), a member of his family, or to anyone for the benefit of an official (s. 121(1)(a) and (b));
 - the receipt of bribes by Canadian officials (s. 121(1)(c)); and
 - private sector bribery (s. 426).
- Section 121(1)(a) prohibits the offering or giving of a benefit to a government official, or any member of his or her family, as consideration for cooperation, assistance, exercise or influence or an act or omission in connection with the transaction of business with, or relating to, the government. An official who accepts the illegal benefit also commits an offence.
- Section 121(1)(b) criminalizes the provision of an award, advantage, or benefit to a government official.
- Section 121(1)(c) criminalizes the receipt of said benefit by a government official.

North American Guidelines – Canada and the U.S.

Offences under Canada’s *Criminal Code*, RSC 1985 c C-46

- Section 122 criminalizes a breach of trust by an official.
- Section 123 criminalizes municipal corruption
 - A municipal official is defined as “a member of a municipal council or a person who holds an office under a municipal government.”
- Section 426 criminalizes private corruption
 - Section 426 creates a ‘secret commissions’ offence that prohibits an agent (including an employee) from receiving, or any person from corruptly offering or giving an agent, an award, advantage, or benefit of any kind as consideration for doing or forbearing to do any act related to the affairs or business of the agent’s principal.
 - It applies to all agency and employment relationships, including private sector businesses.
 - If there is adequate and timely disclosure of the source, amount, and nature of the benefit, no offence is committed.

North American Guidelines – Canada and the U.S.

2. The United States

- *The Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq. (“FCPA”)*
 - prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business, imposes record-keeping and internal control requirements on issuers, and prohibits the falsifying of records.
- a) **The FCPA anti-bribery provisions**
 - Prohibit 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.
 - applies to conduct both inside and outside the United States.

North American Guidelines – Canada and the U.S.

The FCPA anti-bribery provisions (cont'd)

Apply broadly to three categories of entities:

- (1) **“issuers”** and their officers, directors, employees, agents, and shareholders;
 - (2) **“domestic concerns”** and their officers, directors, employees, agents, and shareholders; and
 - (3) **certain persons and entities**, other than issuers and domestic concerns, **acting while in the territory of the United States.**
- **the definition of “issuer”** under the FCPA includes foreign companies with American Depositary Receipts listed on a U.S. exchange.
 - a **“domestic concern”** is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the U.S. or its states, territories, possessions, or commonwealths or that has its principal place of business in the U.S.
 - The anti-bribery provisions also apply to **foreign persons and foreign non-issuer entities** that, either directly or through an agent, engage in *any* act in furtherance of a corrupt payment (or offer, promise, or authorization to pay) while in the U.S.

North American Guidelines – Canada and the U.S.

b) The FCPA accounting provisions

- Apply to public companies
- Prohibit off-the-books accounting
 - i. **The “books and records” provision:** requires issuers to make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect an issuer’s transactions and dispositions of an issuer’s assets.
 - “**reasonable detail**” is defined in the statute as the level of detail that would “satisfy prudent officials in the conduct of their own affairs.”
 - there is no materiality threshold under this provision.
 - ii. **The “internal controls” provision:** requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances of management’s control, authority, and responsibility over the firm’s assets.
 - “**reasonable assurances**” is defined in the statute as “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”
 - Does not specify a particular set of control, but rather gives companies the flexibility to adopt a system that is appropriate to their needs.

Best Practices

- Prevention and Due Diligence
 - Design and implement a code of conduct and training programme
 - Design and implement a compliance programme and attendant training programme
 - Conduct risk assessment based on nature and location of project
 - Conduct due diligence on contractors, subcontractors, agents and employees
- Detection of suspicious behaviours or transactions
 - Ensure sufficient controls are in place
 - Conduct regular monitoring and internal audits

Questions?

