



**COUNTRY
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Canada

BRIBERY & CORRUPTION

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This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in Canada.

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CANADA

BRIBERY & CORRUPTION



1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

Foreign bribery is governed by the Corruption of Foreign Public Officials Act (CFPOA), which applies to all Canadian citizens, permanent residents of Canada, persons anywhere whose acts or omissions have been committed in Canada, and organisations incorporated or formed in Canada. Under the CFPOA, it is an offence to:

- give or offer a loan, reward, advantage or benefit of any kind to a foreign (non-Canadian) public official or to any person for the benefit of a foreign public official as consideration for an act or omission by the official in connection with the performance of the official's duties/functions; or
- induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions.

The Criminal Code governs domestic bribery and corruption. Under the Criminal Code it is an offence to:

- give or offer any loan, reward, advantage or benefit of any kind to public officials (or their family members) for co-operation, assistance, exercise of influence or an act or omission in connection with any government business;
- bribe any municipal official, officer or judicial officer; or
- provide a "secret commission" to the agent of a principal, including giving or offering a reward, advantage or benefit as consideration for doing or not doing anything related to the affairs or business of an agent's principal, or demanding, accepting, or offering to accept such a reward, advantage or benefit, or otherwise knowingly being privy to a secret commission.

Offences involving public officials and secret

commissions are subject to fines and/or imprisonment for up to five years, while offences involving officers and judicial officers may be liable to fines and/or imprisonment for up to 14 years.

Corporate liability can arise where an offence is committed with the knowledge or direction of a "senior officer", which has been held to include individuals responsible for managing an important aspect of the activities of a business, and is not limited to senior management.

Quebec, the only province that broadly addresses bribery at a provincial level through its Anti-Corruption Act, establishes various offences pertaining to corruption, breach of trust, malfeasance, collusion, fraud and influence peddling in the public sector and in the administration of justice; the misuse of public funds; and the gross mismanagement of public contracts. The statute provides a number of penalties associated with hindering investigations and reprisals against whistle-blowers.

2. Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?

The Royal Canadian Mounted Police (RCMP), Canada's federal police service, is responsible for investigating the majority of white-collar criminal offences, and all bribery related offenses under the Criminal Code and CFPOA. The RCMP has specific programs in place to address anti-corruption and financial crimes.

The federal Public Prosecution Service of Canada (PPSC) is an independent prosecuting authority that prosecutes federal corruption offences. The PPSC publishes guidelines for the application of the provisions of the Criminal Code that deal with remediation agreements, Canada's version of deferred prosecution agreements.

Provincially, Crown attorneys are responsible for prosecuting Criminal Code offences and in Ontario are part of the provincial Ministry of the Attorney General.

Crown counsel also form part of the Ministry of the Attorney General and prosecute regulatory offences, and may also act as civil counsel to other ministries. In Quebec, the Directeur des poursuites criminelles et pénales (DPCP) authorizes and directs criminal and penal prosecution on behalf of the province.

3. How is 'bribery' (or its equivalent) defined?

Bribery is not specifically defined in either the Criminal Code or the CFPOA. Instead, as discussed in response to question 1 above, these statutes broadly prohibit conferring benefits to public officials under certain circumstances.

4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

Yes. The CFPOA only prohibits conferring a benefit to foreign public officials. The CFPOA defines a "foreign public official" as:

a person who holds a legislative, administrative or judicial position of a foreign state;

1. a person who performs public duties or functions for a foreign state, including
2. 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
3. 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.

The main prohibition against private bribery in Canada is found at section 426 of the Criminal Code. Section 426 addresses secret commissions, which are more a fraud on an employer than a fraud on the public. The offence prohibits providing a benefit to an agent in consideration for doing something in return without the agent's principal's consent. Receipt of the benefit by the agent is also prohibited.

By contrast, sections 121 and 123 of the Criminal Code address frauds on the government and municipal corruption. Section 121 prohibits conferring benefits to

officials. Section 123 prohibits conferring benefits to municipal officials. The Criminal Code defines an "official" as a person who:

1. holds an office, or
2. is appointed or elected to discharge a public duty;

An office is defined as:

1. an office or appointment under the government,
2. a civil or military commission, or
3. a position or an employment in a public department.

5. What are the civil consequences of bribery in your jurisdiction?

In Canada, there are no specific civil causes of action for bribery. However, an individual who engages in bribery or corrupt activities may face tort or contract liability if another party suffers damages as a result of the bribery or corrupt activities. The Canadian government has also introduced an Integrity Regime which applies to all federal procurement and real property transactions, and debars suppliers who have been convicted of "integrity offences", such as bribery and corruption offences.

6. What are the criminal consequences of bribery in your jurisdiction?

Domestic offences with respect to public officials and secret commissions are subject to fines and/or imprisonment for up to five years, while offences with respect to officers and judicial officers may be liable to fines and/or imprisonment for up to 14 years. Corporate liability can arise where an offence is committed with the knowledge or direction of a "senior officer", which has been held to include individuals responsible for managing an important aspect of the activities of a business, and is not limited to senior management.

Foreign bribery is governed by the CFPOA which includes penalties, including prison terms up to 14 years and unlimited fines for corporate offenders.

In addition, corporations convicted of a CFPOA offence or certain offences under the Criminal Code may be debarred from bidding on projects financed by the World Bank Group or be debarred by other multi-lateral banks under the Agreement for Mutual Enforcement of Debarment Decisions. Canada's Integrity Regime debars individuals and corporations from contracting or sub-contracting with federal government departments and

agencies, if they have been convicted of a CFPOA offence or certain criminal offences. Yes. Hospitality, travel and entertainment expenses may create liability under the Criminal Code or CFPOA. There are no commonly accepted monetary standard or frequency limit for the gifts and hospitalities extended to government officials. The Conflicts of Interest Act, requires Canadian public office holders to report receiving gifts or meals from a single source in a 12-month period if the total value exceeds CAD 200. While the reporting threshold may inform what constitutes an appropriate gift, even business amenities that do not exceed this reporting threshold may be prohibited. The Values and Ethics Code for the Public Sector and the complementary Policy on Conflict of Interest and Post-Employment permit gifts, hospitality and other benefits that are infrequent, of minimal value, within the normal standards of courtesy and protocol, and do not compromise integrity.

7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials? Are there specific monetary limits?

Yes. Hospitality, travel and entertainment expenses may create liability under the Criminal Code or CFPOA. There are no commonly accepted monetary standard or frequency limit for the gifts and hospitalities extended to government officials. The Conflicts of Interest Act, requires Canadian public office holders to report receiving gifts or meals from a single source in a 12-month period if the total value exceeds CAD 200. While the reporting threshold may inform what constitutes an appropriate gift, even business amenities that do not exceed this reporting threshold may be prohibited. The Values and Ethics Code for the Public Sector and the complementary Policy on Conflict of Interest and Post-Employment permit gifts, hospitality and other benefits that are infrequent, of minimal value, within the normal standards of courtesy and protocol, and do not compromise integrity.

8. Are political contributions regulated? If so, please provide details.

Contributions to political parties and candidates are regulated under federal and provincial law, with low annual contribution limits as well as specific prohibitions on contributions by corporations, trade unions, associations and groups.

9. Are facilitation payments regulated? If not, what is the general approach to such payments?

With very narrow exceptions, facilitation payments are prohibited under Canada's Criminal Code and under the CFPOA.

10. Are there any defences available to the bribery and corruption offences in your jurisdiction?

There are exceptions to the offence of bribing a foreign public official set out in the CFPOA where: (a) the benefit given is either permitted or required under the laws of the applicable foreign state or foreign public international organization; or (b) payment was made to reimburse reasonable expenses incurred in the promotion or demonstration of the person's products and services or the execution or performance of a contract between a person and the foreign state.

There are no exceptions listed for Criminal Code bribery or corruption offences.

The CFPOA and Criminal Code bribery offences require a mental element of knowledge and intent. As such, a number of defenses recognized at common law are available for these offences (for example, duress and mistake of fact).

11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?

As a practical matter, companies should have a well-developed compliance program in place to mitigate potential liability and penalties. This is obviously important when it comes to policies covering dealings with government officials, but equally important will be compliance with procedures governing dealings with agents and contractors, and the ongoing training of employees on compliance with the company's program.

One specific area where an effective compliance program may limit corporate exposure is with respect to offences under section 22.2(1)(c) of the Criminal Code, where a senior officer who knows that a representative of the corporation is or is about to be a party to an offence, fails to take "all reasonable measures to stop them from being a party to the offence". The law remains unsettled in this regard, however if a compliance program spells out mandatory steps to be followed that are considered "reasonable measures", it

may qualify as a defense where the area of conduct was under the supervision of senior officers. Such a program, however, will not be a defense at the senior officer level, but may serve in mitigation of sentence.

The law in Canada has recognized a number of high-level elements that make up an effective compliance program. These elements include:

- **Top Level Commitment:** This requires that senior officers specifically address bribery risks.
- **Communication, including training:** Communication should come from the top, and should include the creation of a confidential means to report bribery conduct.
- **Risk Assessment:** External risks (such as country risk and sector risk) should be evaluated along with internal risks (such as poor training, cultures that promote excessive risk-taking and poor financial controls).
- **Due Diligence:** Commercial organizations should put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.
- **Proportionate Procedures:** A specific, tailor made approach will be preferable to a general approach.
- **Monitoring and Review:** Methods may include staff surveys, testing and verification of procedures by outside parties and certified compliance by multilateral bodies.

12. Who may be held liable for bribery? Only individuals, or also corporate entities?

Under both the Criminal Code and the CFPOA, individuals, public officials and corporate entities can be prosecuted for bribery offenses. As referenced above, companies may be held liable where the act was committed with the knowledge of a senior corporate officer. Recent case law suggests that “senior officers” can, in some instances, include those in middle management positions.

Of note, under both the Criminal Code and the CFPOA liability can extend to the acts of those who “directly or indirectly” commit a bribery offense. As a consequence, a parent company can be held liable for acts carried out by a subsidiary, and where a company uses a third party agent who commits an offense, depending on the circumstances, liability can arise for both the company and agent. Under the Criminal Code, a parent company can also be liable for aiding or abetting or counselling an

offense carried out by a subsidiary.

There are also bribery related provisions in the Conflicts of Interest Act, and the Canada Elections Act, which apply to public office holders and individuals running for election to the House of Commons respectively.

13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction?

The Government of Canada has not published specific guidance, setting out the elements of an effective corporate compliance program. However, as Canada is a party to the OECD Conventions, Global Affairs Canada raises awareness of the OECD Guidelines for Multinational Enterprises, which were updated in May 2011. These guidelines give recommendations to multilateral enterprises operating in or from OECD countries. The guidelines provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. Canada has a National Contact Point to support these guidelines.

In addition, the Government of Canada conducts outreach to enhance awareness and to encourage companies to adopt measures that to meet their legal obligations under the CFPOA and certain offences under the Criminal Code, to have a zero-tolerance approach to the bribery of foreign public officials.

Government bodies which provide training and outreach and/or raise awareness of anti-corruption issues include: the RCMP, Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), Global Affairs Canada, Export and Development Canada, the Canada Revenue Agency (CRA), the Department of Justice, Public Services and Procurement Canada, the Competition Bureau of Canada, and the Treasury Board Secretariat.

The RCMP has also developed an anti-corruption awareness risk assessment tool for stakeholders, which may be provided by the RCMP on request.

14. Does the law in your jurisdiction provide protection to whistle-blowers?

While there is no comprehensive whistle-blower legislation in Canada, the law provides some protections to whistle-blowers. The Criminal Code prohibits employers or their agents from:

- Threatening an employee to prevent that

employee from providing information to law enforcement; or

- Retaliating against an employee who has provided information to law enforcement.

Provincial securities legislation also provides protections, but these protections vary from province to province. Alberta, Manitoba, Saskatchewan, New Brunswick, and Ontario have enacted protections, while other provinces have yet to legislate formal protections. Some provincial securities regulators, i.e.: the Ontario Securities Commission, have implemented incentive programs for whistle-blowers.

The CRA offers financial incentives for whistle-blowers who provide information about international non-compliance of Canadian taxpayers.

Under Canada's Public Servants Disclosure Protection Act, federal public sector employees must create a code of conduct to protect whistle-blowers. Similar provincial legislation exists in some provinces.

Under the federal Competition Act, any person may notify the Competition Bureau of an offence and request that their identity be kept confidential. Employers are prohibited from retaliating against whistle-blower employees who act in good faith and on the basis of a reasonable belief, through dismissing, suspending, demoting, disciplining, harassing or otherwise disadvantaging an employee, or denying an employee a benefit of employment.

15. How common are government authority investigations into allegations of bribery? How effective are they in leading to prosecutions of individuals and corporates?

Canada is increasingly focusing on combating bribery, and will investigate complaints or information from whistle-blowers concerning bribery.

Police, regulators and prosecutors may initiate an investigation. The RCMP and other police services may initiate investigations independently or working alongside Crown counsel. Crown counsel play a larger role in the early stages of an investigation where judicial authorisations are required for the purposes of evidence gathering. Federally, the PPSC has drafted guidelines governing investigations and the relationship between crown counsel and investigative agencies.

16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19 pandemic had any ongoing impact and, if so, what?

As Canada prepares for its June 2023 Phase 4 Review by the Organization for Economic Cooperation and Development under the Convention on Anti-Bribery, it appears to be bolstering its anti-corruption enforcement tools and taking steps to use existing enforcement mechanisms.

In federal Budget 2022, Canada announced the creation of a national agency to combat financial crime: the Canada Financial Crimes Agency (CFCA) and issued a mandate to Public Safety Canada to research the implementation of such an agency. In federal Budget 2023, Canada further scoped financial crime to focus on AML enforcement. The CFCA remains a nascent idea being studied by Public Safety Canada with no timeline regarding its proposed format, let alone an implementation date. It is possible that the scope of the CFCA will broaden overtime to specifically include offenses under the CFPOA.

The proposed CFCA bolsters Canada's AML-centric agenda in 2023, which will have positive knock-on effects on anti-corruption enforcement. For example, Canada has tabled Bill C-47 before Parliament which proposes amendments to the Canada Business Corporations Act and other statutes to establish a federal public beneficial ownership registry that will apply to federally incorporated entities, with the possibility of provinces being able to opt into the registry. The registry will help financial institutions meet their KYC obligations and aims to prevent the existence of shell corporations used to launder funds.

These policy proposals and legislative amendments follow criticisms of the federal AML regulatory regime described in the June 2022 Final Report of the Commission of Inquiry into Money Laundering in British Columbia (Cullen Commission Report). For example, the Cullen Commission Report alleges a lack of strategic vision, an inability to get actionable intelligence to law enforcement, the absence of a legislative framework to exchange tactical information on money laundering, and a lack of enforcement resources to investigation and prosecute offences, is behind Canada's poor enforcement record.

Canada continues to have mixed success in its prosecution of offences under the CFPOA. In 2021, the Court of Appeal for Ontario ordered a new trial in a case clarifying the mental element of bribery offenses under

the CFPOA (R. v. Barra, 2021 ONCA 568). Going forward, to secure a conviction for bribery under the CFPOA prosecutors will need to establish, beyond a reasonable doubt, that an accused had knowledge of the “official” character of the person to whom the bribe was offered. If the person offered the bribe is employed by a corporation, then to have the required mens rea the accused must know not only that the person was employed by the corporation, but that the corporation was established to perform a function on behalf of a foreign state. This case also clarified when mistrial can be invoked as a remedy for late disclosure in CFPOA prosecutions. In this respect the court held that an accused must establish, on a balance of probabilities, that the right to make full answer and defence was violated. The accused must also show a “reasonable possibility” that the late disclosure affected the outcome or the overall fairness of the trial.

In March 2023, Damodar Arapakota was acquitted of charges under the CFPOA (R v Arapakota, 2023 ONSC 1567). The court clarified the elements of the bribery offence, specifically that section 3(1)(a) requires a prosecutor to prove subjective fault as the mens rea of the offence. In the future, to successfully convict an accused, prosecutors will need to show that an accused intentionally offered a benefit, something akin to a “material economic advantage”. This is a high threshold for a prosecutor to meet and may result in future acquittals unless an investigation uncovers evidence of subjective intent.

In late 2022, the first Remediation Agreement was entered into with respect to the CFPOA regarding charges laid against Ultra Electronics Forensic Technology Inc. The agreement was approved by the Quebec Superior Court of Justice in early 2023 and will serve as a foundational precedent for corporations seeking non-trial resolutions in respect of corruption charges. As of the date of publication, the agreement is not publicly available. Given the exacting mens rea requirement under the CFPOA, as per the R v Arapakota decision, in the future, prosecutors may seek to enter into more Remediation Agreements to avoid the uncertainty of trial and the possibility of an acquittal.

Despite the Prime Minister mandating the Minister of Foreign Affairs to utilize the Justice for Victims of Corrupt Foreign Officials Act (JVCFOA) Canada has not designated additional persons under the schedule to the Act. Canada last amended the JVCFOA in 2018, when it designated Saudi Arabian nationals in relation to the extrajudicial killing of Jamal Khashoggi. Instead, Canada has relied on its other unilateral sanctions statute, the Special Economic Measures Act, to target corrupt acts and human rights abusers. Throughout 2022 and 2023,

Canada has continued to amend its sanctions regimes in relation to Russia, Belarus, Ukraine (occupied territories), Iran, Haiti, Sri Lanka, and Myanmar.

17. Is there a process of judicial review for challenging government authority action and decisions? If so, please describe key features of this process and remedy.

Decisions and actions of government bodies and agencies are subject to judicial review at both the provincial and federal level, depending on the source of statutory authority of the administrative decision maker. A party can challenge both the substantive decision itself and/or the fairness (or lack thereof) of the process that led to the decision. Only final decisions are subject to judicial review and, depending on the jurisdiction, there may be strict time limits for commencing an application. Generally, a party must exhaust all alternative remedies within the statutory or administrative framework being challenged before applying for judicial review.

18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?

Recent reforms are set out above under question 16.

19. To which international anti-corruption conventions is your country party?

Canada is a signatory to the OECD Convention. The CFPOA was enacted in order to implement Canada’s obligation under this Convention. As a member of the Organization of the American States, Canada is also party to the Inter-American Convention against Corruption (IACC) along with 35 other Member States. Finally, Canada ratified the United Nations Convention against Corruption in 2004.

20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.

Yes. Both lawyer-client (also known as legal advice privilege or attorney-client privilege) and litigation privilege (also known as work product privilege) may apply to a lawyer-led investigation in Canada.

Lawyer-client privilege protects communications

between a lawyer and client that is in furtherance of providing legal advice. The communication must be in relation to the giving or obtaining of legal advice and there must be an expectation of confidentiality over the communication. Lawyer-client privilege may apply to communications from both in-house and outside counsel. It is the client that holds the privilege and only the client can decide to waive the privilege.

Often in an internal investigation initiated to address potential bribery or corruption it is the work product itself that the party wants to protect. Litigation privilege applies where the document at issue was created for the dominant purpose of preparing for actual or anticipated litigation. Litigation privilege may extend to communications with, and documents prepared by, third parties engaged to assist with litigation (such as forensic or accounting experts).

Whether considering lawyer-client or litigation privilege it will be important to clearly establish the identity of the client at the beginning of the investigation. Is it just the corporation, does counsel also act for certain directors or officers of the company, or is the representation limited to a special committee struck for the purpose of the investigation? Clearly delineating the parameters of the relationship will help ensure privilege is not erroneously waived.

21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

To date, Canada has not pursued bribery and corruption matters with the same vigour as, for example, the United States or the UK. Canada has been criticized in recent years for its limited enforcement efforts. However, as outlined above, there have been recent amendments to anti-corruption laws, including the establishment of a Serious Fraud Office (SFO) in Ontario with some noteworthy early prosecutions under way, and Canadian agencies have entered into further multi-national cooperation agreements. Increased fines and sentences have been apparent as well for corruption related offenses. Domestically, there have been a number of recent ethics inquiries into Canadian government dealings. While time will tell, on balance, these developments signal a more serious approach to preventing and pursuing corruption in this jurisdiction.

22. Generally how serious are organisations in your country about preventing bribery and corruption?

Canadian corporations are becoming more serious about preventing bribery and corruption, particularly those with cross border operations that may be captured by aggressive regulators, like the US or UK. Canada is a resource rich country, with Canadian companies regularly conducting resource exploration and projects in other jurisdictions, which can have poorly enforced anti-corruption laws. Canadian mining companies now tend to consider bribery and corruption as one of the initial risk assessments to be undertaken before entering into a new jurisdiction, and continually train and monitor staff and agents regarding interactions with public officials, including issues around gift giving, hospitality and human rights violations. It is increasingly common to have annual 'health checks' of compliance policies and training procedures to ensure up-to-date compliance with Canadian legislation.

23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?

A significant challenge facing Canadian authorities is the proliferation of electronic data and the effect this has had on the time and expense of investigations. The government must accept that this challenge will continue to intensify and adequate resources will need to be allocated for appropriate electronic evidence platforms.

In addition, the Covid-19 pandemic has impacted and will continue to impact efforts to combat bribery and corruption in Canada. Corruption and emergencies fuel each other. During the pandemic, governments have had urgent need for large sums of money and essential goods. This urgency and need can increase opportunities for corruption and bribery to occur, while weakening the mechanisms to prevent it.

24. What are the biggest challenges businesses face when investigating bribery and corruption issues?

Two serious challenges faced by Canadian businesses conducting internal investigations are:

- Defining the scope and scale of an investigation. Careful planning is necessary at

the outset to ensure the investigation is proportionate and effective in isolating the relevant conduct, and the relevant universe of documents. In our experience businesses in crisis will sometimes apply parameters that are too broad in scope, which can be a costly and distracting exercise.

- Electronic document preservation, management and review. As the proliferation of electronic data expands, this aspect of an investigation has become crucial and requires the effective use of technology. Handling documents in an investigation now requires consideration of a number of overlapping regulated issues including data privacy and security of evidence.

25. What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?

We are now seeing the impact of the Covid-19 pandemic across all business sectors, including in the exposure of

increased levels of internal fraud and corruption. As in the years following 2008, we expect this trend will intensify over the next 18 months, with a range of large-scale frauds coming to light as business operations and internal procedures slowly normalize.

26. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?

As mentioned above, Canada has been criticized for its relatively weak anti-corruption enforcement efforts to date. Unlike in the US, in Canada there have been limited resources focused on bribery, corporate fraud and white collar matters. Few cases have been prosecuted to date. Ideally, Canada would send a stronger message when it comes to anti-corruption, by devoting more resources to the investigation, and prosecution of bribery and corruption. That said, the recent steps outlined under question #16 above suggest that Canada is beginning to take these matters more seriously. Time will tell.

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