

## **OECD Convention: Overcoming Obstacles to Enforcement**

### **Submission of Transparency International Canada**

A Survey carried out by TI Canada in order to:

- a) assess the prospects for foreign bribery prosecutions in Canada,
- b) identify obstacles to enforcement, and
- c) consider possible steps to overcome such obstacles.

The following survey is the result of meetings and discussions held over the past several weeks by TI Canada's Vice Chair, Michael Davies, with Canadian law enforcement officials, officials with the Department of Justice and the Department of Foreign Affairs involved with implementation of the OECD Convention and enforcement of the CFPOA (*Corruption of Foreign Public Officials Act*), leading lawyers in the field, corporate executives involved in international trade, accounting executives and other knowledgeable experts.

The survey also draws on information derived by Michael in the process of organizing, coordinating and participating in the private sector/civil society consultation process which formed part of the OECD Phase II review of Canada this past February. The 1½ day consultation process consisted of six (6) separate panels involving the private sector, civil society, trade unions, business executives, lawyers and the accounting profession.

### **POSSIBLE REASONS FOR LACK OF ENFORCEMENT**

#### **Need for More Lead time**

- To date there has been one prosecution in Canada under Canada's *Corruption of Foreign Public Officials Act (CFPOA)* for bribery of a foreign public official. Following a complaint by a competitor in October 2001 which was investigated by the RCMP, charges were laid by the RCMP against a Canadian Company, its president and one of its employees relating to payments in the order of \$28,000 made to a US customs agent in Calgary International Airport to allegedly secure actions favourable to entry of the Company's employees into the United States and unfavourable to entry by its competitor's employees. Provincial prosecutors are handling the case in Alberta and the trial is expected to take place this December.
- The US customs agent who received the payments was charged under Canada's Criminal Code, pleaded guilty and was sentenced to six (6) months in prison.

- In its third annual report to Parliament in October 2002, Justice Canada reported that there had been no other prosecutions under the *Act* either federally or provincially and we understand that no prosecutions are currently outstanding.
- Information regarding active criminal investigations (including those relating to foreign bribery) is not generally made available by law enforcement agencies in Canada.
- Counsel, however has advised of one investigation of a Canadian company that was commence but was subsequently terminated as the events in question were determined to have preceded the enactment of the CFPOA. We were also informed that investigations of two other companies relating to possible relatively minor infractions under the CFPOA are currently in progress.
- There do not appear to be any “big ticket” CFPOA investigations currently in progress.

### **Mutual Legal Assistance**

- Canada is party to several multilateral conventions (such as the OECD Convention) that include provisions relating to mutual legal assistance in criminal investigations. These provisions tend to be fairly general and are usually stated in permissive language that encourages, but does not mandate, co-operation.
- Canada is also party to more than 30 bilateral MLA treaties (MLATs) with individual countries and around 10 other MLATs are currently under discussion. These bilateral agreements, entered into pursuant to Canada’s MLA enabling legislation, the *Mutual Legal Assistance in Criminal Matters Act* of 1988, contain specific obligations referable to such things as search warrants, return of confiscated assets, exchange of exhibits and production of prisoners as witnesses and are usually mandatory. Canadian investigating authorities, therefore, even in situations where a multilateral agreement (such as the OECD Convention) exists, often prefer to seek legal assistance from a foreign country under a bilateral agreement. Some of these bilateral MLATs are with other countries in the industrialized world but many (and most of those currently under discussion) are with less developed countries.

- Where no bilateral agreement exists with a country from whom assistance is needed, Canada's Justice Department may try to negotiate an MLAT or, as also contemplated by the legislation, enter into a special one-time administrative arrangement relating to the specific situation. Legal assistance can also be provided on a purely informal cooperative basis between investigating authorities even where there is no MLAT or administrative agreement in effect. In these circumstances, assistance is usually limited to activities which are voluntary and do not require a court order.
- Requests for mutual legal assistance are usually initiated by the police, flow up to the International Assistance Group (IAC) at the Department of Justice in Ottawa and from there move to the corresponding Justice authorities of the foreign country and then down to their local enforcement authority. This process of itself could, but doesn't usually seem to, cause significant delays. In the experience of counsel, one of the challenges in the process is finding an appropriate enforcement agency in the foreign country with the interest and wherewithal to execute the request.
- Canada does not require dual criminality and does not seek to include dual criminality as a requirement in any MLA treaty that it negotiates. Dual criminality requirements are not therefore perceived by Canadian enforcement authorities to be a serious impediment to securing legal assistance.
- To date Canada has not made any requests for assistance under the OECD Convention. However, documentary evidence requested in 1998 from a foreign bilateral treaty partner in a conspiracy case relating to illegal payments was received 2½ years later. Two other requests in Criminal Code investigations relating to domestic bribery made several years ago have evidently not yet been fully executed. Major delays, therefore can occur.
- Enforcement agencies anticipate that, in the case of foreign bribery investigations under the CFPOA, they will also encounter delays and lack of cooperation in receiving legal assistance, either due to lack of political will in the other country or as a result, particularly in smaller countries, of very limited local legal and investigative resources. Canadian investigators sometimes travel to the foreign country as this may help to expedite cooperation.

## **Lack Of Complaints**

- The one Canadian case to date under the CFPOA was initiated following a complaint by a competitor of the accused who suffered economic damage as a result of actions flowing from the alleged bribe. As a result of the complaint, the local investigating police force (the RCMP) investigated and subsequently laid charges and the case is expected to come to trial in December.

- Media coverage and public airing of the issues appear to have contributed to the commencement of one of the investigations previously mentioned in Section A. Suspicious events abroad having been brought to the attention of Canadian government authorities are believed to have contributed to another.
- Under the Canadian system of criminal law enforcement, complaints are not made to prosecutors (who have no authority to investigate or lay charges or to direct that an investigation take place or that a charge be laid). They are usually made to a law enforcement agency, such as the local police, the provincial police or the Royal Canadian Mounted Police (RCMP) - either in its capacity as a federal law enforcement agency or in its role of providing, under contract, law enforcement services in all but two of the provinces.
- The RCMP, the law enforcement agency most qualified and therefore most likely to become involved in an investigation of foreign bribery, has established a Financial Crime Program consisting of three highly specialized divisions – Commercial Crime, Proceeds of Crime and Market Enforcement. The Commercial Crime division (whose responsibilities include the investigation of foreign and domestic bribery) consists of some 400 officers – a few situated in the central branch in Ottawa and the others spread across Canada in 34 divisional field units called Commercial Crime sections. It is to one of these divisional field units in the relevant geographic area in Canada that a complaint would normally be made or be referred.
- Investigations by the police are usually the result of a complaint received from an injured party or, in the case of foreign bribery (where an unsuccessful bidder has only suffered a loss of business opportunity and therefore may not be as likely to complain as when it suffers actual financial loss or damage) as a result of information received from a government or police official, an NGO or some other source such as a newspaper report. In this regard, the RCMP Commercial Crime division carries out a comprehensive daily media scan.
- The RCMP also has about 35 liaison officers assigned to Canadian embassies around the world. Reports from these officers back to head office regarding suspicious transactions in the region for which they are responsible could give rise to an investigation. Similarly Canadian government agencies, such as CIDA and EDC, who provide money in support of international contracts, are also potential sources of information. This latter source, it has been suggested, could be more effectively utilized and expanded.
- The current lack of awareness of the new Canadian law among many small to medium sized Canadian companies could have an impact on the number of “competitor” complaints. However, some larger Canadian companies who are aware of the legislation have indicated that they would generally be reluctant to lodge a complaint with the police regarding an alleged bribe by a Canadian competitor unless they were in possession of fairly clear evidence (vs. merely a suspicion as is usually the case) that a bribe had been paid by the competitor. The risk of possible defamation claims or loss of future business prospects with the foreign government (particularly if the complaint turns out to be

unfounded), the strain on internal resources in assisting an investigating authority and concern over a perceived lower level of interest on the part of law enforcement agencies relating to commercial crime between two companies (not necessarily applicable however in the case of bribery of a public official) are all potential deterrents to complaints by an unsuccessful bidder.

- Where, however the evidence of bribery is clear and the financial loss (of anticipated profit) is significant (or the company strongly supports the need to eliminate foreign bribery) it is anticipated that competitor complaints will be more likely to occur. One experienced counsel is of the view that, as time goes on, some companies will be increasingly prepared to hire an investigator to prepare a preliminary dossier that might allow the company to make a complaint.
- In the opinion of one chartered accountant, mandatory reporting by auditors and lawyers of suspicious transactions (similar to recent reporting obligations relating to large cash transactions in the area of money laundering) could increase the number of cases investigated, although it was acknowledged that there were issues of privilege and confidentiality obligations which would need to be addressed..
- Canada currently does not have any whistleblower protection legislation that would help to encourage employees to blow the whistle on the payment by their employer of a bribe to a foreign public official. This, it was suggested, should be rectified.

## **Adequacy of Resources**

- It is recognized that, other than the specialized Commercial Crime division of the RCMP and the two provincial police forces, law enforcement agencies in Canada do not have adequate budgets and resources to deal with the complexity of foreign bribery cases.
- Accordingly, although all three levels of the police - municipal, provincial and federal - have jurisdiction to investigate a case of foreign bribery, most foreign bribery investigations will be conducted by one of the RCMP Commercial Crime sections where the highest level of expertise and the requisite resources are most likely to be found. The RCMP Commercial Crime division is staffed by investigators with specialized knowledge and experience in fields such as law, accounting, finance, economics, computer services and business administration. They also receive education and training on the CFPOA.
- The RCMP's Commercial Crime division, and particularly the smaller sections, like all police forces, have budgetary constraints which prevent them from investigating every case that comes to their attention. As a guide to help determine what priority to assign to a particular case when deciding, within the limitations of existing resources, which case or cases to investigate, the RCMP

has developed a computer software program called PROOF (Prioritized Rating of Operational Files) whereby, in respect of each category of crime, points are awarded to each case based on the number of criteria that the case satisfies. Regarding commercial crime these criteria include dollar amount, organized crime component, multiple victims, corruption and potential outstanding threat. No points are awarded because a case is “domestic” so workload pressure should not, if the PROOF system is applied, favour investigation of domestic over foreign bribery cases.

- The PROOF system however, is only a guide and other considerations may be taken into account where there is a perceived need to investigate which is not reflected by the PROOF score, for example, with regards to an CFPOA case, the high national profile attributable to foreign bribery and the fact it involves a public official.
- Another concern was raised relating to budgets and availability of resources. Canada’s new bribery law places more investigative responsibility on the police as will also the UN Convention against Corruption when it comes into force. It is imperative that additional resources accompany new treaty responsibilities, otherwise police forces, including the RCMP, must reallocate already stretched resources if they hope to meet new training and investigative challenges.

## **Decentralization Of Prosecution**

- In Canada, responsibility for criminal law enforcement rests concurrently with federal, provincial and local law enforcement agencies (i.e. police forces) all of which have authority to carry out an investigation in relation to the CFPOA. However, since the RCMP has a specialized Commercial Crime division and acts under contract as the municipal and provincial police in most regions (other than Ontario and Quebec) the RCMP generally assumes investigative responsibility for the CFPOA. Lack of interest or resources at the provincial or municipal level is therefore not an issue.
- Law enforcement agencies in Canada also have the responsibility for the laying of charges against an accused, although in B.C. and Quebec the laying of charges requires the approval of a provincial crown counsel.
- The Attorney General of Canada has specific, but concurrent with provincial Attorneys General, jurisdiction to institute and conduct prosecutions of offences under the CFPOA and the Federal and provincial Attorneys General enjoy a good working relationship in determining who should prosecute in a particular case. Since the CFPOA is a federal statute, the federal Attorney General’s office, particularly if the national interest is involved, will often take on responsibility for prosecution.
- In determining which cases to prosecute (and whether to continue with a prosecution) the Attorney General (usually through local Crown Counsel)

exercises a broad discretion in the public interest, and is obliged, under the Federal Prosecution Services Deskbook, to exclude any personal bias or any consideration of political consequences to the government or any political group. Among the various factors to be considered by crown counsel in deciding whether it is in the public interest to pursue a prosecution are – seriousness or triviality of the offence, significant mitigating or aggravating circumstances, likely length and expense of trial, available resources, etc.

- No one at the political level in Canada is involved in decisions by crown counsel relating to whether or not to prosecute or to continue with a prosecution. Crown prosecutors are generally perceived by counsel to be independent and free from political influence.
- Under the Criminal Code a private complainant can commence a private criminal prosecution but this is very rare and the Attorney General has the right at any time to take control of the prosecution.
- The Commercial Crime division of the RCMP, (and likely also in some cases the provincial police authorities in Ontario and Quebec) would seem to have the interest and for the most part the professional capability to take on the investigation of a foreign bribery case. However, it is the view of one counsel that resource-strapped enforcement agencies may be prone to devote greater attention to criminal activity that targets victims in their own jurisdiction. This is one more argument, in his opinion, for having dedicated personnel within the relevant agencies to be responsible, in addition to their other duties, for anti-corruption matters.

## **Statutory Shortcomings**

- Although apparently technically in compliance with the OECD Convention, the Canadian implementing legislation (primarily the CFPOA) does have some shortcomings that could present some obstacles to foreign bribery prosecutions in Canada.

- **Lack of Nationality Jurisdiction**

Canadian courts apply “territorial” principles of jurisdiction in criminal matters. As determined by the Supreme Court of Canada in the case of *R vs. Libman*, for an offence to be subject to the jurisdiction of Canadian courts a significant portion of the activities constituting the offence must take place in Canada. There must be a “real and substantial link” between the offence and Canada. This is a much narrower test than that applicable to support territorial jurisdiction in the United States.

Where specifically provided by statute, Canadian courts also have jurisdiction to prosecute Canadian nationals for offences committed outside of Canada. It is understood that the Canadian government generally only applies such “nationality” jurisdiction to those specific offences where there is universal agreement, confirmed by treaty or international consensus, that the specific act is recognized as a criminal offence and should be prosecuted on the basis of

nationality (for example, war crimes, hi-jacking and terrorism). There have, however, been some exceptions to this requirement (notably bigamy and sex tourism).

Although, following ratification of the OECD Convention, the US amended the FCPA to add jurisdiction based on nationality, we understand that Canada did not adopt a similar approach in its implementing legislation on the basis that to do so would not be “according to the same principles” (as per Article 4.2 of the Convention) that Canada applies to the extension of jurisdiction based on nationality to other offences.

In its recent legislation, the UK adopted nationality as well as territorial jurisdiction. Canada is now one of only two or three signatories to the Convention that have not applied “nationality” jurisdiction to the offence of bribing a foreign public official.

The addition of “nationality” jurisdiction would no doubt, as per Article 4 of the Convention, be more effective in the fight against bribery of foreign public officials by permitting Canadian courts to hold Canadian nationals accountable for their illicit actions outside the country. This could be of particular benefit in reaching the activities of foreign subsidiaries where Canadian nationals are involved.

Most of those surveyed outside of government were in agreement that Canada should be taking steps to modify the CFPOA in this regard.

- **Books and Records**

Most prosecutions in the United States have been initiated under the accounting provisions of the FCPA. Not only is the gathering of evidence and the establishment of facts less complicated, it is also much easier -- since an accounting offence will generally occur in a company’s home country -- to establish “territorial” jurisdiction where, as in Canada, to do so is required.

Unlike the FCPA, which contains detailed accounting provisions, the CFPOA does not address accounting issues it being the view of Canadian government officials that Canada’s existing laws comply with Article 8 of the Convention and that no further legislation is required. Many others do not agree. Although there are “document fraud” and “accessory” provisions in the criminal code, existing Canadian law does not appear to go far enough. For example, there is no clear prohibition in Canada relating to off-the-books accounts.

The Canada Business Corporations Act (CBCA) simply requires a corporation to maintain adequate accounting records but does not specify what the accounting records must contain. In their verbal and written recommendations to the OECD reviewing team at the time of the Canadian review, the Canadian Institute of Chartered Accountants (CICA) recommended amendments to existing legal requirements in Federal and Provincial acts of incorporation to



more specifically address books and records requirements for all Canadian companies, including foreign subsidiaries.

The amendments, they suggested, should address the maintenance of adequate books and records, including prohibition of off-the-books accounts and transactions, the recording of non-existent transactions and false documentation and onerous sanctions should be imposed for misrepresentations and omissions in financial reports and accounting records. In addition, there should be requirements calling for full identification and description of transactions in the accounts, accurate and proper classification of transactions and adequacy of the audit trail.

## **G. Political Commitment**

- The RCMP operates independently from Parliament and is not subject to political influence or political commitment in its determination as to which cases it will investigate and when it will lay charges.
- Although the RCMP has a PROOF program which assigns priority rankings to potential cases awaiting an investigation decision, the guide is not necessarily conclusive and strong anti-bribery sentiment in the country and in the halls of parliament could have some influence on priority setting by police authorities.
- As already stated, Federal and provincial prosecutors are also perceived to be independent and not subject to political influence. It is therefore doubtful that they, or the RCMP would in any way be discouraged from bringing foreign bribery cases against state-owned or politically connected companies. That said, the fact that the victims are not Canadian combined with the relative expense of investigating these matters could at times, in the opinion of one counsel, militate toward a decision to "pass" on the investigation of a foreign bribery case independently of political pressure.
- Although it seldom happens, the Criminal Code permits private citizens to initiate and carry out criminal prosecutions. A company could therefore itself initiate criminal proceedings under the CFPOA against a competitor who paid a bribe to a foreign public official to secure a contract.

## **POSSIBLE REMEDIES**

### **Specialized Prosecutorial Office**

- A specialized office with responsibility for investigating and prosecuting foreign bribery cases such as the Serious Fraud Office model in the UK, Australia and New Zealand (where prosecutors direct serious crime investigations), was recently rejected in Canada in favour of preserving the segregation of authority between the police – federal, provincial and

municipal (who investigate) and Crown prosecutors – federal and provincial (who prosecute).

- The only example of a specialized office of this type in Canada relates to war crimes arising out of the second world war and this office tends to be “prosecutor” driven.
- In 1996, twelve multi-disciplinary investigative teams, involving the RCMP, the Justice Department, customs, tax, forensic accounting, the Ontario Provincial Police (OPP) and local police, were created across the country for the purpose of investigating proceeds of crime offences (money laundering).
- Currently, in the aftermath of Enron and Worldcom, there is a bill before Parliament designed to better coordinate and strengthen enforcement against serious capital markets fraud. Nine highly skilled Integrated Market Enforcement Teams (IMETs) made up of RCMP investigators, federal lawyers and other investigative experts are to be created and will be located in Canada’s four major financial centers. The legislation will also create a new employment-related intimidation offence protecting employees who report unlawful conduct within their corporation.
- Since foreign bribery cases are resource-intensive and expensive to investigate and prosecute, the single largest impediment to vigorous enforcement, in the opinion of one experienced counsel, is the absence of dedicated enforcement resources. These don't have to be solely dedicated to international corruption but, in his opinion there should be a unit in every federal and provincial Justice Dept't, the RCMP and the provincial police services that is expressly mandated to investigate and prosecute international corruption cases. Another mechanism that would be useful in his view would be an inter-agency task force like the one set up among the RCMP, OPP, Competition Bureau, etc. in the mid-90s to address telemarketing scams.

### **Strengthening Mutual Legal Assistance**

- In the view of Canada’s law enforcement agencies, success in receiving legal assistance in a country where bribes have been paid is largely dependent on having or entering into an individual MLA treaty or administrative agreement with that country and also very much on the political will and the resources that exist in that country to provide assistance.
- It is not perceived likely that the UN Convention will provide more effective mutual legal assistance between industrialized and developing countries since the MLA provisions of the Convention are not mandatory. They may, however help to create the will to cooperate.
- In the opinion of one counsel, having dedicated enforcement responsibility in both the requesting and the requested governments would greatly facilitate and expedite the MLA process.

## **Steps To Facilitate Complaints**

- There seems to be strong support for the idea that useful steps could be taken and procedures developed by such organizations as the OECD, World Bank and/or TI to facilitate bringing foreign bribery complaints to the attention of investigating authorities in OECD states (eg. the RCMP in Canada).
- Suggestions include:-
  - hot lines to local representatives in the foreign country (e.g.. RCMP liaison officers and/or international finance institutions (e.g..World Bank, ADB, CIDA and EDC) or domestic law enforcement agencies (e.g.. RCMP);
  - auditing of major projects financially supported by government agencies (e.g.. CIDA, EDC and CCC),
  - laws requiring company auditors to report evidence of foreign bribes; and
  - whistleblower protection legislation (such as IMET legislation currently before the Canadian parliament).

## **Improving Awareness Of Convention And Implementing Laws**

- It was recommended that OECD organize a program as proposed in the survey questionnaire.
- International lending agencies such as the World Bank, ADB, CIDA and EDC could provide much needed education on anti-bribery laws to companies bidding on foreign projects and could require them to have in place effective compliance programs meeting certain basic criteria.
- The OECD's outreach program, business sector organizations (e.g. BIAC, ICC, Chambers of Commerce, CCIB), the legal and accounting professions and TI could help to proactively inform and educate the business community on anti-bribery legislation and the development of effective compliance programs.
- A considerable amount of public awareness building has been conducted in Canada, particularly with large companies. Until, however there is a record of enforcement action and significant penalties imposed on companies in Canada, the CFPOA will not, in the opinion of many of those surveyed, command the full attention and commitment of the business community as a whole.

## **Foreign Subsidiaries**

- It was suggested by one counsel that there is no point pressing for amendments to the Convention or to existing legislation relating to foreign subsidiaries until we have clearly identified what the problems are.
- Priority, however should be given by the OECD Working Group to addressing the issues relating to the ability of foreign subsidiaries to pay bribes without thereby creating a breach of the foreign anti-bribery laws applicable in the country of the parent company.
- It is also recommended that the OECD consider issuing a Commentary requiring subsidiaries of companies in OECD countries to comply with the anti-bribery policies of their parent company or to adopt a comparable anti-bribery policy.

## **Strengthening of OECD Reviews**

- Support was indicated for the four actions identified in the survey questionnaire.
- Responses to the OECD Phase 2 questionnaire should be made public or, at the very least be made available to civil society/private sector participants in the Phase 2 on-site reviews.
- More timely reporting should occur on the results of individual country reviews and a follow-up program should be developed by the OECD to identify ongoing activity in the various countries in support of enforcement and implementation of the Convention and also regarding compliance with recommendations contained in the Phase 2 reports of the OECD Working Group.

## **Other Suggestions**

- The OECD Convention should be amended, a Commentary issued or other steps taken to require member states to adopt “nationality” jurisdiction.

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