

TI Report Card 2004 on Enforcement of OECD Convention - Canada

Date: August 20, 2004

I. Current Status of Enforcement

A. Prosecutions brought

Total number of cases - **one**

- R vs. Hydro Kleen Group Inc. et al (a Canadian company, its president and one of its employees.
- 2002 – charges laid by Royal Canadian Mounted Police (RCMP) under the CFPOA.
- Payments allegedly made in the order of \$28,000. to a US customs agent in Calgary International Airport to secure preferential treatment over competitors in terms of gaining access into the United States in order to do business there.
- The preliminary hearing was held in February, 2004. The trial is scheduled for Feb. 2005 in Red Deer, Alberta (Provincial Court)
- In a separate trial, the US customs agent who received the payments was charged under Canada's Criminal Code, pleaded guilty and was sentenced to 6 months in prison.

In its fourth annual report to Parliament in October 2003, 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.

B. Investigations under way

Information regarding active criminal investigations (including those relating to foreign bribery) is generally not made available by law enforcement agencies in Canada.

In September, 2002 a Canadian company, Acres International, was convicted in the Lesotho High Court of having paid bribes to a Lesotho government official in relation to the Lesotho Highlands Water project. The judgment was subsequently upheld (in part) on appeal. A review, we understand, was commenced by the Canadian authorities but was subsequently terminated prior to any investigation as the events in question were

determined to have preceded the enactment of the *Corruption of Foreign Public Officials Act* (CFPOA).

There have evidently also been investigations of at least two other Canadian companies relating to relatively minor infractions under the CFPOA but there is no indication that there have been any “big ticket” investigations under the legislation.

C Serious Allegations

To the best of our knowledge, following various enquiries, there have been no serious allegations of foreign bribery carried out by Canadian companies or individuals after the CFPOA was enacted that have appeared in reputable domestic or international publications.

II **Actions to Promote Enforcement**

A Government Commitment to Enforcement

Assessment of Canadian Government’s commitment to enforcing foreign bribery laws

- **moderate**

Comments

- Foreign bribery appears to have received somewhat limited attention in terms of overall Canadian government planning since the passing of the CFPOA. No government-wide agenda for proactively addressing foreign bribery has been developed although, as identified in Section F below, some awareness initiatives have been taken independently by some government agencies.
- But, to assess the level of commitment to enforcement of the CFPOA in Canada, one needs to look not only at the political and bureaucratic levels of government (where an overall agenda seems to be lacking) but also at those agencies, who operate quite independently from the government, where responsibility lies for the investigation and laying of a charge under the CFPOA and subsequently for prosecution of the offence.
- The RCMP, the principal investigatory agency with respect to foreign bribery, operates quite independently from Parliament and is not subject to political influence or political commitment in its determination of which cases it will investigate and when it will lay charges.

- 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
- 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 a CFPOA case, the high national profile attributable to foreign bribery and the fact it involves a public official would almost certainly result in it being reviewed and an investigation commenced, if warranted
- In the OECD Phase 2 Review of Canada, the RCMP representative indicated that every corruption offence that had come to the attention of the RCMP had been investigated where there had been at least a prima facie case
- In determining which cases to prosecute, the Attorney General (usually through local Crown Counsel) exercises a broad discretion in the public interest. Among the list of public interest factors to be considered, as set out in the Federal Prosecution Services Deskbook, is "whether prosecuting would cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest."
- Although 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 and Crown prosecutors are generally considered by counsel to be independent and free from political influence, there is a perceived risk that the above factors required to be considered in the public interest could result in a decision not to prosecute in very sensitive cases.

B. Organization of Enforcement

NO. The Canadian government does not have a centralized national office for foreign bribery enforcement.

Level of coordination and supervision provided by government for foreign bribery enforcement - **Moderate**

Comments:

- Responsibility in Canada 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. The RCMP also normally investigates cases with an international dimension as well as “national interest” cases.
- Law enforcement agencies in Canada also have the responsibility for the laying of charges against an accused.
- As to prosecution, 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.
- Although the system is perceived to be generally effective, no federal-provincial wide data system exists containing case related data and there is no formal process for the sharing of information between the relevant agencies although, prior to launching an investigation it appears that a police force will usually communicate with other police forces having concurrent jurisdiction.
- The system could therefore be reinforced by establishing a coordinating role for one of the principal agencies responsible for the implementation of the CFPOA for the purpose of collecting information from the police and prosecutorial authorities about investigations and prosecutions.
- The RCMP is also in the process of working with its partners to establish a protocol whereby police agencies would inform the RCMP about any case involving the CFPOA.
- 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).

- Since 1996 multi-disciplinary investigative teams (currently there are 12 of them) , involving the RCMP, the Justice Department, customs, tax, forensic accounting, the Ontario Provincial Police (OPP) and local police, have been in place across the country for the purpose of investigating proceeds of crime offences (money laundering).
- 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 Dep'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 opinion 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.
- Legislation has recently been enacted in Canada and should soon be in force 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. Two IMET's are currently operating – in Toronto and Vancouver. They provide a new opportunity for the RCMP to increase its visibility in corporate Canada. The IMET's have a corporate outreach program, which aims at prevention of fraud and corruption, as well as a “knock-and-talk” program whereby the units will call upon companies in the news relating to alleged wrongdoing. The legislation also creates a new employment-related intimidation offence protecting employees who report unlawful conduct within their corporation.
- The RCMP is currently considering raising the profile of international corruption within its Commercial Crime Branch through various initiatives, in particular the appointment of a commissioned officer to oversee the program. Should this occur, that there will no doubt be increased linkages with the Proceeds of Crime or money laundering units and the Market Enforcement teams, which are already working within the corporate milieu.

C. Available Resources

Canadian government's provision of staffing and resources for foreign bribery enforcement - **Moderate**

Comments:

- 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, 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
- 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 considered 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.

D. Complaint Procedure

Canadian government's efforts to provide and publicize procedures for reporting foreign bribery complaints – **Weak**

Comments:

- The Canadian government has not provided or publicized any specific procedures for reporting foreign bribery complaints, such as hotlines and websites and does not currently appear to have any plans to do so.
- 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.
- Investigations by the police are usually the result of a complaint received from an injured party or, in the case of foreign bribery 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 some 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 should play an important role in helping to detect bribery of foreign public officials.
- Similarly Canadian government agencies, such as CIDA and EDC, who provide money in support of international contracts, are also valuable potential sources of information. EDC requires that all cases of suspected bribery be reported by the officer processing the EDC application. This type of proactive activity, it has been suggested, could be expanded beyond the application stage and extended to other government agencies involved with international business.

E Whistleblower Protection

Level of Canadian whistleblower protection for foreign bribery complaints - **Very weak**

Comments:

- Although Canada recently enacted whistleblower protection legislation applicable to public sector employees, Canada currently does not have any legislation that would help to encourage employees in the private sector to blow the whistle on the payment by their employer of a bribe to a foreign public official.

F. Public Awareness

Canadian government's efforts to create public awareness that foreign bribery has become a crime - **Moderate**

Comments:

- The Department of Justice (DOJ) and Department of Foreign Affairs and International Trade (DFAIT), the primary agencies responsible for oversight and implementation of the OECD Convention and the CFPOA, have been involved in a number of awareness raising activities since the CFPOA was enacted.
- The DOJ has published a guide on the Act and prosecutors and police officers have received training from the relevant justice authorities on the CFPOA. DFAIT has provided training for its trade officers and commercial officers and for its heads of missions and embassy personnel and has placed information on its web site to assist its trade officers on how to counsel Canadian businesses abroad on the risk of bribery and the CFPOA.
- Export Development Canada (EDC), Canada's official export credit agency with a mandate to support and develop Canada's export trade, has been quite proactive in its efforts to raise awareness among its customers and the Canadian business community at large. EDC sponsored a cross-country workshop for companies in 2002 (poorly attended, however by SME's) and has produced an anti-corruption brochure for its customers as well as writing to inform them about corruption and the CFPOA.
- The Canadian International Development Agency (CIDA), which provides contracting opportunities for Canadian companies through its international aid program to developing countries, has also engaged in some awareness-raising activities with its customers, but the perception is that considerably more could be done.

- The other principal agencies providing assistance and support to Canadian exporters – Team Canada Inc., Industry Canada’s International Trade Centers, Canadian Commercial Corporation and Canada’s Business Development Bank, provide little, if any, information about the CFPOA or the risks of bribery in their publications or on their websites.

G Accounting and Auditing Requirements

Accounting and auditing requirements in Canada intended to prevent practices for hiding foreign bribery (such as the prohibition of off-the books accounts) - **Weak to Moderate**

Comment:

- Unlike the FCPA, which contains detailed accounting provisions, the CFPOA does not address accounting issues. 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) in this regard 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.
- All public companies in Canada are required to have an annual external audit. Shareholders of a private company, however can agree to an exemption from the independent audit requirement with the result that many large private companies in Canada are not subject to independent audit. This is a problem.

H. Private Sector Efforts

Use of corporate anti-bribery compliance programs in Canada - **Moderate** (large companies) to **Very Weak** (SME's)

Comment:

- Large companies in Canada seem to have a high level of awareness of the CFPOA and most have codes of conduct and internal compliance programs which prohibit foreign bribery. There is, however a very low level of awareness in SME's and most SME' s do not seem to have codes of conduct or any form of compliance program.

I Statutory and Other Legal Obstacles

YES. There are a few inadequacies in the legal framework for foreign bribery prosecutions in Canada. Whether or not they are significant remains to be seen

- short statutes of limitation - **NO**. There is no statute of limitation for foreign bribery offences
- jurisdiction limitations - **YES**.
- Canadian courts apply "territorial" jurisdiction in criminal matters and the interpretation by the courts in this regard is not overly broad. A significant portion of the activities constituting the offence must take place in Canada and there must be a "real and substantial link" between the offence and Canada
- Where specifically provided by statute, Canadian courts also have jurisdiction to prosecute Canadian nationals for offences committed outside of Canada. The Canadian government, however 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 and the UK have both amended their laws to add jurisdiction based on nationality, Canada has not 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.
- restrictive dual criminality limitations - **NO**.
- lack of criminal liability for corporations - **NO**.
- other - The CFPOA requirement that the purpose of the bribe must be “for profit” could render the Act to be not applicable to the public sector and non-profit companies and could even allow “for-profit” companies to escape the application of the statute where the particular transaction could be structured as being “not-for-profit”.
 - Canada’s apparent reservation of an exception to Article 5 of the Convention with respect to investigation and prosecution of a CFPOA offence where “*proper*” considerations of “national economic interest, the potential relations with another state, or the identity of the natural or legal entities” are involved. This could allow certain cases of foreign bribery to escape investigation and prosecution.

J. Actions Needed in Canada To Promote Enforcement and Compliance

1. adoption by the Canadian government of “nationality” jurisdiction in addition to the existing “territorial” jurisdiction. This 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.
2. greater efforts by the Canadian government (and especially those agencies, such as CIDA and EDC, who are engaged with the international business activities of Canadian companies) to establish a more systematic, comprehensive and coordinated approach to promoting awareness of the CFPOA.
3. the enactment of amendments to Federal and Provincial acts of incorporation to more specifically address books and records requirements for all Canadian companies. The amendments 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.

4. the adoption, by federal agencies such as CIDA and EDC, of a requirement that their customers have in place an appropriate and effective code of conduct and compliance program and the imposition of administrative sanctions (such as debarment from future business and withdrawal of export credit protection) upon companies convicted under the CFPOA.
5. the guidelines in the FPS guideline Deskbook for prosecutors regarding the exercise of prosecutorial discretion should be changed to state that, in investigating and prosecuting a case under the CFPOA there are no *proper* “considerations of economic national economic interest, the potential effect on relations with another state or the identity of the natural or legal entities involved” that can or should be taken into account.
6. a coordinating role should be established for one of the principal agencies responsible for the implementation of the CFPOA (such as the RCMP) for the purpose of collecting information from the police and prosecutorial authorities about investigations and prosecutions.

III Current and Anticipated Level of Enforcement in Canada

Current level of foreign bribery enforcement in Canada - **Moderate**

Expectations as to change in Canadian government’s enforcement of foreign bribery in the next 3 years - **No significant change but hopefully some improvement in the promotion of enforcement.**

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Professional Experience -

- Chair, Corruption & Bribery Committee, Canadian Council for International Business (CCI)
- Recently retired V.P. & General Counsel, General Electric Canada Inc.
- Vice Chair, Canadian Centre for Ethics & Corporate Policy

