

## 2007 TI Progress Report Card on OECD Convention Enforcement - Canada

Date: May 8, 2007

### I Current Status of Enforcement.

#### A. Prosecutions brought for foreign bribery

*Is there adequate public access to information about foreign bribery cases?* - **YES.**

This is a matter of public record and would also be reported in detail in the annual report to Parliament referred to in Section II. A of this report.

Total number of cases - **one**

- R vs. Hydro Kleen Group Inc. et al (a Canadian company, its president and one of its employees.
- Payments allegedly made in the order of \$28,000. to a US immigration official 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.
- Charges were laid by the RCMP (Royal Canadian Mounted Police) in 2002, the preliminary hearing was held in an Alberta Provincial court in February, 2004 and at trial on January 10, 2005, the company pleaded guilty, was convicted and fined \$25,000 (which is generally in line with other similar cases of economic crime). The case against the two officers of the company was stayed.
- 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 seventh annual report to Parliament in October, 2006, Foreign Affairs 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 not made available by law enforcement agencies in Canada. Nor is it possible to obtain any information as to how many investigations are currently in process.

In 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 shortly thereafter 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 several investigations of other Canadian companies relating to possible infractions under the CFPOA (mostly minor we believe) since the legislation came into force in Canada in February, 1999 and we understand that some investigations of potential CFPOA offences are currently in process. Also, allegations in the Volcker Report relating to Canadian companies are, we understand, still under investigation by Canadian authorities.

## **C Serious Allegations**

To the best of our knowledge, following various enquiries, there have been no serious allegations of foreign bribery or related offences by companies or individuals based in Canada after the CFPOA was enacted that have appeared in reputable domestic or international publications and with respect to which , as far as we know, no investigation or prosecution has been undertaken.

## **D. Political Control over Enforcement Actions / Independence of prosecutors**

We are not aware of any instance where an investigation or prosecution has been terminated by political decision-makers

## II Actions to Promote Enforcement

### A. Organization of Enforcement

*Is there a centralized national office or unit in Canada for foreign bribery enforcement?*

**NO** . In early 2005, however, the Canadian government established a dedicated Officer in Charge of National Interests and International Corruption with responsibility for monitoring all cases alleged, under investigation or being enforced in the courts relating to international corruption including any cases relating to the CFPOA (*Canadian Foreign Public Officials Act*).

*Level of coordination and supervision provided by the Canadian government for foreign bribery enforcement* - **Satisfactory**

#### 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 CFPOA is a federal statute and 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 has federal investigative responsibility for the CFPOA. It is also customary for the RCMP to investigate 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. In this regard the RCMP, the principal investigatory agency with respect to foreign bribery, operates 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 has also raised the profile of international corruption within its Commercial Crime Branch through various initiatives, in particular the appointment in February 2005 of a commissioned officer (the Officer in Charge of National Interests and International Corruption) to provide functional oversight of its anti-corruption programs. Also in March, 2005, the RCMP added the issue of foreign bribery and the CFPOA to its training of all RCMP liaison officers before they depart for their assignments overseas.
- The RCMP also tracks CFPOA cases being handled by the Force and other police agencies. Furthermore, the RCMP's PROOF Criteria and Weights: Economic Crime system, which assists in determining the priority to be

assigned to incoming cases and which, as reported on in our 2004 report, already placed high priority on fact situations involving corruption, was amended in 2005 to specifically include corruption of foreign public officials as an additional criteria. More recent amendments to the protocol in the past year have resulted in corruption receiving an even higher profile within the PROOF system.

- With respect 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.
- 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.”
- Information on on-going prosecutions is included in an Annual Report to Parliament that the Minister of Foreign Affairs, the Minister of International Trade, and the Minister of Justice are required by law to prepare on the implementation of the OECD Convention and on the enforcement of the CFPOA. The Department of Justice collects information on prosecutions under the CFPOA from provincial authorities and this information, when it exists, is included in the Annual Report to Parliament.
- 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 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. Since 2004, however, a prosecutor is expected to provide written reasons why he or she does not proceed with a case.
- *Not surprisingly*, a specialized office with responsibility for *both* 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), has been 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).

- Also, legislation was enacted in Canada three years ago to better coordinate and strengthen enforcement against serious capital markets fraud. Around nine highly skilled Integrated Market Enforcement Teams (IMETs) made up of RCMP investigators, federal lawyers and other investigative experts have been created and are located in Canada's four major financial centers. These IMET's provide a new opportunity for the RCMP to increase its visibility in corporate Canada. The IMET's *also* 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.

B. Available Resources

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

Comments:

- Although theoretically all three levels of the police - municipal, provincial and federal - have jurisdiction to investigate a case of foreign bribery, most foreign bribery investigations *are* 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. Also the CFPOA is a federal statute. The RCMP Commercial Crime Program 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 Directorate consisting of three highly specialized branches – Commercial Crime, Proceeds of Crime and Market Enforcement. The Commercial Crime Program (whose responsibilities include the investigation of foreign and domestic bribery) consists of around 450 officers – a few situated in the central branch in Ottawa and the others spread across Canada in 27 divisional field units called Commercial Crime Sections.
- In early 2005, the RCMP established a new position within its Commercial Crime Program called the Officer in Charge of National Interests and International Corruption with responsibility (with the help of two assistants) for tracking and monitoring all cases relating to commercial crime including

potential and actual investigations under the CFPOA. This is a very positive step in the direction of providing effective coordinated oversight of CFPOA cases.

- Canada's new bribery law places more investigative responsibility on the police as will also the UN Convention against Corruption which came into force on December 14, 2005 and which is expected to be ratified by the Canadian government in the very near future. It remains imperative that additional resources continue to accompany new treaty responsibilities. Otherwise police forces such as the RCMP will have to reallocate existing already strained resources if they hope to meet new training and investigative challenges.

### C. Complaint Procedure

*The Canadian government's efforts to provide publicly-known and accessible procedures for reporting foreign bribery allegations, such as hotlines and websites* - **Satisfactory**

Comments:

- 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 *Program* carries out a comprehensive daily media scan.
- The RCMP also has around 35 liaison officers assigned to Canadian embassies around the world who are briefed on foreign bribery and the CFPOA before they leave on foreign assignment. Reports from these officers back to *the* newly created Officer in Charge of National Interests and International Corruption regarding suspicious transactions in the region for which they are responsible play an important role in helping to detect bribery of foreign public officials.

- In addition, the RCMP operates an internet site where complaints can be made by anyone on-line, although it does not appear that that this mode of communication has to date generated anything of significant substance.
- Canadian government agencies, such as CIDA and EDC, who provide money in support of international contracts, are also valuable potential sources of information.
- The Canadian International Development Agency (CIDA) has in place a Protocol for Dealing with Allegations of Corruption which outlines internal procedures for assessing and reporting allegations of corruption to the relevant Director and the Director of the Internal Audit Division for appropriate action. The Protocol ensures a thorough assessment of the allegations regarding CIDA financing so that senior management can ascertain whether 'credible evidence' of a violation of the CFPOA has occurred. If the allegations are substantiated, then the Protocol provides for law enforcement authorities to be informed.
- In 2004, Export Development Canada (EDC) introduced its Anti-Corruption Policy Guidelines which outlines the measures EDC will apply to combat corruption, including a section on disclosure to law enforcement authorities. This has been further developed into an internal procedural document for the Corporation to follow when faced with this situation.
- The Trade Commissioner Service of DFAIT has developed specific instructions to foreign representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Canada. On March 01, 2006, a broadcast message was sent to all staff of the Department both in Canada advising employees of the Department's policy regarding Canadian companies and individuals involved in cases of corruption and bribery. The message mentioned the OECD Convention and the CFPOA and indicated that staff who have concerns regarding the conduct of Canadian companies or individuals should bring these concerns to the attention of their supervisors, the Post Support Unit or to the Values and Ethics Division of DFAIT.
- We are not aware of any such allegations having been reported either within CIDA, EDC or DFAIT or by such organizations to the law enforcement authorities. Consideration might well be given by such government agencies to possibly involving law enforcement agencies at an earlier stage of the process as their experience and expertise could be helpful in the determination as to whether the evidence is or is not "credible"

## D Whistleblower Protection

*Level of Canadian whistleblower protection in law and in practice in the public sector for foreign bribery complaints - **Satisfactory**, now that the *Public Sector Disclosure Protection Act* has come into effect this month..*

### Comments:

- Although Canada in 2005 enacted whistleblower protection legislation (the Public Sector Disclosure Protection Act) applicable to public sector employees to encourage them to report wrongdoing, the legislation only came into force on April 5, 2007 after amendments to increase the protection offered to public servants were passed in the Federal Accountability Act.
- 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. However, the Criminal Code was amended in 2005 to protect employees of both the public and private sectors from reprisal from their employer when reporting breaches of federal or provincial law (such as the CFPOA) to a law enforcement agency.

## E. Public Awareness

*Canadian government's efforts in the last year to create public awareness that foreign bribery has become a crime - **Satisfactory***

### Comments:

- Since our first report in 2004, considerable efforts continue to be made by the Canadian government to increase awareness of the CFPOA and government officials continue to make presentations on the subject at conferences and meetings around the country.
- The Department of Justice's 1999 publication "The Corruption of Foreign Public Officials Act: a Guide", amended to reflect amendments to the Act continues to be distributed and posted on the department's web site.
- Foreign Affairs & International Trade Canada (DFAIT) has provided instructions and information to all staff (local and abroad) on the OECD Convention and the CFPOA. Also, the departmental website features material



on bribery and corruption, including all seven annual reports to parliament on OECD Convention enforcement in Canada

- Over the course of 2006, the Canadian government organized a series of multi-stakeholder roundtables across the country to examine issues related to CSR and the Canadian extractive industry in developing countries. The final report of these Roundtables to the government, which was just recently released, contains a strong recommendation that the government should amend the CFPOA so as to adopt nationality jurisdiction..
  
- DFAIT continues to provide training for its trade commissioners and their assistants on the CFPOA and the OECD Convention and has taken other steps to increase awareness
  - o The Trade Commissioner Service over a year ago added the promotion of corporate social responsibility (CSR), which includes counseling Canadian business against engaging in foreign bribery, to its list of roles and activities;
  - o Horizons, one of the Department's trade-focused intranet websites, provides information to Canadian trade commissioners on how to counsel businesses abroad on the CFPOA and the risks of bribery;
  - o Trade Commissioners now receive information on the CFPOA during a mandatory training course for all trade commissioners preparing for an overseas posting. The Trade Commissioner Service has also developed and will be giving in May a new course on CSR (including foreign bribery) for trade commissioners being posted abroad.
  - o Team Canada Inc has added links on the CFPOA to its Export Source website;
  - o In 2004, the Trade Commissioner Service Operations Division and the Investment Trade Policy Division developed a pilot training course on CSR which was offered to trade staff from Canadian missions in South-east Asia. A module in this course was devoted to foreign bribery and corruption;
  - o Also, in 2004 a comprehensive 3-day training course entitled the Global Learning Initiative (GLI) was developed to strengthen the capacity of trade program managers in their overall management competencies and skills. All trade program managers in missions abroad and all directors and deputy directors at regional offices in Canada have received this course which features a number of case studies dealing with Corporate Social Responsibility including issues of bribery and corruption. This course is now mandatory for all outgoing trade managers;
  - o A similar training course (GLI2) has since been developed for all trade staff posted abroad, not just program managers, and most of them (over 800 to date) have received this training.

- The Canadian International Development Agency (CIDA), which provides contracting opportunities for Canadian companies through its international aid program to developing countries, has for several years been engaged in raising the awareness of anti-corruption issues within the Agency. In June, 2004, CIDA circulated an Anti-corruption scoping study within the agency which provides an overview of anti-corruption policy and programming activity in the agency. Recently, CIDA appears to have suffered from staffing shortages and have therefore not been as proactive in the area of promoting awareness as it might otherwise have been. However, In February, 2005, CIDA did host a seminar on Corruption and Development Effectiveness at their headquarters and the Agency has recently added a link to the Act on its website.
  
- Export Development Canada (EDC), Canada's official export credit agency with a mandate to support and develop Canada's export trade, has also continued to be very proactive in its efforts to raise awareness of the OECD Convention and the CFPOA among its customers and the Canadian business community at large. Its activities include:
  - o the inclusion of an entire page on its website devoted to corruption and bribery, including the Act, the Convention and the OECD Export Credits Group Action Statement on Bribery and Officially Supported Export Credits;
  - o the development and distribution of an anti-corruption brochure that is systematically distributed to its customers to inform them of the potential risks they face if exposed to corrupt business practices and to encourage the development of corporate best practices in this area. EDC is updating this brochure to reflect recent enhancements to the OECD Action Statement on Bribery, including encouraging Canadian exporters to develop, apply and document appropriate management control systems that combat bribery;
  - o Frequent written communication with customers to inform them about the OECD Convention and the CFPOA as well as articles in its quarterly magazine ExportWise, and through industry association trade publications.

F 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) – Not fully satisfactory*

Comment:

- Unlike the FCPA, which contains detailed accounting provisions, the CFPOA does not address accounting issues. “Document fraud” and “accessory” provisions do however exist in the Criminal Code although there are conflicting views as to whether these provisions go far enough. .
- *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 Canada Business Corporations Act* is currently scheduled for a review and accounting standards may become an item of interest in this review.
- 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.
- Recent amendments to Securities legislation in Canada along the lines of Sarbanes-Oxley have expanded criminal and administrative sanctions against wrongdoers, created new statutory civil causes of action for breach of securities legislation and imposed more stringent duties on auditors, directors and senior officers of public companies in the area of disclosure and certification of financial statements.
- 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 unfortunate.

G. Private Sector Efforts

*Use of corporate anti-bribery compliance programs in Canada* - **Satisfactory** (large companies) to **Unsatisfactory** (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.

H 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

- inadequate definition of foreign bribery - **NO**
- short statutes of limitation - **NO**. There is no statute of limitation for foreign bribery offences
- jurisdictional 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.
- Canada is now evidently the only country not to have adopted “nationality” jurisdiction in its legislation implementing the OECD Convention. In the opinion of most experts, the Canadian government should promptly rectify this omission.
- This view is shared by the National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, a multi-stakeholder group established by the government which, over the past year, held a series of roundtables across the country culminating in a detailed written report last month in which they specifically recommended that the government should amend the CFPOA to adopt nationality jurisdiction. Hopefully this will stimulate some positive government action in this regard.
- lack of criminal liability for corporations - **NO**
- inadequate sanctions - **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. Consideration should be given to removing this limitation.
  - 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.

I. 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. As mentioned in Section H above, there is now some reasonable expectation that the government will proceed in the fairly near future to amend the CFPOA to adopt nationality jurisdiction in response to a recent recommendation to that effect put forward in a report from a series of Roundtables organized by the government itself;
2. greater efforts within government agencies involved in foreign countries or with foreign trade initiatives to report up the line, and ultimately to enforcement agencies, information relating to suspicions or allegations of bribery so as to increase the number of investigations being carried out and thereby increasing the likelihood of further prosecutions of Canadian companies under the CFPOA.;
3. 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
4. greater efforts to promote anti-bribery compliance programs in Canada among small and medium size businesses (SME's).

**III Current and Anticipated Level of Enforcement in Canada**

1. *Current level of foreign bribery enforcement in Canada - Satisfactory*
2. *Change in Canadian government's enforcement efforts since last year - No change*
3. *Expectation as to change in Canadian government's enforcement of foreign bribery in the next 3 years - One significant change is expected, namely that the government will give serious, and hopefully favourable, consideration to the very strong recommendation contained in the recent final Report from the multi-disciplinary National Roundtables on Corporate Social Responsibility and the Canadian Extractive Sector in Developing Countries (organized by the government across the country) that the CFPOA be amended to apply extraterritorially to Canadian nationals.. The new government has also placed*

“accountability” at the core of its agenda and therefore additional positive government activity may be anticipated in promoting enforcement and awareness of the CFPOA.

Report prepared by:           ”Michael N. Davies Q.C.”          

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Professional Experience -

- Recently retired V.P. & General Counsel, General Electric Canada Inc.
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