

2009 TI Progress Report on OECD Convention Enforcement - Canada

Date: March 6, 2009

I. CURRENT STATUS OF ENFORCEMENT

A. FOREIGN BRIBERY AND DOMESTIC BRIBERY BY FOREIGN COMPANIES

1. TOTAL CASES

a. FOREIGN BRIBERY CASES, PENDING AND CONCLUDED:

One

b. CASES OF DOMESTIC BRIBERY BY FOREIGN COMPANIES, PENDING AND CONCLUDED:

Two related cases¹ were brought in Alberta in 2007 in connection with alleged unlawful inducements made to two Edmonton police officers by a U.S. company, ACS Public Sector Solutions Inc., ("ACS") to improperly influence a decision made by the Edmonton police force to use ACS as the sole source for the provision of automated photo radar systems for the city of Edmonton, contrary to Sections 121 and 122 of the Criminal Code. The first case, R. v. ACS Public Sector Solutions Inc. was dismissed at the preliminary inquiry stage while the second case, R. v. Thomas Bell and Kerry Nisbet, resulted in an acquittal at trial.

c. Is information unavailable?

Criminal prosecutions are a matter of public record in Canada.

2. PENDING CASES

a. Total number of pending foreign bribery cases:

None

¹ R. v. ACS Public Sector Solutions Inc., 2007 ABCP 315 (CanLII) and R. v. Thomas Edmund Bell and Kerry David Nisbet, 2007 ABCP 243 (CanLII)

Please list all pending foreign bribery cases brought since the OECD Convention became effective in your country.

R. v. Hydro Kleen Group Inc.

Cases pending brought since 1 January 2008:

None

b. Total number of pending cases of domestic bribery by foreign companies

We are unaware of any such pending cases.

For each NEW foreign case or any domestic case, please list if possible the following:

Two domestic bribery cases by foreign companies were concluded in 2008.

(1) Name of cases, including principal parties

R. v. ACS Public Sector Solutions Inc.

R. v. Thomas Bell and Kerry Nisbet

(2) Is this a major case? (See Guidelines for definition) **No**

Note: For major cases please provide as much detail as possible to the questions below. Less detail is needed for minor cases.

(3) Is it a FOREIGN bribery case or a DOMESTIC bribery case involving a foreign company?

Domestic

(4) Is it a criminal or civil case?

Criminal

(5) Summary of principal charges, including name of the country whose officials were allegedly bribed

See summary at Section 1 (b) above

(6) Penalties or other sanctions imposed

Charges dismissed against corporate defendant at preliminary inquiry and the individuals charged in the R. v. Bell and Nisbet case were acquitted at trial

(7) To your knowledge has a case involving the same facts or defendants been brought in another country? If so where and when?

We are unaware of whether charges were brought in another country.

PLEASE NOTE: State source of information for each case

Reported cases

3. CONCLUDED CASES: Including convictions, settlements, dismissals or other final dispositions of cases

a. Total number of concluded foreign bribery cases. **One**

Please list all pending foreign bribery cases brought since the OECD Convention became effective in your country.

b. Total number of concluded cases involving domestic bribery by foreign companies: **Two**

For each NEW case (since the last report) of foreign bribery and for EACH case of domestic bribery by foreign companies, please list if possible the following:

See explanation of alleged domestic bribery cases cited above.

(1) Name of case, including principal parties (Please indicate if major multinationals involved)

See above

(2) Is this a major case? (See Guidelines for definition.)

See above

(3) Is it a FOREIGN bribery case or DOMESTIC bribery by a foreign company?

See above

(4) Is it a civil or criminal case?

See above

Note: For major cases please provide as much detail as possible to the questions below. Less detail is needed for minor cases.

(5) Summary of principal charges, including name of the country whose officials were allegedly bribed

See above

(6) Disposition of case, including penalties or other sanctions imposed including (a) penalties against individuals or companies; (b) requirements for compliance programmes

See above

(8) To your knowledge has a case involving the same facts or defendants been brought in another country? If so where and when?

Do not know

PLEASE NOTE: State source of information for each case

See above

4. INVESTIGATIONS UNDER WAY

Please provide available information on government investigations of allegations of bribery of foreign public officials which were commenced since the OECD Convention became effective in your country.

Total number of known foreign bribery investigations:

We are unable to ascertain the total number of foreign bribery investigations currently underway from Canadian law enforcement agencies.

However, one public Canadian company, Niko Resources Ltd. (“Niko”), made a public statement in mid-January, 2009, that the Royal Canadian Mounted Police (“RCMP”) was investigating allegations that Niko, or a Niko subsidiary, may have made improper payments to government officials in Bangladesh.

Total number of known investigations of domestic bribery by foreign companies:

Unable to ascertain

Number of foreign bribery investigations since 1 January 2008:

We are unable to ascertain this information from law enforcement agencies. However, see reference to newspaper reports regarding Niko Resources Ltd., referred to above.

Information regarding active criminal investigations (including those relating to foreign bribery) is not made available by law enforcement agencies in Canada as this information is considered confidential and could result in actionable damage to a person or company being investigated if the fact of the investigation were to be made public prior to charges being laid. Nor is it possible to obtain any information as to how many investigations are currently in process.

We were informed, however, by a senior RCMP officer that the two seven-person RCMP International Anti-Corruption units established in 2008 were actively engaged in enforcement activity related to international bribery (including the

CFPOA) and that he was satisfied with the level of activity that was taking place in that regard.

As noted above, one Canadian public company, Niko Resources Ltd. ("Niko"), made a public statement in mid-January, 2009, that the RCMP was investigating allegations that Niko, or a Niko subsidiary, may have made improper payments to government officials in Bangladesh. The following is an excerpt from an article that appeared in the Canadian "Financial Post":

"[The investigation] relate[s] to possible improper payments to officials in Bangladesh by either Niko or our subsidiary over there," Murray Hesje, Niko's chief financial officer, said in an interview yesterday. "There were no specifics [from the RCMP] other than they named the country that was involved....Niko denies any wrongdoing and welcomes a Canadian review of the company's processes. Niko intends to cooperate with any review process in this regard."²

State source of information for each case:

News stories reporting Niko Resources' public statements regarding such investigation were reported in Canadian and international newspapers and news services, including the Financial Post, The Globe and Mail and Reuters.

5. SERIOUS ALLEGATIONS OF FOREIGN BRIBERY

Please provide information about serious allegations of foreign bribery or related offences by companies or individuals based in your country, that (a) have been published in reputable international or domestic publications since the OECD Convention became effective in your country, and (b) with respect to which, as far as you know, no investigation or prosecution has been undertaken.

As noted above, one Canadian company, Niko Resources Ltd. was reported in the press to have made a public statement confirming that it is the subject of an RCMP investigation in connection with possible improper payments to foreign officials. Whether the reported investigation relates to "serious allegations of bribery" is not known.

Total number of serious allegations of foreign bribery:

Unknown.

For each matter, where available, please list the following: N/A

- (1) Names of companies and/or individuals allegedly involved:
- (2) Date of publication:
- (3) Nature of allegations:

² Carrie Tait, Financial Post, With Files From Reuters. Published: Friday, January 16, 2009

(4) Name of country whose officials were allegedly bribed/Name of multinational or company involved in bribery process:

6. ACCESS TO INFORMATION: Information available about foreign bribery cases

Is there adequate public access to information about foreign bribery cases?

Yes. Prosecutions are a matter of public record and are also reported in detail in the annual report to Parliament that the Ministers of Foreign Affairs and 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 Corruption of Foreign Public Officials Act (the CFPOA). The ninth annual report to Parliament, which was tabled in December 2008, reported that, other than the Hydro-Kleen case referred to previously, there had been no other prosecutions under the CFPOA (either federally or provincially) and we understand that no prosecutions are currently pending.

Is there adequate public access to information about domestic bribery cases?

Yes. See explanations above.

Is there adequate public access to information about foreign bribery investigations?

Not entirely, although we believe the rationale provided by the RCMP for declining to provide this information represents an appropriate balancing of interests between the rights of those who are the subject of police investigations and the public's interest in knowing the level of enforcement of the CFPOA.

Notwithstanding what we concede to be an appropriate balancing of interests, we nevertheless believe that Canadian Government authorities could provide information on the approximate *number* of investigations underway without compromising either the integrity of those investigations or the rights of the individuals or companies being investigated.

Is there adequate public access to information about domestic bribery investigations?

No, although we believe the rationale provided by Government authorities for declining to provide this information represents an appropriate balancing of interests between those who are the subject of police investigations and the public.

II. ACTIONS TO PROMOTE ENFORCEMENT

A. COMPLAINT PROCEDURE

How would you assess your government's efforts to provide publicly known and accessible procedures for reporting foreign and domestic bribery allegations, such as hotlines and websites?

Please circle one of the following:

UNSATISFACTORY

SATISFACTORY

Explanation for choice, including any difference from last year:

- 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, 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 approximately 35 liaison officers located in 25 strategic locations 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 Sensitive Investigation 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 a web site called 'Reporting Economic Crime On-Line' (www.recol.ca) where complaints can be made by anyone on-line, although it does not appear that this mode of communication has to date generated anything of significant substance relating to bribery of foreign officials.
- Canadian government agencies, such as The Canadian International Development Agency (CIDA) and Export Development Canada (EDC), who provide money in support of international contracts, are also valuable potential sources of information.
- 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, 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 Corruption to follow when faced with this situation.

- The Trade of 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 1, 2006, a broadcast message was sent to all staff of the Department both in Canada and abroad 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 that has 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. This policy remains in place and has led to the exchange of information and bribery allegations between headquarters and missions, as well as increased cooperation and information sharing with the RCMP.

B. STATUTORY AND OTHER LEGAL OBSTACLES

1. Are there significant inadequacies in the legal framework for foreign bribery prosecutions in your country? **Yes**

2. If so, please indicate if these include the following:

- Inadequate definition of foreign bribery: **Yes**
- Jurisdictional limitations: **Yes**
- Lack of (criminal) liability for corporations: **No**
- Inadequate sanctions: **No**
- Statutes of limitation: **No**

Please provide a short explanation of your choice for EACH OF THE FIVE ITEMS ABOVE:

Inadequate definition of foreign bribery – A CONCERN

The CFPOA defines business as “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit,” thereby requiring, that, in order to constitute an offence, the purpose of the bribe must be for obtaining an advantage in the course of business “for profit”.

This “for profit” requirement in the Canadian legislation was raised as an issue in the Phase 2 review of Canada, it being noted by the Working Group that the Convention does not draw a distinction between transactions that are ‘for profit’

and 'not for profit'. Recommendation 59b) in the Working Group's Phase 2 Report of March, 2004 recommended that Canada consider amending the part of the definition of "business" in the CFPOA that results in the requirement that the purpose of the bribe be for obtaining an advantage in the course of business "for profit" (Convention, Article 1).

In its written report of March 2006 on actions taken to implement this, and other, recommendations, Canada reported that, following careful consideration, and since the title of the Convention refer to "Business Transactions" and business transaction imply a profit motive. Canada considered this definition of "business" in the CFPOA to be consistent with the requirements of the Convention, of the Convention, both in language and in spirit, since the title of the Convention refer to "Business Transaction" and business transactions imply a profit motive. Therefore, in Canada's view, the Corporation applies to transactions that are carried on to generate some form of profit.

In their Follow-up Report of June 21, 2006, on the Phase 2 review of Canada, The Working Group notes that the Convention does not draw a distinction between transactions that are "for profit" and "not for profit" and that therefore the Working Group continued to consider that this additional criterion imposed by the CFPOA could create a problem in the enforcement of the foreign bribery offence in Canada. They therefore concluded in their Report that Recommendation d(b) requires further consideration from Canada. Canadian authorities continue to support the inclusion of a "for profit" requirement in the CFPOA.

We have some sympathy for concerns expressed within the Canadian government that the payment of a bribe by an NGO, where necessary to secure the distribution of food and other necessities of life to those who are starving or otherwise direly in need, should not constitute a criminal act on the part of the donor. However there are other bribing situations involving NGOs in the public sector and other not-for-profits where the same moral justification does not apply, for example in the case of a trade union paying a bribe to secure preferential treatment for its employees, or an NGO, in competition with a "for-profit" enterprise, paying a bribe to a foreign government official to secure the award of a contract to provide consulting or other services in preference to its business competitor.

Whether the inclusion by Canada in its legislation of a "for-profit" requirement is, or is not, in violation of the Convention, we agree with the Working Group's conclusion that a 'for profit' requirement, whether by specific legislative act (as in the case of Canada) or by an interpretation to the same effect in countries where the legislation may be more ambiguous, could unnecessarily and inappropriately restrict the scope of application of the Convention. This issue of whether the Convention (and the Canadian legislation) should cover not-for-profit transactions, and if so, whether there should be any exception for humanitarian situations such as those identified in Canada, requires further consideration, not only by Canada, but by the Working Group as a whole, if not immediately then as an item to be included as one of the modalities to be considered and discussed on agenda for Phase 3 monitoring. Canadian authorities do not appear to support any further consideration of this issue at this time.

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, terrorism).

Although, following ratification of the OECD Convention, the US, the UK and more recently, Ireland, have amended their laws to add jurisdiction based on nationality, Canada has not done so, 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 one of the few Convention countries not to have adopted ‘nationality’ jurisdiction in its legislation implementing the OECD Convention. With most other countries having done so, there would now appear to be a clear ‘international consensus’ among the parties to the Convention that this should be done. 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, in 2007, held a series of roundtables across the country culminating in a detailed written report, which was presented to the government in March 2007. The Report specifically recommended that, ‘in the interest of harmonizing Canadian law with the best practices of other OECD countries, reducing uncertainty as to the scope of that law and to address recent criticism by the OCED, the Government of Canada should amend the CFPOA to clarify that it applies extraterritorially to Canadian nationals”.

In our last TI Canada report, we reported that the Canadian government, through an interdepartmental process, was in the process of developing a response to the Advisory Group report that was to be tabled in Parliament. As of the date of this report, that has not occurred. It is unclear to us at this stage, having recently met with representatives of the Canadian Department of Justice and the Department of Foreign Affairs and International Trade (“DFAIT”), that the Canadian Government will move any time soon to amend the CFPOA to make it applicable to Canadians simply on the basis of their nationality. Although we continue to hope that such an amendment will be made, (as there appears to be no valid

reason for the government's continued apparent reluctance to do so), we do not believe there is any prospect that this will occur in the near future.

Lack of (criminal) liability for corporations

Corporations may be prosecuted for criminal offences in Canada.

Short Statutes of Limitation

There is no Statute of Limitations for foreign bribery offences.

Inadequate sanctions

Sanctions are adequate. The CFPOA imposes a maximum five-year term of imprisonment for the offence of bribing a foreign public official, which ensures that it is an extraditable offence. Corporations can be fined. The amount of any fine would be at the discretion of the judge, and there is no maximum. Moreover, because the offence of bribing a foreign public official is an indictable offence, no limitation period would apply. The penalty is comparable to the maximum penalty for domestic bribery in sections 121 and 123 of the *Criminal Code*³.

C. POLITICAL CONTROL OVER ENFORCEMENT ACTIONS/INDEPENDENCE PROSECUTORS

Are you aware of any instances where a foreign bribery investigation or prosecution has been terminated by political decision-makers?

No.

The following are general comments on the separation of powers in Canada relating to investigation and prosecution and on some of the safeguards in place that deter political interference that address the above issue:

- Law enforcement agencies in Canada have the responsibility for the laying of charges against an accused. In this regard the RCMP, the principal investigative 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.
- With respect to prosecutions, 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 cause 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

³ Canadian Justice Department website

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 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.
- In December 2006, the Public Prosecution Service of Canada (PPSC) replaced the Federal Prosecution Service, which was part of the Department of Justice. The PPSC is headed by the Director of Public Prosecution, who acts under and on behalf of the Attorney General of Canada and reports to the parliament of Canada through the AG. By law, the Attorney General can only give instructions to the Director in writing to refrain from or discontinue prosecution must be in writing and those instructions must be published in the Canada Gazette.
- 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 and provincial (who prosecute).

D. ACCOUNTING AND AUDITING REQUIREMENTS

1. How would you assess accounting and auditing requirements IN LAW intended to prevent practices for hiding foreign bribery (such as the prohibition of off-the-books account or the use of other practices for hiding foreign bribery)?

Please circle one of the following:

UNSATISFACTORY

Not fully satisfactory

Explanation for choice: Accounting and Auditing Requirements

- 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.
- 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.**

Are you aware of any cases or investigations brought for violation of these requirements? If already mentioned above please indicate.

We are not aware of any such cases.

2. How would you assess accounting and auditing requirements IN PRACTICE intended to prevent practices for hiding foreign bribery (such as the prohibition of off-the-books account or the use of other practices for hiding foreign bribery)?

Please circle one of the following:

UNSATISFACTORY

Not fully satisfactory

Explanation for choice:

See explanation under D (1) above.

E. TAX DEDUCTIBILITY OF BRIBES

1. Is tax deductibility of bribes prohibited explicitly in law? **Yes.**

2. Is tax deductibility prohibited in practice? **Yes.**

Explanation for choice:

The Government of Canada and all provinces expressly deny the tax deductibility of outlays or expenses incurred in the bribery of foreign public officials. Section 67.5 of the *Income Tax Act* of Canada specifically prohibits the deduction of expenses involved in the bribery of foreign public officials.

Canada Revenue Agency (CRA) has developed a section in its Audit Manual to deal with the application of section 67.5 of the *Income Tax Act*. The Investigations Manual, which previously referred to bribery offences under the *Criminal Code*, has been revised to include a reference to the CFPOA and a link to the section of the Audit Manual that deals with the application of section 67.5.

F. MUTUAL LEGAL ASSISTANCE (MLA)

1. Are there cases in which your government has not responded in a satisfactory way to MLA requested by other states in foreign bribery cases?

We do not believe that there have been any such cases, based on our discussions with Canadian law enforcement officials.

2. Are there cases in which your government has not received a satisfactory response to its requests for MLA from other states in foreign bribery cases?

We have not been able to determine whether there have been cases of unsatisfactory responses for MLA from other states in foreign bribery cases.

G. ANTI-MONEY LAUNDERING EFFORTS

1. How would you assess the regulations in place for the financial sector regarding Anti-Money Laundering (AML) procedures?

Please circle one of the following:

UNSATISFACTORY

SATISFACTORY

Explanation for choice:

Canada has implemented a comprehensive national initiative to combat money laundering and terrorist financing. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Act)* provides the legislative framework to deter and detect money laundering. The *Act* sets out reporting and record keeping requirements for suspicious transactions, large cash transactions, international electronic funds transfers and terrorist property. The *Act* also establishes requirements for client identification, retention of records and implementation of a compliance regime by financial entities and other reporting persons.

Money laundering is also an offence under the *Criminal Code* in Canada.

Financial institutions have an obligation to report to their Federal regulator, the *Office of the Superintendent of Financial Institutions (OSFI)* on a monthly basis if they are in possession or control of property that is owned or controlled by a listed entity. An institution that reports having such property in its possession or control is immune from criminal or civil proceedings for having made such a report. Failure to do so is an offence punishable by up to ten years in prison.

Several government departments and agencies are directly involved in Canada's national initiative to combat money laundering and terrorist financing. These include, among others,

(i) The *Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)*, an independent Canadian government agency that operates at arm's length from Canadian law enforcement agencies. *FINTRAC's* mandate is to collect, analyze and assess information related to money laundering and terrorist financing activities and to disclose certain

information to law enforcement and intelligence agencies to assist in the detection, prevention and deterrence of these criminal activities;

(ii) The *Department of Finance*, which is responsible for leading and coordinating Canada's anti-money laundering and anti-terrorist financing initiatives, including heading the Canadian delegation to the *Financial Action Task Force (FATF)*;

(iii) The *Department of Public Safety* which plays a national role in coordinating efforts to combat organized crime and monitors how the *RCMP* and *CSIS* respond to *FINTRAC* disclosures relating to money laundering, terrorist financing and national security;

(iv) The *RCMP Integrated Proceeds of Crime Unit (IPOC)*, which receives and acts on information prepared by *FINTRAC*; and

(v) The *Canada Border Services Agency (CBSA)*⁴

3. Is there a well-functioning regulatory body or financial intelligence unit ensuring compliance with corruption-related AML?

Yes. See above.

3. Are the penalties imposed on financial institutions that violated AML regulations satisfactory? If not, please explain why.

Please circle one of the following:

UNSATISFACTORY

SATISFACTORY

Explanation for choice:

The maximum penalty for money laundering under the Criminal Code of Canada is 10 years imprisonment.

4. Are the levels of Know-Your-Customer and PEP Due Diligence investigations in financial firms satisfactory?

Please circle one of the following:

UNSATISFACTORY

SATISFACTORY

Explanation for choice:

Know-Your-Customer client identification measures have been in place in Canada since 2002. In addition, OSFI, the IDA and FINTRAC have issued and enforced guidance on the implementation of these provisions. Enhanced customer due diligence provisions came into force in June 2008 to address deficiencies in this

⁴ Source: Anti-Money Laundering and Terrorist Financing Act Handbook, Government of Canada

area noted by the Financial Action Task Force in its February 29, 2008 report on its evaluation of Canada's anti-money laundering regime (the "FATF Report"). In addition, regulatory provisions came into force in June 2008 to address deficiencies in Canada's legislative requirements that were noted in the FTAF Report.

5. Please describe the main strengths and weaknesses of the AML regulatory system in your country:

Strengths: Canada is dedicated to combating money laundering and has significantly strengthened its AML regulatory regime to implement FATF standards through new requirements for financial institutions that came into effect in June and December, 2008 that substantially address certain deficiencies noted in the FTAF Report of February 29, 2008.

Weaknesses: The FTAF Report questioned the effectiveness of FINTRAC, pointing out that until 2007 no money laundering conviction had directly resulted from a FINTRAC disclosure. The FATF Report found that FINTRAC has insufficient access to intelligence information from CRA, CSIS and Customs, and that FINTRAC is not allowed to gather additional financial information from reporting entities. To safeguard Canadians' rights under the Canadian Charter of Rights and Freedoms, FINTRAC has no investigative powers and is not able to request further information directly from reporting entities for analysis purposes as such activity corresponds to investigative powers.

III. RECENT DEVELOPMENTS, ACTIONS NEEDED

A. NOTEWORTHY RECENT DEVELOPMENTS

Please describe recent developments in the areas covered in this report or any other areas that you feel are relevant, e.g. new legislation, institutional changes in the last 1 - 2 years.

Parliament passed legislation in May 2007 making Canadian law consistent with the provisions of the UN Convention. Canada ratified UNCAC on October 2, 2007.

The following excerpt from the Ninth Report to Parliament under the CFPOA describes other recent notable developments in the area of anti-corruption in Canada:

"The RCMP established [in 2008] two seven person International Anti-corruption Units, based in Ottawa and Calgary. These units are charged with investigating allegations that a Canadian person/business has bribed a foreign public official, allegations that a foreign person has bribed a Canadian public official that may have international repercussions, allegations that a foreign public official has secreted or laundered money in, or through, Canada. They also deal with requests for international assistance. The RCMP provides functional oversight of the International Anti-Corruption Teams and anti-corruption enforcement

activities through a commissioned officer at National Headquarters. The International Anti-corruption Teams' law enforcement mandate is aligned with Canada's obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as well as the United Nations Convention Against Corruption.

The Trade Commissioner Service of The Department of Foreign Affairs and International Trade (DFAIT) has developed instructions to Canadian missions abroad, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or attempted to bribe a foreign public official. In April 2004, an internal committee was established, chaired by the Chief Trade Commissioner, to consider and review cases where Canadian individuals or companies have been found guilty of bribery or corruption overseas and this committee would advise the Minister responsible. Although no such cases have been referred to the committee to date, some members of the committee do meet to discuss allegations against Canadian individuals and companies.

The Public Servants Disclosure Protection Act (PSDPA), as amended by the Federal Accountability Act, came into force on April 15, 2007. The Canada Public Service Agency (formally known as the Public Service Human Resources Management Agency of Canada) is responsible for leadership and support to organizations in the implementation of the PSDPA. The purpose of the PSDPA is to encourage employees in the public sector to come forward if they have reason to believe that serious wrongdoing has taken place, and to prohibit reprisal against them if they do so...In addition, the PSDPA establishes the Public Sector Integrity Commissioner as an agent of Parliament. It gives the Commissioner a mandate to conduct independent reviews of disclosures of wrongdoing, issue reports of findings to enable organizations to take appropriate remedial action, and submit annual and special reports to Parliament. Although there is nothing in the PSDPA that specifically addresses bribery of foreign public officials, the Act nevertheless provides a means by which a public servant could report the bribery and be protected from reprisal. Public servants may make disclosures within their organization or to the Commissioner, and members of the public may provide information concerning wrongdoing in the federal public sector to the Commissioner."

B. ACTIONS NEEDED IN YOUR COUNTRY

1. Your suggestions and recommendations

Please list, in order of importance, the most important actions the government in your country should take to promote enforcement and compliance. Please consider the actions listed above, but feel free to add other recommendations.

- 1. Adoption by the Canadian government of "nationality" jurisdiction in addition to the existing 'territorial' jurisdiction. This would no doubt be more effective in the fight against bribery of foreign public officials by permitting Canadian courts to hold Canadian nationals accountable for illicit activities outside the country. This could be of particular benefit in reaching the activities of foreign subsidiaries and third party agents where Canadian nationals are involved.**

2. **Consideration to be given within the Canadian government to amending the CFPOA to eliminate the present requirement that the transaction be ‘for profit’ and/or to placing this issue of whether ‘not-for-profit’ transactions should or should not be covered by the Convention on the agenda for discussion by the OECD Working Group in Phase 3.**

C. ENFORCEMENT TRENDS

1. How would you assess the current level of foreign bribery enforcement in your country?

Please circle one of the following:

We are unable to ascertain at this time whether the current level of foreign bribery enforcement in Canada is satisfactory given our lack of visibility into ongoing criminal investigation activity. Certainly, the lack of criminal convictions to date might suggest that enforcement is lacking. However, as noted above, and in last year’s report, RCMP resources dedicated to investigating CFPOA offences increased substantially in 2008, which suggests an increased dedication on the part of the Canadian government to enforcing the CFPOA. We believe there has *likely* been an increase in the number of investigations being carried out by the RCMP. We base this assumption on the recent increase in dedicated RCMP resources and a statement made to us by a senior member of the RCMP to the effect that he is satisfied with the performance of this newly created task force. Nevertheless, we will have to wait to see if this assumed increase in foreign bribery investigations results in an actual increase in criminal prosecutions in 2010 and future years.

It is important to note in assessing the current level of foreign bribery enforcement in Canada that, while Canada accounted for 5.2% in value of OECD exports during the period 2001-2007, 84% of those exports, in value terms, were made to the United States, which has a very rigorous anti-foreign bribery enforcement regime.

Please choose one of the following:

1	2	3
<i>Decreased enforcement</i>	<i>No change</i>	<i>Increased Enforcement</i>

I have shown this report to a member of my country’s delegation to the OECD Working Group on Bribery and taken into account their feedback:

Yes

Report prepared by:

"Bruce N. Futterer"

(signature)

Name of respondents:

Bruce N. Futterer

Affiliation:

Director, Transparency International Canada Inc.

Professional experience:

Vice President, General Counsel & Secretary, General Electric Canada

Appendix

List of persons consulted (with affiliation):

1. **Michael Davies, Q.C., former Director, Transparency International Canada Inc. and former Vice President, General Counsel & Secretary, GE Canada**
2. **James Klotz, Partner, Miller Thomson LLP, Vice-Chair, Transparency International Canada Inc.**
3. **Nancy J. Carroll, Partner, McCarthy Tetrault LLP**
4. **Senior officials of DFAIT, Department of Justice and RCMP**

List of references and sources used in responding to this questionnaire:

1. **FINTRAC 2008 Annual Report**
2. **2009 Annual Report to Parliament under the CFPOA**

3. **Financial Action Task Force Report (on its evaluation of Canada's anti-money laundering regime) dated February 29, 2008**
4. **The Globe and Mail**
5. **The Financial Post**
6. **Criminal law reports**