



DRAFT

2010 TI Progress Report on Enforcement against Foreign Bribery Questionnaire for TI National Chapters

Questionnaire for: **Canada**

Date: **April 30, 2010**

I. CURRENT STATUS

A. FOREIGN BRIBERY CASES

PLEASE NOTE: Foreign bribery cases (and investigations) shall include all cases involving bribery of foreign public officials, criminal and civil, whether brought under laws dealing with corruption, money laundering, tax evasion, fraud, or accounting and disclosure.

1. PENDING CASES

a. **Total number of pending cases: None**

b. **Cases pending brought since 1 January 2009: None**

c. **Details about cases. For each pending case that was not included in last year's country report please list if possible the following: N/A**

(1) **Name of case, including parties N/A**

(2) **Is this a major case? (See Guidelines for definition) N/A**

Note: For major cases please provide as much detail as possible to the questions below.

(3) **Is it a criminal or civil case? N/A**

(4) **Summary of principal charges, including name of the country whose officials were allegedly bribed N/A**

(5) **Penalties or other sanctions sought N/A**

(6) **Status of case, including expected trial date or appeal date. N/A**

(7) **To your knowledge are there any obstacles holding up the case, such as lack of resources or of mutual legal assistance from other governments? If so, please explain. N/A**

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

NOTE: Please state source of information for each case

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

a. Total number of concluded cases: One.

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

R. v. Hydro Kleen Group Inc. (Reported in previous Canada reports)

b. Cases concluded since 1 January 2009: None

c. Details about cases. For each concluded case that was not included in the last country report please list if possible the following: N/A

d. Name of case, including principal parties and when it was brought or lodged in court (Please indicate if major multinationals involved) N/A

Is this a major case? (See Guidelines for definition.) N/A

Note: For major cases please provide as much detail as possible to the questions below.

Is it a civil or criminal case? N/A

Summary of principal charges, including name of the country whose officials were allegedly bribed N/A

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

To your knowledge were there any obstacles, holding up the case? If so, please explain: N/A

To your knowledge has a case involving the same facts or defendants been brought in another country? If so where and when? N/A

NOTE: Please state source of information for each case: N/A

3. INVESTIGATIONS UNDER WAY IN 2009

Please provide available information on 2009 government investigations of allegations of bribery of foreign public officials:

e. Total number of known foreign bribery investigations under way in 2009: Unknown

f. Number of those foreign bribery investigations begun since 1 January 2009: Unknown

g. Developments during 2009: If possible, please provide information on any investigations that (a) turned into prosecutions or (b) were dropped in the course of the year.

(1) Investigations turning into prosecutions: **Unknown**

(2) Investigations dropped: **Unknown**

h. Details about investigations. Please provide any available details about principal parties and charges under investigation for each investigation: **Unknown. 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.

NOTE: Please state source of information for each investigation: **N/A**

4. 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.

A 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. We have had no confirmation from the RCMP as to whether such an investigation is ongoing or whether the matter that was reported to be under investigation involves a "serious allegation of bribery". 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."*¹

We are unaware as to the status of this reported investigation.

Total number of serious allegations of foreign bribery: One

For each matter, where available, please list the following:

- (1) Names of companies and/or individuals involved: **See above.**
- (2) Date of publication: **Financial Post, With Files From Reuters. Published: Friday, January 16, 2009**
- (3) Nature of allegations: **Hydro Kleen case reported in prior Canada reports. No information known regarding purported investigation of Niko Resources**
- (4) Name of country whose officials were allegedly bribed/Name of company allegedly involved in bribery process: **The Niko Resources allegation involved Bangladesh**

NOTE: Please state source of information for each allegation: **News stories reporting Niko Resources' public statements regarding the above-noted investigation were reported in Canadian and international newspapers and news services, including the Financial Post, The Globe and Mail and Reuters. See footnote 1 below.**

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

¹ Carrie Tait, Financial Post, With Files From Reuters. Published: Friday, January 16, 2009

- a. **Is information on numbers of cases accessible? No.** If not, please indicate the official or other reasons why not: _____

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.

- b. **Is information on case details accessible?**

Yes. Criminal trials and convictions are a matter of public record in Canada.

6. REQUIREMENTS OF EXPORT CREDIT AGENCIES AND THEIR ENFORCEMENT

Are companies applying for export credits required to make a no-bribery commitment?

Yes, with few exceptions (which are noted in the Canadian Export Development Agency's (CDC's) response to the ECG Survey), EDC requires exporters requesting official export credit support to submit an anti-corruption declaration.

Do such commitments extend to conduct by an agent or business partner, including but not limited to joint ventures and consortium members;

The CDC's standard anti-corruption declaration contains references to "agents" but not to joint ventures or consortium members.

Are companies required as a condition for export credit eligibility to demonstrate that they have effective anti-bribery compliance programmes?

The EDC may, on occasion, require that a customer demonstrate that it has an anti-bribery program, but it is not a normal requirement for EDC support.

Are companies required as a condition for export credit eligibility to report on compensation for agents?

The EDC's standard anti-corruption declaration states that such information must be disclosed to EDC on demand.

7. FACILITATION PAYMENTS

Are facilitation payments prohibited in law in your country?

No.

Subsections 3(4) and 3(5) of The *Corruption of Foreign Public Officials Act* specifically permit facilitation payments. These subsections allow for the payment of "facilitation payments" where they are made to expedite or secure the performance by a foreign public official of any "act of a routine nature" that is part of the foreign public official's duties or functions. Examples of such

payments are provided in subsection 3(4), although this is not an all-inclusive list. Such examples include payments made to secure,

- the issuance of a permit, licence or other document to qualify a person to do business,
- the process of official documents, such as visas and work permits,
- the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply, and,
- the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

Subsection 3(5) emphasizes that an "act of routine nature" does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision. In addition, a payment to obtain or retain an improper advantage could not be characterized as a facilitation payment, because such a payment would not relate to an *act of a routine nature* that is part of the foreign public official's duties or functions.

Are facilitation payments prohibited in practice in your country?

No. See above.

B. DOMESTIC BRIBERY BY FOREIGN COMPANIES (last 5 years)

Please provide a list of all known cases and investigations of domestic bribery by foreign companies in your country. Please provide citations to information sources about these cases and include information about dates and parties in the cases.

Two related cases² 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.

Please also note: Domestic bribery by foreign companies here refers to the bribery of domestic public officials by foreign companies or subsidiaries of foreign companies.

² 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)

II. STATUS OF ENFORCEMENT

A. INADEQUACIES IN LEGAL FRAMEWORK AND ENFORCEMENT SYSTEM

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

Yes

If yes, please provide a short description of the main inadequacies in the legal framework such as:

The Canadian legal framework for the enforcement of foreign anti-bribery legislation has a number of shortcomings that should be addressed:

- **The *Corruption of Foreign Public Officials Act (CFPOA)* does not currently permit prosecutions within Canada based strictly on Canadian nationality but requires a nexus between the alleged offence and Canada. Amendments to the statute addressing the lack of nationality jurisdiction were proposed in the previous parliamentary session but the amendments were not passed before the Canadian parliament was prorogued earlier this year. It is not clear as of the date of this report whether the earlier proposed nationality jurisdiction amendment will be re-introduced in the current parliamentary session;**
- **The CFPOA also implicitly excludes charities from the ambit of the statute by defining an offence as the conferring of "...a benefit ... in order to obtain or retain an advantage *in the course of business*"(emphasis added);**
- **The CFPOA's definition of bribery also places unnecessary qualifications on the improper granting of a benefit on a foreign public official by suggesting that an offence only takes place where (a) the inducement is made "as consideration for an act or omission by the official in connection with the performance of the official's duties or functions" and (b) where the benefit conferred is intended "to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions";**
- **The CFPOA also explicitly permits facilitation payments, which in our view is an unnecessary exception. We would recommend the elimination of this exception except in cases where the "facilitation payment" is required to protect the affected individual's physical well-being;**
- **Most importantly, and unlike the *US Foreign Corrupt Practices Act*, the CFPOA does not include provisions requiring the maintenance of accurate books and records.**

2. Are there significant inadequacies in the enforcement system for foreign bribery prosecutions in your country?

If yes, please provide a short description of the main inadequacies in the enforcement system.

- **We have been advised that on occasion Canadian law enforcement agencies have had difficulty in obtaining mutual legal assistance with certain other foreign law enforcement agencies.**
- **Although the RCMP task force recently created to address foreign anti-bribery has engaged in an outreach program to educate Canadian businesses regarding foreign anti-corruption legislation, we still believe that more could be done to promote greater public awareness of the CFPOA in Canada within the Canadian business community. To some degree, we believe the lack of public awareness of the CFPOA is a function of the lack of a more robust enforcement record to date and specifically a dearth of successful prosecutions.**

If there are inadequacies (a) in the legal framework and/or (b) the enforcement system please explain the reasons why

The impression one is left with is that the enforcement of anti-bribery and foreign corruption legislation is not a high enough priority within the Canadian federal government and that more could be done both in terms of strengthening the existing legislation and allocating greater human and financial resources to the education and enforcement of the CFPOA.

In your view, have any investigations or cases been hindered or dropped for improper reasons

We are unaware of any such circumstances.

B. 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 year.

On March 3, 2010, the Department of Foreign Affairs and International Trade Canada (DFAIT) released its Policy and Procedures for Reporting Allegations of Bribery Abroad by Canadians or Canadian Companies.

Under the terms of this policy, any information DFAIT officers receive regarding suspected bribery of foreign public officials, or related offences, by Canadian individuals or companies is to be forwarded to the RCMP, in accordance with the procedure set out in the policy. Related offences include: conspiracy to bribe, attempting to bribe, aiding and abetting, counselling, an intention in common to bribe and possession of property or proceeds of property obtained or derived from bribery or laundering that property or those proceeds.

The policy does not apply to allegations of fraud, embezzlement or bribery implicating Canadian government staff, or any other alleged illegal acts against the Crown. These allegations are handled by a separate policy (*Malfeasance*,

losses of money and other illegal acts against the Crown) administered by the Special Investigations Unit under the Office of the Inspector General.

The policy attempts to strike a balance by asking officials to pass on information that is received in the course of their professional activities, while not charging them to seek out such information. The policy also encourages DFAIT officers to proactively inform Canadian companies about the CFPOA and its main implications, most particularly that it is an offence under Canadian law to bribe a foreign public official.

C. ACTIONS NEEDED IN YOUR COUNTRY

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. The CFPOA needs to be amended to address the deficiencies in the legislation identified above.

2. Greater financial and human resources need to be deployed to improve overall level of awareness among the business community of Canadian laws relating to foreign bribery and to increase the investigative and prosecutorial capacity of the Canadian agencies tasked with enforcing the CFPOA.

3. We would encourage the Canadian government to direct more resources to the training of Canadian businesses in their legal obligations under the CFPOA.

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:



**Name of respondent: Bruce N. Futterer
Affiliation: Director, Transparency International Canada
Professional experience: Lawyer**

Appendix

List of persons consulted (with affiliation):

Mr. James Klotz, partner, Miller Thompson and Chair of Transparency International Canada

Ms. Cheryl Cruz [title]

Other DFAIT officials [please provide names and titles of persons who participated in interview with Jim Klotz]

Superintendent Stephen R. Foster, Director Commercial Crime Branch, Royal Canadian Mounted Police

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

DFAIT

RCMP

EDC

“Canlii” legal research service