Transparency International Canada Inc.

TI-Canada

Spotlight on Anti-Corruption: Current Issues Day of Dialogue

Rapporteur Reports

12 May 2011

Introduction

On 12 May 2011, Transparency International Canada (TI-Canada) held *Spotlight on Anti-Corruption: Current Issues Day of Dialogue.* This *Day of Dialogue* was composed of twelve Roundtable Sessions, on hot anti-corruption issues facing Canadians, today. Chaired by TI-Canada Board Members, each session featured 4 – 6 Discussion Leaders, who shared their thoughts, followed by dialogue with the broader Roundtable audience.

The 54 Discussion Leaders led a lively exploration of topics for Canadian businesses, working both nationally and internationally, from corruption and access to health care, to corruption as the root cause of all revolutions, whistleblowing as a tool for fighting corruption, corruption as a problem in Aboriginal communities in Canada, a primer on anti-corruption laws, Corporate Social Responsibility programs as a necessary good or a conduit for corruption, the cultural norms vs. legal definitions of corruption, how to legally do business in China without paying bribes, the implications of the Dodd-Frank Act for foreign filers with the US Securities and Exchange Commission, whether there is corruption abroad carried out by Canadian charities and should it be penalized by Canadian law, perceptions of corruption in provincial governments, and due diligence and effective anti-corruption compliance programmes. Included in the 136 participants were corporate managers and compliance officers, senior bureaucrats and ombudsmen, police investigators and forensic auditors, lawyers, civil society leaders, academics, and whistleblowers.

The purpose of the Roundtables was to either initiate or continue discussion rather than come to any conclusions. Included here are short summaries of the Roundtable sessions as well as the full Rapporteur Reports. The sessions were held under the Chatham House Rule, meaning the content is public but comments are not attributed to individual speakers.

We trust you will find this information informative and look forward to continuing the discussions with you.

James M. Klotz
Chair and President

For any questions/suggestions or further information, please contact:
ti-can@transparency.ca; or 416-488-3939.

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Agenda

Transparency International Canada Inc.

presents

Spotlight on Anti-Corruption: Current Issues
Day of Dialogue

Thursday, 12 May 2011
08:00 – 16:15
Bennett Jones, 1 First Canadian Place, #3400, Toronto

AGENDA

PD credits for Ontario CAs

This program has been accredited by the Law Society for 3 hours toward the annual Professionalism Requirement; this program has been accredited by the Law Society for 6 hours toward the annual New Member Requirement.

08:00 – 08:30 **Coffee and Networking – CANADA A**
08:30 – 08:45 **Welcome and Introduction to Day**
James M. Klotz, Chair and President, Transparency International Canada, Co-Chair, International Business Transactions Group, Miller Thomson LLP

08:45 – 10:15

1. **Healthcare corruption in Canada: Is it a threat to public health? – CANADA B**
   Moderator: Jillian Clare Kohler, Assoc. Prof., Leslie Dan Fac. of Phar., Univ. of Toronto
   Aria Ilyad Ahmad, MSc. Student, Leslie Dan Fac. of Phar., Univ. of Toronto
   Maryse Bouchard, M.D., MSc Candidate, Orthopaedic Surgery Resident, University of Toronto
   Joel Lexchin, Professor, School of Health Policy and Management, York University
   Tom Slahta, Partner, Kestenberg Siegal Lipkus LLP
   Rapporteur: Aria Ilyad Ahmad, MSc. Student, Leslie Dan Fac. of Phar., Univ. of Toronto
2. **Is corruption the root cause of all revolutions? – CANADA D**
   Moderator: James Klotz, Co-Chair, International Business Transactions Group, Miller Thomson
   Marcus Davies, Legal Officer, Criminal, Sec. & Dip. Law Division, DFAIT
   Huguette Labelle, Chair, Transparency International
   Errol Mendes, Professor of Law, University of Ottawa
   Bessma Momani, Sr. Fellow, Centre for International Governance and Innovation
   Mariana Mota Prado, Assistant Professor, Faculty of Law, University of Toronto
   David Rounthwaite, Barrister Solicitor
   Rapporteur: Natalie Grebinko, Bachelor of Commerce Law Major, Ryerson University
3. **Whistleblowing as a tool for fighting corruption – CANADA C**
   Moderator: Kernaghan Webb, Assoc. Prof., Bus. Law, Ted Rogers Sch. of Mgmt., Ryerson U.
   Fiona Crean, City of Toronto Ombudsman
   Hentie Dirker, Regional Compliance Officer, Siemens Canada Ltd.
   David Hutton, Executive Director, FAIR
   Dimitri Lascaris, Partner, Class Actions Department, Siskinds LLP
   Rapporteur: Zaker Khan, MMSc (2012 candidate), Ryerson University

10:15 – 10:45 Nutrition Break – CANADA A

10:45 – 12:15

4. Corruption in Aboriginal communities in Canada: Is it really a problem? – CANADA B

Moderator: Joe Ringwald, Vice President, Mining, Selwyn Resources Limited.
Ben Bradshaw, Associate Professor, Geography, University of Guelph
Phil Fontaine, former National Chief, Assembly of First Nations
Anne Scotton, Chief Audit & Evaluation Executive, Indian & Northern Affairs Canada
Grant Wedge, Legal Director, Ontario Ministry of Aboriginal Affairs
Rapporteur: Samir Murji, Articling Student, Fasken Martineau DuMoulin

5. Primer on Anti-Corruption Laws: Basics and new developments – CANADA D

Moderator: J. Michael Robinson, Counsel, Fasken Martineau DuMoulin
Milos Barutciski, Partner, Bennett Jones LLP
Gord Drayton, Inspector, OIC Sensitive Investigations and International Corruption, RCMP
Bruce N. Futterer, V. P., General Counsel & Secretary, GE Canada
Janet Keeping, President, Sheldon Chumir Foundation for Ethics in Leadership
Thomas C. Marshall, former General Counsel, Attorney General of Ontario
Rapporteur: Paul Lalonde, Partner, Business Law Group, Heenan Blaikie LLP

6. Are CSR Programs a Necessary Good or a Conduit for Corruption? – CANADA C

Moderator: Peter Dent, Part. & Nat'l Leader, Forensic & Dispute Services, Deloitte & Touche
Valerie Chort, Part. & Nat'l Leader, Corporate Resp. & Sust. Practice, Deloitte & Touche
Madelaine Drohan, Canada correspondent for The Economist
Marketa Evans, Extractive Sector CSR Counsellor, DFAIT
Kernaghan Webb, Assoc. Prof., Business Law, Ted Rogers School of Business, Ryerson Univ.
Rapporteur: Matthew Armstrong, Masters Student, Ryerson University

12:15 – 13:00 Lunch – CANADA A

13:00 – 14:30

7. What is Corruption? Cultural norms vs. legal definitions – CANADA B

Moderator: Milos Barutciski, Partner, Bennett Jones LLP
Peter Dent, Partner & National Leader, Forensic & Dispute Services, Deloitte & Touche
Marke Kilkie, Legal Counsel, Regulatory Crime, Public Prosecution Service of Canada
Dale Chakarian Turza, Partner, Cadwalader, Wickersham and Taft, LLP
Rapporteur: Elliot J. Burger, Associate, International Trade and Customs, Bennett Jones LLP

8. How to legally do business in China without paying bribes – CANADA D

Moderator: James Klotz, Co-Chair, International Business Transactions Group, Miller Thomson
Sandy Boucher, Senior Investigator, Grant Thornton LLP
David Fung, Chairman and CEO, ACDEG Group
Sarah Kutulakos, Executive Director & COO, Canada China Business Council
Homer E. Moyer, Jr., Partner, Miller & Chevalier, Chair, Anti-Corr. Committee, Int'l Bar Assoc.
The Hon. Pierre Pettigrew, Executive Advisor, International, Deloitte & Touche, LLP
Rapporteur: Ken Mark, Ken Mark Freelance Writer

9. The Dodd-Frank Act: Implications for Canadian foreign filers with the SEC – CANADA C

Moderator: Bruce N. Futterer, Vice Pres., General Counsel & Secretary, GE Canada
John W. Boscariol, Partner & Head, Int'l Trade & Investment Law Group, McCarthy Tétrault
Brian Chilton, Of Counsel, DLA Piper
Dimitri Lascaris, Partner, Class Actions Department, Siskinds LLP
Ian Putnam, Partner, Stikeman Elliott LLP
Rapporteur: Emily Cole, Associate Counsel, Litigation & Business Law Groups, Miller Thomson

14:30 – 14:45 Nutrition Break – CANADA A

14:45 – 16:15

10. Corruption abroad by Canadian charities and NGOs: Does it happen? Should it now be penalized by Canadian law? – CANADA B

Moderator: Janet Keeping, President, Sheldon Chumir Foun. for Ethics in Leadership
Rosemary McCarney, President & CEO, Plan Canada
Bruce Moore, former Director, International Land Coalition
Archana Sridhar, Asst. Dean, Graduate Program., Faculty of Law, Univ. of Toronto
Rapporteur: Elliot J. Burger, Associate, International Trade and Customs, Bennett Jones LLP

11. Perception of corruption in provincial governments – CANADA C

Moderator: Thomas C. Marshall, former General Counsel, Attorney General of Ontario
Ian Greene, Professor, School of Public Policy and Administration, York University
Shelly Jamieson, Secretary of the Cabinet & Head of Ontario Public Service Organization
Janet Leiper, Toronto Integrity Commissioner
Robert MacDermid, Associate Professor, Political Science, York University
Lynn Morrison, Ontario Integrity Commissioner
Rapporteur: Margaret Kim, Student, Ethics, Society, & Law Program, University of Toronto

12. Due diligence and effective anti-corruption compliance programmes – CANADA D

Moderator: Peter Dent, Part. & Nat'l Leader, Forensic & Dispute Services, Deloitte & Touche
Ruth Fothergill, Head, Corporate Responsibility, EDC
Chris Mathers, chrismathers inc, former sr. undercover operator, RCMP Proceeds of Crime
Frank McShane, Manager, Corporate Respon. Policy & Ethics, Talisman Energy Inc.
Martin Mueller, VP & Chief Compliance Counsel, Integrity Resource Centre, Nexen Inc.
Joe Zier, Partner, Deloitte Financial Advisory Services
Rapporteur: Moez Bawania, Manager, Financial Advisory, Deloitte and Touche LLP

Roundtable Summaries

The following are short summaries of the 12 sessions at the *Spotlight on Anti-Corruption: Current issues day of dialogue* held May 12th 2011 in Toronto.

1. Healthcare corruption in Canada: Is it a threat to public health?

While many think of healthcare corruption as something that only occurs in poor and under-developed countries, it can and does occur in developed countries such as Canada. The reasons are simple: Healthcare is a massive industry involving enormous sums of money and touching the lives of Canada's 34 million people. As well, in the public health care system, government decisions on how and where to spend billions of dollars each year affect individuals and institutions. Healthcare spending can also influence what research is done and by whom. The discussion leaders mentioned a broad range of corrupt activities taking place in Canada, including counterfeit drugs, fraudulent billing and unnecessary procedures, queue jumping by influential people, kickbacks for purchases of medical equipment and corporate influence on healthcare decisions. They also made the point that healthcare corruption abroad concerns Canadians, not just because it involves fellow human beings but also because Canadian aid money could be involved. While Canada already has in place some measures to reduce corruption in healthcare, more could be done. Regulations that exist, for example, on counterfeit medicines, could be promoted to increase awareness in the industry and among the general public. Laws, such as those governing kickbacks in the medical devices industry, could be more rigidly enforced. Codes of conduct are needed, where they do not exist, and there could be better monitoring of relationships between industry and decision-makers, be they in research, government, or the private sector. It was concluded that corruption does threaten public health and needs to be addressed more in-depth to ensure the protection of the patient.

2. Is corruption the root cause of all revolutions?

Corruption can be a root cause, a fuel or even the result of revolution. Most of the countries experiencing revolt in 2011 are at the bottom of the TI Corruption Perceptions Index. There are three main ways corruption feeds revolution. When it is used to enrich elites, it exacerbates inequality, which heightens social tensions. This was the case in Egypt, where young, well-educated people could not get a job and revolted against the old, elite networks. Second, when it is used to maintain power and instill fear in the population, which occurred in Kenya. And third, when it is used to capture the powers of

the state, which is the case with the drug lords in Latin America. Yet widespread corruption does not necessarily lead to revolution. China has high levels of corruption but has so far avoided a significant revolt. This situation could continue as long as the Chinese government lives up to the expectations of its people. A corrupt state can avoid revolt, if it spreads the proceeds of corruption wide enough to maintain control of the population. In Brazil, for example, political parties buy votes by offering the poor food baskets. The *UN Convention against Corruption* has provisions to strengthen international cooperation and asset recovery. However, it is difficult to deal with differences among countries and between domestic and international law in evidentiary burden, investigation procedures and penalties.

3. Whistleblowing as a tool for fighting corruption

Whistleblowing mechanisms can potentially play an important role in bringing corruption and bribery activities to the attention of companies and governments. Organizations can create anonymous tip lines and establish independent ombudspersons to encourage employees and other individuals to come forward with information concerning problematic activity. There are Canadian and U.S. laws or guidelines that require or suggest that companies establish procedures for receiving tips anonymously and confidentially. There are Canadian laws that provide protection to certain whistleblowers against retaliation (in the public and private sector) and proposed laws that encourage whistleblowing through "rewards" arrangements, whereby individuals who provide information on non-compliance may receive some financial compensation. Some argue that caution must be exercised in the development and use of whistleblower mechanisms, suggesting that they can be abused (e.g. employees might be seeking retaliation) and that encouraging whistleblowing might have negative effects on existing procedures (e.g. employees might bypass internal company mechanisms in favour of programs that provide financial rewards). Canada has not kept up with best practices related to whistleblowing and has a poor track record of protecting truth tellers and acting on their disclosures to expose wrongdoing. Stronger laws are needed and existing laws need to be fully enforced.

4. Corruption in aboriginal communities: Is it really a problem?

Corruption is a problem in aboriginal communities, but there is no agreement on its causes and potential solutions. A lack of transparency and of formal auditing mechanisms may be contributing to the misuse of community funds. The confidentiality

surrounding impact and benefit agreements, which are negotiated between a community and a company or government in the context of resource development, may also create an opportunity for corruption. However, this may be perception rather than reality. In terms of solutions, the government of Canada has created a new role for a forensic auditor in the funding process and has begun to introduce a "right to audit" clause into every funding agreement. In addition, there is an increased emphasis on self-reporting by aboriginal communities. A majority of aboriginal communities already prepare audited financial statements, which are submitted to the government for review. Increased transparency could be achieved by requiring community leaders to make financial statements available to the community. However, some leaders resist increased transparency in order to prevent interference in their affairs by the government. Other suggested solutions include the creation of a First Nations audit committee and ombudsman, stiffer penalties for those caught misusing community funds, the creation of tribal courts to try cases of corruption and a stronger media presence in aboriginal communities.

5. Primer on anti-corruption laws: Basics and new developments

The modern history of anti-corruption law begins in the US, where a string of bribery scandals involving corporations in the 1970s led Congress to pass the *Foreign Corrupt Practices Act* of 1977. The act made bribery of foreign officials illegal. Canadian corporations listed on US stock exchanges must comply with this law. US businesses pressed for other countries to adopt similar measures. Members of the Organization for Economic Co-operation and Development agreed on the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the OECD Convention) in November 1997. Canada signed the convention that same year and its *Corruption of Foreign Public Officials Act* came into force in February 1999. Thirty-four countries have laws prohibiting the bribery of foreign public officials. The UN General Assembly adopted the *UN Convention against Corruption* in October 2003. In more recent developments, the *Dodd–Frank Wall Street Reform and Consumer Protection Act* of July 2010 contains anti-corruption provisions and Britain brought in strict new provisions in the UK Bribery Act, which came into force July 1st 2011. OECD reviews of Canada's anti-corruption performance have been negative. Of particular concern is Canada's lack of assertion of jurisdiction in the absence of a substantial, direct connection to Canada. There have been two convictions under the act (one occurred after the May 12th roundtables), and there are more than 20 investigations ongoing. Participants were divided on whether the Canadian government will significantly improve the bribery law or just change the clause on nationality. The US experience

shows that a sea change in this area is possible. Recently, the US Department of Justice announced it will pursue individual prosecutions on the basis that they constitute a stronger deterrent to corruption than corporate prosecutions. This will likely continue to drive compliance. The World Bank Integrity Unit, which used to pass information about questionable conduct to home governments, is now making this information public because experience indicated that there was no follow-up.

6. Are corporate social responsibility programs a necessary good or a conduit for corruption?

The general consensus of the discussion leaders was that corporate social responsibility programs could lead to corruption. But this depends on what we mean by "corporate social responsibility". If it is understood to involve making organizations more accountable and transparent in their decisions and activities, then the opportunities for corruption may be reduced. If a company's actions are seen from a community perspective as providing local benefits in exchange for gaining the support of the community, then corruption problems might arise. For instance, in China a company was questioned for its motive for promising to construct a school after they had submitted a tender to construct a water treatment plant. The Chinese company said it wanted to show that they would be a socially responsible company, but some interpreted their actions as "buying the community" and, therefore, corrupt. In November 2010, ISO (International Organization for Standardization) published ISO 26000, an international standard providing guidance on social responsibility. It starts from the premise of compliance with all applicable laws and international norms and integration of consideration of an organization's impacts on all of an organization's decisions and activities. Thus, social responsibility is not simply voluntary philanthropic activity. Second, transparency is a key element of social responsibility. Third, the definition of social responsibility emphasizes the need for engagement with stakeholders. By taking into consideration the views and concerns of stakeholders in a transparent way and in compliance with laws, and through proper training of its employees and contractors, there is further likelihood that socially responsible organizations will not engage in corruption.

7. What is corruption? Cultural norms vs. legal definitions

Corruption is defined by specific laws, including the *Corruption of Foreign Public Officials Act,* the *Criminal Code*, the *Foreign Corrupt Practices Act* in the US, and the

OECD Convention. However, there are ways business interacts with government where the lines between government and business, and the lines between personal and professional relationships, are less clear and can verge on corruption even where they are not strictly illegal. The example was given of the pervasive presence of developers and lobbyists at Queen's Park in Toronto. Relationships and political contributions can blur these lines. There's nothing necessarily illegal about this. You hire former prime ministers, etc., precisely because of their knowledge of the workings of government. There is a line, however, where this kind of relationship can become corrupt in the legal sense. How close are you to the line when you retain someone with a personal relationship? What about gifts, entertainment or political contributions? Where does that cross the line? Transparency is really the key to defining the line between a legitimate relationship and criminal corruption. In Canada, the *Corruption of Foreign Public Officials Act* requires proof of intent and knowledge, and the payment must obtain or retain benefit for business. In the US, Congress said that there must be an "evil purpose or motive" behind the payments. An offer is sufficient; there doesn't have to be a consummated bribe. However, the US Department of Justice has never prosecuted the mere offer of a bribe. Both US and Canadian laws exempt facilitation payments, which are paid to an official to expedite the proper performance of duties. This is controversial. Corruption is not a manifestation of culture. Corruption is the manifestation of the abuse of power.

8. How to legally do business in China without paying bribes

It is possible to do business in China without paying bribes. It takes time, planning and resources. But first, firms must draw a line in the sand – “we do not pay bribes” – and stick to it. To bribe seekers, such a policy is comparable to car thieves spotting a steering-wheel lock. After hearing it, they move on to easier prey. Once investors settle on a site, they need to set up a realistic timetable, say two years. They must commit resources to learn the culture and business practices as well as align their objectives with those of the local people and authorities. And rather than offering bribes to speed things up, they should try to get officials onside by outlining a common goal whose achievement will help them win promotions. Foreign firms must not box themselves in or add more pressure by trying to get things done quickly. Paying bribes is a short cut. For example, you have been working on a project for a long time and the chief operating officer is coming over to sign the contract. But the Chinese side tells you that they need to change one clause before signing. What do you do? If you cave in and pay, such demands will never stop. Bribing foreign officials is not only morally wrong, it is illegal under both the Canadian *Corruption of Foreign Public Officials Act* and the US *Foreign Corrupt*

Practices Act. In China, the definition of foreign official is very broad since the government is deeply involved in everything from huge state-owned enterprises to almost every economic sector. The quantity of corruption has not changed. But its sophistication and complexity has. In China, officials and others no longer ask for brown envelopes or sightseeing trips to Bangkok, Las Vegas and Disney World. They are more likely to request help for their children to attend elite universities, placing friends and family on the payroll or favouring certain partners, consultants or agents with contracts. Even if such requests appear innocent or vague, a bribe is still a bribe. And the smell test still works.

9. The Dodd-Frank Act: Implications for Canadian foreign filers with the SEC

The *Dodd–Frank Wall Street Reform and Consumer Protection Act* was signed into law in the US in July 2010. Section 1504 of the act requires issuers in the extractive industry reporting to the US Securities and Exchange Commission to disclose any payments made to a foreign government or the U.S. federal government for the purpose of commercial resource development. This means all payments, including legal payments such as taxes and facilitation payments. Companies are to disclose payments in their annual report on a project-by-project basis, which could prove challenging. Section 1502 of the *Dodd-Frank Act* introduced a new disclosure obligation on issuers who report to the SEC to disclose whether materials, which are necessary either to produce their product or for it to be functional, originated in the Democratic Republic of the Congo or an adjoining country. Section 1502 is not a prohibition against using conflict materials but requires disclosure of the use of conflict minerals so that an investor can make an informed decision. The SEC has proposed rules to implement a whistleblower provision mandated by the *Dodd-Frank Act*. The SEC will give substantial monetary awards to whistleblowers that voluntarily provide original information about violations of securities law that lead to successful enforcement actions resulting in monetary sanctions exceeding US$1 million. This includes settlements. The introduction of a bounty is controversial as it could undermine compliance programs. However, some argue it will encourage people to come forward, including those who are putting their career on the line.

10. Corruption abroad by Canadian charities and NGOs: Does it happen? Should it be penalized by Canadian law?

There is virtually no public discourse about corruption in Canadian charities. Some participants thought that if there is such corruption, it is probably occurring at such a low level that it is below the radar. For example, it was claimed that charities often fall into the practice of paying small facilitation payments, for example, $20, to process a permit faster. There have been reports that some European charities are involved in corruption and there are OECD publications suggesting there are Canadian NGOs involved in corrupt pharmaceutical schemes. An OECD review of Canada points out that the "for profit" element of the *Corruption of Foreign Public Officials Act* prevents that statute from applying to NGOs. One participant suggested that the "for profit" provision of the act should be changed to include NGOs, thereby adding a level of accountability. Canadian charities do not want the act to apply to them, saying that a small number of charities are causing the majority of the problems. However, there was considerable sympathy for the view that, if there is corruption in NGOs, it should be penalized by Canadian law. There was some discussion about the non-profit sector's ability to regulate itself. It was noted that Imagine Canada has launched a governance standard starting with the largest NGOs in an attempt to improve NGO governance from the top down. The first reporting on these accountability and transparency requirements will take place in fall 2011. One thing is obvious: Financial controls and accountability cost money and implementation of them can have a negative impact on a charity's ability to achieve its goals. So, the question arises, how do you achieve a balance between enforcing anti-corruption standards and effectiveness and not eroding donor confidence?

11. Perception of corruption in provincial governments

Perception is important. The more the general public perceives elected officials are corrupt, the less the public will participate in politics and the lower the level of trust. In a 2008 survey, 38% of Canadians thought that "quite a lot of politicians are crooked", and 36% thought politicians are "a little crooked". Perceptions of corruption are based on real situations, which is why corruption needs to be tackled. The number of stories in the newspapers about conflict of interest involving politicians has dropped in the provinces, since the creation of independent ethics commissioners. However, the same is not true for federal politicians, and the reason is that the ethics process for the House of Commons is considered flawed. In the municipal sphere, Toronto was the first to have a

code of conduct and an integrity commissioner. Ethics education is key. Codes of conduct by themselves are not sufficient. At the provincial level, the *Public Service of Ontario Act* of 2006 created clear conflict of interest rules for public servants and ministerial staff. Ontario then conducted the "Doing the Right Thing" campaign and set up a web portal. The Ontario integrity commissioner's office receives about 350 questions a year from MPPs and their staff members. Canada needs higher standards regarding conflict of interest, undue influence, lobbying and campaign financing. Tougher and more independent enforcement is also needed, especially at the municipal level.

12. Due diligence and effective anti-corruption compliance programs

Because they are on the front lines of the fight against corruption, corporations must have strong anti-corruption compliance programs. There are several factors that make a compliance program effective. Above all, organizations must ensure that the tone at the top is appropriate and that there is zero tolerance of corrupt practices at all levels of the organization. In addition, senior executives should ensure their actions are consistent with their messaging, meaning they cannot say that bribery is unacceptable but then pay bribes themselves. Executives should explain to employees that anti-corruption compliance protects the company's reputation and reduces risk for individuals. They should use incentives similar to other corporate performance metrics. This works better than simply stating that compliance is necessary because "it is the law". Independent evaluations and a well-established whistleblower program will also make a compliance program more effective. One component of an effective anti-corruption program is due diligence. The UK government discusses, as part of its anti-bribery guidance, the idea that due diligence procedures should be proportional to the risk of bribery in the target area. One successful practice is to send a team to the local area to build relationships and meet with key local people. The team should be staffed with professionals with various skill sets and backgrounds and should have a common objective of understanding the lay of the land. There are a number of red flags that signal a transaction may be high risk. They include a history of corruption in the region, a lack of transparency with regard to corporate and government agency structures, and highly centralized decision-making power.

Full Rapporteur Reports

1. Healthcare corruption in Canada: Is it a threat to public health?

Moderator: Jillian Clare Kohler, Assoc. Prof., Leslie Dan Fac. of Phar., Univ. of Toronto
Aria Ilyad Ahmad, MSc. Student, Leslie Dan Fac. of Phar., Univ. of Toronto
Maryse Bouchard, M.D., MSc Candidate, Orthopaedic Surgery Resident, University of Toronto
Joel Lexchin, Professor, School of Health Policy and Management, York University
Tom Slahta, Partner, Kestenberg Siegal Lipkus LLP
Rapporteur: Aria Ilyad Ahmad, MSc. Student, Leslie Dan Fac. of Phar., Univ. of Toronto

Why is the health sector prone to corruption and why it matters to Canada?

- Health care system is prone to corruption because it is an essential service and there is a lot of money in this industry with huge influence; this sector is complex, hard to predict who gets sick, when, and there is lots of asymmetric information between health care centers.
- Corruption is mostly thought of as a low-resource setting issue, but Canada is not exempt, and corruption in low-resource settings also matters to Canada, as its government gives aid and needs to know how its dollars are being spent.
- The burden of corruption disproportionately affects the poor and impedes access to health services; for example, in Burkina Faso, thousands of deaths in maternal care occur because of corruption, when the poor cannot afford to pay bribes.
- As for the 8 anti-poverty Millennium Development Goals (MDGs), 3 are related to health care, so there is a need to fight corruption to achieve the MDGs.
- Canada is trying in some ways to eradicate corruption. It is part of U4, an anti-corruption resource center, which is funded by several countries, including Canada.

Levels of corruption in the pharmaceutical sector and in institutional areas

- Ghostwriting: pharmaceutical companies hire medical communications companies that write articles and then shop them for clinicians, who are willing to publish and sign to get greater reputation.
- It is claimed that between 5-10 ghost written articles are identified each year. The University of Toronto, however, claims that in four years, not a single case has occurred.
- University of Toronto level: A book used for many years at University of Toronto Pain Week was underwritten by Purdue Frederick (PF), maker of oxycontin. This was brought to light by a family practice physician at the University of Toronto, but the report is now unobtainable.

- Canadian Medical Association agreed to take $780k to set up and run a continual medical education program. This was decided by board of six (2 from CMA, 2 Pfizer, 2 Independent).
- Government level: in Canada, there are three major federal granting agencies: Social Sciences and Humanities Research Council (SSHRC), Natural Sciences and Engineering Research Council of Canada (NSERC) and Canadian Insitutes of Health Research (CIHR). CIHR is the largest and last year appointed a former VP for Pfizer to the governing council. He has input into the overall policy/focus of CIHR.

Counterfeited medicines

- There is a need to follow the money to tackle the counterfeited drugs: many of them are destined for low income countries because there are higher vulnerabilities to corruption in these countries.
- From a list by big pharmaceuticals of the top 14 counterfeited drugs to watch, almost none was for "lifestyle" drugs
- The problem of counterfeits in Canada is most prevalent on the Internet. A report showed that from a sampling of over 7,500 websites, over 95.93% of the medicines were "not recommended" and only 0.65% were approved.
- Pharmacy case in Hamilton, 2005: there was no generic version of Norvasc in Canada, and it had to be obtained from licensed pharmacies. A pharmacy found a loop-hole in the system and began purchasing Norvasc from another distributor. Only after a patient noticed a change was there was an investigation determining the product to be counterfeits from India and Turkey. In the legal case that followed, the judge determined that a mental state of criminal liability was not established, and the pharmacist kept his license.

The health implications of poor quality medicines

- Many of counterfeit medicines have little or no active pharmaceutical ingredient. In some cases, they contain toxic ingredients that can lead to therapeutic failure, prolonged illness and death and also drug resistance (sub-standard anti-malarials have directly led to the doubling of resistance over the past twenty years to the cheaper first line anti-malarial).
- In lower income countries, this is more pronounced because of high drug costs/lower access to essential medicines, and presence of informal (poorly regulated) markets .
- Comprehensive data on the scale of the problem does not exist, and there is a lack of global consensus in defining the problem with broad lexicon of classification.
- World Health Organization (WHO) established IMPACT (International Medicines Product Anti-Counterfeiting Taskforce) in 2006, bringing together all necessary stakeholders to promote regulatory procedures, improved training for customs

officers, and increased public and health professional awareness, but some countries have questioned the legitimacy of IMPACT (controversies over guideline intentions and alleged conflicts of interest). In 2010, at the World Health Assembly, a coalition of Member States indefinitely blocked activities of IMPACT pending an investigation regarding its mandate and affiliation with WHO.

Corruption in the medical device industry

- Canada copied the US code of conduct to: implement policies, designate complacent officer, education, lines of communication (anonymous prorating tools), internal monitoring, enforce standards, report detected breaches.
- In 2008, US Department of Justice took five major medical devices companies to court (for kickbacks, consulting fees, etc.). Four of the five were asked to pay $311m, but no such trial has occurred in Canada. No kickbacks have been reported, but it is known it is happening.
- Continual medical education is a $2 billion a year business, and 50% of is provided by private sector: there is a need to disclose financial interests, and physicians are also required to disclose from whom they get money.
- Another problem is fraudulent billing: charges for procedures that are either not performed or performed unnecessarily. And more common than bribes are cases where patients are falsely prioritized.
- There is a need for implementation of proper codes of conduct, through a compliance and disciplinary committee, and for anti-counterfeiting measures to be enforced, as well as industry relationships to be monitored.

2. Is corruption the root cause of all revolutions?

Moderator: James Klotz, Co-Chair, International Business Transactions Group, Miller Thomson
Marcus Davies, Legal Officer, Criminal, Sec. & Dip. Law Division, DFAIT
Huguette Labelle, Chair, Transparency International
Errol Mendes, Professor of Law, University of Ottawa
Bessma Momani, Sr. Fellow, Centre for International Governance and Innovation
Mariana Mota Prado, Assistant Professor, Faculty of Law, University of Toronto
David Rounthwaite, Barrister Solicitor
Rapporteur: Natalie Grebinko, Bachelor of Commerce Law Major, Ryerson University

Corruption can be both a root cause and a fuel for revolution and there are three main reasons for this. First, corruption is used to enrich leaders and their clan as happened in Kyrgyzstan; secondly, to maintain power and to instil fear in the population as occurred in Kenya, and thirdly to capture the state by the powers within the state, e.g. the drug lords in Latin America. In Egypt, corruption was one of the many reasons for the revolution. Since the educational attainment of the Arab population is quite high, the effects of corruption can be especially demoralizing to young people. Large segments of the population are young and well educated, but are unemployed because of corruption, as people are required to pay bribes to get jobs. Thus, corruption translates into frustration, because it delays the normal course of life such as marriage and establishment of a household. These young, well educated, tech savvy individuals revolted against the old way of operation of the elite networks. Middle Eastern countries did not experience lack of growth, with rough GDP growth of 7% per annum, but lack of distribution, which is the result of corruption. Economic liberalization should lead political liberalization, but autocracy had made this relationship perverse. Interestingly, most of the countries in revolt are at the bottom of the TI Corruption Perceptions Index (CPI).

Some situations are not called revolutions at first, but are considered to be such in hindsight. This occurs when there is popular support and commitment to the restructuring of government and administrative controls. Collapse of the current system may occur in a different context, i.e., popular uprising or military defeat, but emotion and interests are always involved. Corruption is like the use of steroids in sports, which improves performance, but creates tension and unequal opportunity. Corruption may be one of many causes for revolution. Therefore, it is a symptom of the failure of state mechanisms in a local situation.

If corruption is the cause of the revolution, then why is Latin America not in revolt? Is it because it is not at the bottom of the CPI, yet? In Latin America, the state uses corruption to

stay in power by distributing the resources through certain channels. Some segments of the population benefit from this arrangement, but some do not. However, those disadvantaged segments do not get any opportunity to revolt. In the wide spectrum of state governance, there is a relationship between autocratic government and corruption. The more autocratic the government is, the higher the corruption and vice versa. However, in weak democracies, the corruption is even higher than in autocratic regimes, which is advantageous for the elite.

In some countries corruption is "business as normal" and for those who are not part of the "business" it may become a contributing factor for a revolt. The scale of corruption and its influence have increased, as funds can be easily moved out of the countries. Thus, when the corruption proceeds are spent, they are spent abroad, making it harder to trace.
The lack of confidence of local people is a contributing factor that can lead to a more sudden change. It causes projects to break down and resources to be plundered. The loss of confidence of the population is followed by the loss of investments, because investors do not have confidence to conduct business in that country.
The UN Convention against Corruption (UNCAC) has provisions that are designed to combat corruption by strengthening international cooperation, asset recovery and criminalization. When dealing with combating international corruption, one of the challenges is to get the two criminal systems to work together, as criminal law is designed to work only domestically. Some of the challenges faced include differences in evidentiary burden, investigation procedures and penalties. Since corruption is a global phenomenon, there is a requirement for broader expertise, i.e., RCMP and forensic accountants. However, during UNCAC negotiations some countries are very reserved negotiators and are unwilling to include disclosure requirements that would be of a great help.

Comments and Q&A:
Corruption may not only be the cause of revolution; it can also be the result of revolution or have a separate life of its own.

Brazil now has a law that puts corrupt politicians on a black list. Similar deterrence is expected from the developments of the UNCAC on asset recovery. In the past, a corrupt politician may have been charged and jailed, but the incentive would have remained, since the family was financially protected. Poverty and inequality is a way to maintain power in Brazil. Political parties buy votes of individuals by offering them food baskets and temporary improvements in livelihood. In this case, economic liberalization can be limited by the political liberalization. Therefore, political liberalization should come before economic liberalization, in order to combat corruption.

China has a potential to have a revolution that would be the result of corruption, because it has high levels of corruption and is a centrally planned economy. There is a complex mix of people's expectations and leadership that relate to the corruption. As long as the Chinese government lives up to the expectations of its people, it will be able to maintain its position.

One could argue that inequality is not relevant to corruption and cannot be a reason for revolt. Recent US trends indicate further inequality among individuals, but it will not result in revolution or lead to corruption.
One aspect that has not been discussed up to this point that strongly relates to corruption is greed, its out of control environment and how to structurally change it. Greed discounts the future and leads to the loss of confidence for the long term collective good. It intends to maximize the possibility of one time capitalization.

Q: Is FDI by China to African countries and Middle East fuelling the global corruption rate or not?
As in the example of Angola, the effect was negative because the country was no longer eligible for World Bank funding and thus would not need to adhere to terms and transparency conditions imposed by the World Bank that would include anti-corruption provisions. China is a significant player in the UN; however, it does not have many international transparency mechanisms. When negotiating on disclosure, peer review or partnerships, some countries exhibited more conservative behaviour.

3. Whistleblowing as a tool for fighting corruption

Moderator: Kernaghan Webb, Assoc. Prof., Bus. Law, Ted Rogers Sch. of Mgmt., Ryerson U.
Fiona Crean, City of Toronto Ombudsman
Hentie Dirker, Regional Compliance Officer, Siemens Canada Ltd.
David Hutton, Executive Director, FAIR
Dimitri Lascaris, Partner, Class Actions Department, Siskinds LLP
Rapporteur: Zaker Khan, MMSc (2012 candidate), Ryerson University

The purpose of this session was to discuss the role of and issues associated with whistleblowing as a method for addressing and combating corruption. It was noted at the outset that whistleblowing mechanisms can potentially play an important role in bringing corruption and bribery activities to the attention of companies and governments.

Organizations can create anonymous tip lines and establish third party ombudspersons, to encourage employees and other individuals to come forward with information concerning problematic activity. There are also Canadian or U.S. laws or guidelines that require or suggest that companies establish procedures for receiving tips anonymously and confidentially. There are Canadian laws that provide protection to certain whistleblowers against retaliation (in the public and private sector), and proposed laws that incentivize whistleblowing through "rewards" arrangements, whereby individuals who provide information on non-compliance may receive some financial compensation for so doing. On the other hand, some argue that caution must be exercised in the development and use of whistleblower mechanisms, suggesting that they can be abused (e.g. employees might be seeking retaliation against management for bad performance reviews, and have no basis for their claims of violation of anti-corruption laws) and that incentivizing whistleblowing might have negative effects on existing procedures (e.g. the incentives give employees a reason to bypass internal company mechanisms in favour of regulator programs that provide financial rewards for doing so).

After the Siemens bribery problems came to light, significant company-wide reforms were undertaken to prevent future violations. A centralized whistleblowing hotline was established and is managed by a third party. A strict process of vetting all compliance-related whistleblowing allegations is in place. Most of the whistleblowing allegations that occur at Siemens are HR /employee related. In some instances, employees may not always understand established policies and procedures. Since all complaints can be anonymous, this makes it administratively challenging because everything has to be reviewed for plausibility. The anonymous nature of the hotline sometimes presents a challenge in terms of investigation and following up with whistleblowers.

Canada is not keeping up with best practices related to whistleblowing. Public sector mechanisms to protect whistleblowers are easy to circumvent. There is evidence of reprisals being undertaken against whistleblowers. The myth is that whistleblowers are self-serving opportunists. The problem with respect to oversight is that often the lowest possible sanction is given. Apart from legislative measures, it is important to consider the establishment of independent officials, in both public and private sectors, who have the means to advocate, investigate, and create change in situations that are often fraught with controversy. These initiatives should be part of a wider effort to create a culture where whistleblowing is considered to be ethical heroism.

From a plaintiff securities lawyer's perspective, it was noted that, before coming forward, every whistleblower conducts a cost-benefit analysis. In light of the dangers associated with coming forward with potentially damaging information to the reputation of the organization, more powerful financial incentives are needed so that the whistleblower has some assurance of financial well being in the event of reprisals. There are numerous legal obstacles in place as matters currently stand that make it difficult for plaintiff lawyers to get access to and draw on whistleblower information. Stronger legislation to protect whistleblowers (e.g. confidentiality agreements) in the private sector is essential for the effective functioning of our markets as well as our democracy.

From a civil society perspective, experience suggests that whistleblowers are frequently the subjects of serious reprisals. While there is always the risk of abuse of whistleblower protection (unsubstantiated complaints, fruitless investigations, etc.), this risk tends to be exaggerated and providing due process for disclosures of wrongdoing is the price of effective democracy. Canada has a poor track record of protecting truth tellers and acting on their disclosures to expose wrongdoing. Stronger laws are needed, and existing laws need to be fully enforced. Given the failure of the federal whistleblower protection system and the resignation of the Public Sector Integrity Commissioner, civil society organizations are calling for the appointment of a more independent and proactive commissioner, as well as reformed legislation and better parliamentary oversight.

4. Corruption in Aboriginal Communities in Canada: Is it really a problem?

Moderator: Joe Ringwald, Vice President, Mining, Selwyn Resources Limited.
Ben Bradshaw, Associate Professor, Geography, University of Guelph
Phil Fontaine, former National Chief, Assembly of First Nations
Anne Scotton, Chief Audit & Evaluation Executive, Indian & Northern Affairs Canada
Grant Wedge, Legal Director, Ontario Ministry of Aboriginal Affairs
Rapporteur: Samir Murji, Articling Student, Fasken Martineau DuMoulin

Discussion Leaders considered causes of corruption within Aboriginal communities, measures currently in place to remedy corruption and recommendations for future deterrence. Although all Discussion Leaders present concurred that corruption was a salient problem facing contemporary Aboriginal communities, the discussion revealed dissonance regarding the root cause of the corruption and potential solutions.

A significant portion of the panel's discussion was devoted to a consideration of transparency and accountability among band leaders as an enabling factor of corruption in Aboriginal communities. Among varied opinions on this subject, Discussion Leaders suggested that a lack of formal auditing mechanisms surrounding the practices of band leaders provides a greater opportunity for the misuse of community funds. Similarly, Discussion Leaders remarked that the heightened level of confidentiality surrounding impact and benefit agreements (IBAs) also create an opportunity for corruption as the terms of these agreements are generally not subject to public scrutiny. However, proponents of IBAs suggested that the lack of transparency surrounding these agreements often results in the perception of backroom dealings and corruption even where no such foul play has occurred. Moreover, given the relatively recent introduction of the agreements, advocates argued that Aboriginal communities must be afforded the opportunity to acclimate themselves to using the agreements. Finally, one Discussion Leader opined that the resistance by band leaders to adopt mechanisms for increased transparency and accountability is to prevent further interference in their affairs by the government.

The discussion also considered current efforts by the Federal and Provincial Governments to address the issue of corruption and misuse of funds in Aboriginal communities. Among such initiatives, the government of Canada has created a new role for a forensic auditor in the funding process and has begun to introduce a "right to audit" clause into every funding agreement. In addition, there has been an increased emphasis on self-reporting and a

majority of Aboriginal communities already prepare audited financial statements which are submitted to the government for review.

The panel's final topic of discussion concerned recommendations for future anti-corruption efforts. In this regard, Discussion Leaders argued that increased transparency could be achieved by requiring band leaders to make financial statements available to the community. Others argued for the creation of a First Nations Audit Committee and an Ombudsman to independently audit and oversee the finances of these communities. Other solutions discussed included stiffer penalties for those caught misusing community funds, the creation of tribal courts to try cases of corruption in Aboriginal communities, an increase in use of independent dispute resolution and a stronger media presence in Aboriginal communities that may expose corrupt practices.

Perhaps the greatest source of accord among Discussion Leaders at the round table was the considerable work that remains to eliminate corruption in aboriginal communities. Based on the discussion described, it can be said with relative ease that although corruption is indeed a significant issue facing Aboriginal communities, the solutions discussed require further thought and analysis to determine their applicability within these communities.

5. Primer on Anti-Corruption Laws: Basics and new developments

Moderator: J. Michael Robinson, Counsel, Fasken Martineau DuMoulin
Milos Barutciski, Partner, Bennett Jones LLP
Gord Drayton, Inspector, OIC Sensitive Investigations and International Corruption, RCMP
Bruce N. Futterer, V. P., General Counsel & Secretary, GE Canada
Janet Keeping, President, Sheldon Chumir Foundation for Ethics in Leadership
Thomas C. Marshall, former General Counsel, Attorney General of Ontario
Rapporteur: Paul Lalonde, Partner, Business Law Group, Heenan Blaikie LLP

Discussion Leaders and other participants at this session addressed a wide range of topics, including the following:

- Welcoming remarks: the session is intended as a basic primer for the non-expert, but all levels of questions welcome.
- Brief presentation of UK Bribery Act, with reference to a recent Miller Chevalier publication on the topic.
- Introduction to CFPOA:
    - History in US – Lockheed scandal
    - Leading to FCPA
    - Competitive disadvantage for US businesses leading to US pressure to adopt FCPA-like measures in other developed countries
    - OECD Convention leading to 34 countries adopting laws prohibiting bribery of foreign public officials
    - Core offence in Canadian law – Corruption of Foreign Public Officials Act (CFPOA), section 3(1)
- Other developments:
    - 1995 OECD Guidelines for MNEs (wholly unenforceable and not well known)
    - UN Convention against Corruption (UNAC) – good convention, similar principles as OECD Convention but little follow up and monitoring
    - UK Bribery Act – publication of the Guidance – coming into force July 1, 2011:
        - No facilitation payments
        - Nationality jurisdiction – any minor connection to UK sufficient
        - Separate offences for individuals and corporations
        - Very limited safe harbour provision
    - Dodd-Frank Act in the US
- Why, with all these laws, do we seem to have more corruption than ever?

- Economic considerations: corruption is part of commercial dynamic in certain markets and if companies want to invest and grow in high growth, developing markets, they may not have a choice.
- Canadian industry is not "clean": e.g. BC Rail scandal; various municipal scandals; many instances of legitimate vs. questionable lobbying.
- It is not clear that the problem of corruption is growing. It has always been present. Recall Bre-X and before. Difference is that we have more enforcement now, particularly in US. This has resulted in greater company focus on related compliance issues, giving the issue greater visibility.
- Awareness is increasing exponentially – there is a realization that the potential cost of engaging in corruption outweighs benefits of engaging in corruption.
- Inter-American Convention against Corruption: involves monitoring and great focus on supply chain.
- Follow-up mechanisms and compliance with Conventions are key. In this regard, civil society plays an important role. For example, the OECD sends a panel to Canada to talk to interested persons when preparing its reports on compliance with the OECD Anti-Bribery Convention.
- We should not underestimate the power of ideas. Consider examples of public smoking and driving while under the influence of alcohol. Major cultural shifts have occurred in these areas and similar cultural shifts could occur around corruption.
- Canadian corporations listed on US stock exchanges must comply with FCPA.
- Conviction for corruption offences can lead to blacklisting (World Bank and other institutions).
- Senior executives of some US companies spending time in jail – spurring focus on these issues.
- Corruption is about human behaviour, which is culturally entrenched. Bottom half of TI Index are countries where corruption is considered by outsiders to be way of life.
- Domestically, nothing undermines faith in our system more than corruption scandals – this is a reason to give these issues a higher profile and to promote more dialogue such as the present session.
- Canada can have a direct impact abroad in this area. The behaviour of Canadian companies will have an influence on countries where they are active; they are ambassadors for Canada. The extractive industries in particular often have a significant local footprint.
- History of enforcement in Canada was complaints-based and dealt with by the RCMP Commercial Crime Unit. Corruption investigations are deemed "sensitive

investigations" (involving politicians). There are currently well over 20 investigations ongoing.

- Collecting evidence abroad is problematic: Mutual Legal Assistance Treaties provide for a process that takes time here and that can then be sabotaged abroad if local authorities are not collaborating.
- The culture of corruption must be addressed, including through education/outreach. For law enforcement, t he Charter changed everything. At the same time, major changes in law enforcement have been driven by cultural changes. Drunk driving is an example of this. We need, on the business side, in relation to corruption, initiatives that will drive change the same way that MADD and other groups changed attitudes on DUI.
- World Bank initiatives are supportive. For example, to receive assistance, receiving country must sign UNCAC. This has resulted in more domestic laws being adopted against corruption. The focus now turns to enforcement of these laws.
- Better enforcement intelligence is starting to be available through various international initiatives.
- Panelists discussed the World Bank approach to companies engaged in questionable activities. The World Bank sanctions regime has now expanded to other International Financial Institutions. This has a "squeeze play" effect on companies that are tempted to engage in corruption.
- The leveraged investigation model of the US DOJ was discussed. These investigations force companies to make internal investigations and then report back to the DOJ who then determines whether the internal investigation was sufficient and whether further action is required. In Canada, this is not a strategy that is pursued by law enforcement. Among other things, Canadian judges are not bound by deals between companies and prosecutors.
- We have done immunity deals in Canada on the Competition Law front for a couple decades, following criminal rules of procedure, including international deals.
- The US DOJ approach of multiple, leveraged investigations will not work in Canada until the stakes get higher here.
- FCPA clauses in M&A deals are getting more prevalent and detailed – this often triggers investigations that lead to realization that compliance is an issue.
- Recent growth in compliance focus in Canada in areas like securities, privacy, etc., has led to inquiries about the full range of issues that should be the subject of a robust compliance model, including corruption.
- The OECD reviews on Canada have been negative. Of particular concern is Canada's lack of assertion of jurisdiction in the absence of a substantial, direct connection to Canada. The OECD committee has made a strong recommendation in this regard

but it has never been implemented in Canada. This is an embarrassment for Canada (we are, perhaps with Chile, the only country in the OECD that has not adopted nationality jurisdiction).

- The real and substantial connection to Canada requirement is a problem on the enforcement side.
- It was suggested that TI-Canada send a letter to the Prime Minister asking him to re-introduce Bill C-31 (which died when Parliament prorogued in late 2009). It is not clear why this has not already been re-introduced.
- The Department of Foreign Affairs and International Trade appears quite uncomfortable with nationality assertion and reluctant about extra-territorial jurisdiction, which is viewed as too closely associated to U.S. sanctions on Cuba and other extra-territorial measures that Canada has opposed in the past.
- In addition to its letter to the PM, TI-Canada should seek support from other organizations and get them to send similar letters.
- A discussion surrounding the tax law privacy protections followed, with some participants maintaining that changes on this front might offer a way to facilitate investigations. Other participants cautioned against opening the tax regime, which would have significant precedential and other implications. One of the fundamental principles of our tax system is self-reporting. The CRA has extraordinary powers that are predicated on an air-tight tax system. If we open the door for non-tax investigations, the foundations of the system are changed which may have an impact on government revenues. As a result, major changes in the self-reporting system are not likely.
- It was the practice of the World Bank Integrity Unit that when it obtained information that indicated questionable conduct this was passed on to home country. Experience showed that there was no follow up after transmission of such information. The World Bank is now making this information public.
- Anti-corruption is supposed to be based on the Rule of Law. In one participant's view, the World Bank and US DOJ have adopted a kind of "shake down" approach that is not consistent with these principles.
- Search warrants work although they are sometimes thought to be too complicated. The available tools can be effectively used. The more serious challenge is police-to-police collaboration and creating safety/security issues for officials in the target country. If you ask the wrong questions to the wrong person in certain countries, you can literally get people killed.
- The TI-Canada Anti-Corruption Compliance Checklist is an excellent tool. It is free and provides compliance procedures with live links to other resources (available for download at: www.transparency.ca).

- The likelihood of legislative changes was discussed by several participants, with various views being expressed. The hopeful view is that the current government will weave amendments into its priorities and that international pressure will build to point where we will see change. The UK Bribery Act may add momentum for change. The pessimistic view is that we just might see a change on the nationality issue but not more.
- To the extent there is a problem with anti-corruption in Canada, it is not the law; it is about the lack of resources at the RCMP and at the prosecution level.
- The US experience and the history of FCPA show that a sea change in this area is possible. The first major driver for change was the first significant prosecution. The push on compliance was driven by that, not by an organic impetus from industry. Recently, the US DOJ has announced they are going to pursue individual prosecutions on the basis that they constitute a stronger deterrent to corruption than corporate prosecutions. This will likely continue to drive compliance.
- The enforcement of anti-corruption laws in other jurisdictions and the spill-over into Canada was discussed. If an entity or individual is found guilty of a corruption offence in another jurisdiction, double jeopardy rules would probably mean we will not prosecute in Canada. In anti-trust matters, we do not recognize the application of double jeopardy rules. That said, there is no jurisprudence on the issue and one would need to consider the elements of the offence. While not entirely clear, it appears defense counsel would have a credible argument to make that a prosecution for the same offence in another jurisdiction would mean it is res judicata.
- The issue of books and records offences was discussed. In Canada, there is no separate "cooking the books" offence. Canadian securities commissions do not seem to care about this issue.
- Facilitation payments were discussed. In the UK Act, there is no exemption for FPs; the matter is left to prosecutorial discretion (assessment of materiality).

6. Are CSR programmes a necessary good or a conduit for corruption?

Moderator: Peter Dent, Part. & Nat'l Leader, Forensic & Dispute Services, Deloitte & Touche
Valerie Chort, Part. & Nat'l Leader, Corporate Resp. & Sust. Practice, Deloitte & Touche
Madelaine Drohan, Canada correspondent for The Economist
Marketa Evans, Extractive Sector CSR Counsellor, DFAIT
Kernaghan Webb, Assoc. Prof., Business Law, Ted Rogers School of Business, Ryerson Univ.
Rapporteur: Matthew Armstrong, Masters Student, Ryerson University

There were two major issues that were addressed at this roundtable: the lack of clarity on the meaning of Corporate Social Responsibility (CSR) and the connection between CSR and corruption in developing countries. The lack of clarity on the meaning of CSR was discussed in greater detail than the latter.

The session started off with an anecdote that illustrated why this topic is of importance. If a company's actions are seen, from a community perspective, as providing local benefits in exchange for gaining the support of the community, then corruption problems might arise. For instance, in China, a company was questioned for its motive for promising to construct a school after they had submitted a tender to construct a water treatment plant. The Chinese company wanted nothing more than to show that they had the intention of being a socially responsible company, but their actions were interpreted by some as "buying the community" and, therefore, corrupt.

The general consensus of the discussion leaders was that CSR can lead to corruption. But this depends on what we mean by "CSR". If CSR is understood to centrally involve making organizations more accountable and transparent in their decisions and activities, then, in so doing, the opportunities for corruption may be reduced.

In November 2010, ISO (International Organization for Standardization) published ISO 26000, an International Standard providing guidance on Social Responsibility, after five years of negotiation involving inter-governmental organizations (e.g. the UN Global Compact, the OECD, the ILO), governments, leading industry associations (e.g. the International Chamber of Commerce, the International Organization of Employers, the International Council on Mining and Metals), labour, consumer organizations, environmental organizations and other civil society organizations such as Transparency International, and national standards bodies. The standard is not a management system standard capable of third party certification. The following is the definition of social

responsibility (SR) from ISO 26000:

> *Responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that: is consistent with sustainable development and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the organization.*

This definition presents a couple key points that are of significance. First, note that the definition starts from the premise of compliance with all applicable laws and international norms, and integration of consideration of an organization's impacts in all of an organization's decisions and activities. Thus, social responsibility is not simply voluntary philanthropic activity. Second, transparency is a key element of social responsibility. This means that compliance with anti-corruption laws and openness as to decision making and activities are integral to social responsibility. By definition, therefore, a socially responsible organization is one where corruption does not take place, and where its activities with respect to ensuring transparency should decrease the possibilities for corruption. Third, the definition of SR emphasizes the need for engagement with stakeholders. By taking into consideration the views and concerns of stakeholders in a transparent way and in compliance with laws, and through proper training of its employees and contractors, there is further likelihood that socially responsible organizations will not engage in corruption.

CSR can be seen as a systematic and proactive approach to risk management, requiring organizations to put in place the necessary resources, processes, training, and continuous improvements. If organizations design their CSR programs using the concept of proactive risk management, then the possibility for corruption to occur is diminished.

Organizations should not underestimate the power of social media when it comes to specific projects, since social media can provide an excellent avenue for communicating the ideas of the organization as well as receiving feedback from stakeholders whose voice is usually not heard. Using social media can lead to the discovery of both human rights and other abuses, as well as corruption.

The second major issue that was discussed during the roundtable was the perceived hypocrisy that exists when a company from a developed country operates in a developing country. Most of the time this occurs as a result of inadequate laws or enforcement in developing countries. This means that companies operating in developing countries need to work with governments, communities, employees, NGOs, and others in order to ensure

that the company is meeting local laws and international norms. Legal, NGO and market (investors, consumers, supply chain dimensions) pressure can play an important role in driving socially responsible behaviour, including behaviour that ensures that a firm is not violating corruption and bribery laws.

7. What is Corruption? Cultural norms vs. legal definitions

Moderator: Milos Barutciski, Partner, Bennett Jones LLP
Peter Dent, Partner & National Leader, Forensic & Dispute Services, Deloitte & Touche
Marke Kilkie, Legal Counsel, Regulatory Crime, Public Prosecution Service of Canada
Dale Chakarian Turza, Partner, Cadwalader, Wickersham and Taft, LLP
Rapporteur: Elliot J. Burger, Associate, International Trade and Customs, Bennett Jones LLP

What is corruption?

Corruption is defined by specific legal rules – CFPOA, *Criminal Code*, *Foreign Corrupt Practices Act* (FCPA), OECD Anti-Bribery Convention, etc. On the other hand, there are certain ways business interacts with government where the lines between government and business, and the lines between personal and professional relationships, are less clear and can verge on corruption even where they are not strictly illegal. The example was given of the pervasive presence of developers and lobbyists at Queen's Park. Relationships and political contributions can blur these lines. There's nothing necessarily illegal about this. You hire former prime ministers, etc., precisely because of their knowledge of the workings of government. There is a line, however, where this kind of relationship can become corrupt in the legal sense. How close are you to the line when you retain someone with a personal relationship? What about gifts and entertainment, political contributions, etc? Where does that cross the line?

Canadian bribery offences

The CFPOA provisions of the Act were introduced and each was discussed briefly. There has been only one conviction under the CFPOA. The panel noted the attention the CFPOA has been getting recently. One Discussion Leader suggested that this largely has to do with the OECD review that took place in October and the subsequent report released in March. The CFPOA requires proof of *mens rea* – need to prove intent and knowledge, and must obtain or retain benefit for business. Business is defined as "an activity, professional undertaking, trade for profit." The OECD doesn't like the qualifier of "for profit." They think it should relate to any commercial transaction. The elements of the offence are broad and can capture many acts. The bribe doesn't need to be just money. The exemption for facilitation payments is controversial to the OECD. It is there because we followed the US legislation (FCPA). This exemption exists to recognize cultural realities of doing business in certain countries. Exemptions also include payments or consideration allowed under the laws of a foreign state.

US legislation (FCPA)

After Watergate, the SEC swept Fortune 500 companies to look at political contributions they had made. They found out that those companies had made "political contributions" abroad. The FCPA was passed as a result, in 1977. International business in the 1970's was largely defense sales, telecommunications, a bit of oil work. This was the focus of the FCPA when it was drafted. Its relevance has grown over the years with as a result of increased international business. Moral and ethical outrage over events like Enron has created a huge surge of prosecutions under acts like the FCPA (even though it doesn't relate directly to Enron). The SEC seems to have seen this as a great way to get good publicity and get money through huge fines.

The FCPA has two distinct areas – 1. Criminal bribery; 2. Books and records. The SEC side of the FCPA establishes requirements for issuers that are registered with the SEC to maintain accurate financial records and financial controls ensuring the soundness of the records. Based on this, if you record a bribe as a bribe, you don't have a problem with the SEC provisions. These provisions have been used broadly, way beyond foreign bribery.

US FCPA bribery provisions - what does "corrupt intent" mean?

Congress said that there must be an "evil purpose or motive" behind the payments. An offer is sufficient; there doesn't have to be a consummated bribe. The US Justice Department has never prosecuted the mere offer of a bribe. Generally, there has to be something more involved. There must be an expectation that they will get something back for it. Technically, goodwill gifts, absent corrupt intent will, likely fall outside of the context of the act.

Exception under the act – facilitating payments (as in Canada)

US legislative history contemplated these payments would be used to expedite the proper performance of duties. Congress understood that this was required to do business internationally in certain parts of the world. Congress did not put a dollar limit on facilitation payments, but it is clear that facilitation payments do not mean $25,000 payment to get goods off a “dock.” That would be a bribe. An affirmative defence is available under the FCPA and CFPOA for reasonable expenses in contemplation of a contract. As for indirect payments, the FCPA provides for circumstances where payments are being made through third party agents. You have to establish under what circumstances you would know when the agent was going to use the money as a bribe. The agent generally has to have some sort of qualifications to be an agent, which creates an impetus for due diligence, with regard to an agent.

The FCPA and the CFPOA

In both the FCPA and the CFPOA, "indirect" payments can include payments made through joint venture partners (i.e., a supplier working with a distributor to sell the product in the country).

Corruption is not a manifestation of culture. Corruption is the manifestation of the abuse of power. Take Indonesia, for example. When the country became more democratic, corruption became more widespread because power was more broadly diffused. Tolerance levels shot up. One defence for corruption is "that's the way things are done." Another argument is that "the civil service is underpaid." These arguments are not well founded. The root causes are usually lack of local knowledge. Corruption is usually the result of being taken advantage of by locals who are steering favours to friends or family. There is also a lack of due diligence about local partners. It may be possible to do business in China in the last 15 years without bribery. It is impossible to do work in Russia without bribery. As for cultural manifestations of bribe payers, up until 1999, we didn't have any legislation preventing bribery overseas. This is a new limit in Canada.

Internationally

While corruption is never condoned internationally, it may be acknowledged cynically. If you are going to do hospitality or gifts make sure you document them meticulously – this will help define the line between a gift and a bribe and explains the intent of a "payment."

Questions

Q: Is there any study to show how often commercial kickbacks occur?

A: A panel member described the private bribery offences in Canada ("secret commissions") that are prohibited by the Criminal Code. Private payments back and forth between companies can be lawful ("rebates") or can be tax evasion depending on the circumstances. In the US commercial kickbacks are illegal under several statutes. Also in the US, if you breach another country's commercial kickbacks laws, you can be tried in the US for aiding and abetting the breach of a foreign law. When corruption is occurring, there are usually other forms of misconduct occurring (i.e., internal fraud)

Q: Ratings agents are giving ratings that are too high because huge clients are putting pressure on the rating agencies to give good rating to a certain product. How does that fit within the CFPOA/FCPA?

A: This may sometimes lead to "willful blindness." Willful blindness is the result of a strong incentive to turn a blind eye.

Q: Are we victimizing developing countries by paying bribes to foreign officials? How does the ability to freeze funds of corruption of foreign public officials come about in the private market?
A: Private advisers are aware of the law. We know about it, but it seems the banks are far more affected than law firms or accounting firms.

Q: Is there a way to prosecute the acceptor of the bribe?
A: If they run afoul of domestic bribery laws in their country they can be charged there. Every country has domestic bribery laws although they are not always enforced. The CFPOA and the FCPA do not reach the recipient of a bribe.

Q: Is the secret commissions section of the *Criminal Code* used for public corruption?
A: No, we would use the CFPOA internationally and the *Criminal Code* domestically.

Q: How does lobbying fit within this legal structure? How does the hiring of ex-heads of state fit within this structure?
A: There is a lot of behavior that is "improper," but is not necessarily illegal. Transparency is really the key to defining the line between a legitimate relationship and criminal corruption.

8. How to legally do business in China without paying bribes.

Moderator: James Klotz, Co-Chair, International Business Transactions Group, Miller Thomson
Sandy Boucher, Senior Investigator, Grant Thornton LLP
David Fung, Chairman and CEO, ACDEG Group
Sarah Kutulakos, Executive Director & COO, Canada China Business Council
Homer E. Moyer, Jr., Partner, Miller & Chevalier, Chair, Anti-Corr. Committee, Int'l Bar Assoc.
The Hon. Pierre Pettigrew, Executive Advisor, International, Deloitte & Touche, LLP
Rapporteur: Ken Mark, Ken Mark Freelance Writer

Yes, it is possible to do business in China without paying bribes. It takes time, planning and resources.

But first, firms must draw a line in the sand – "we do not pay bribes" – and stick to it. To bribe seekers, such a policy is comparable to car thieves spotting a steering-wheel lock. After hearing it, they move on to easier prey.

Similarly, foreign firms have choices as well. They have the funds and projects to help China fulfill its economic destiny. It is a huge country full of opportunities. If one location does not work out, they can look elsewhere.

But once investors settle on a site, they need to set up a realistic timetable, say two years. They must commit resources to learn the culture and business practices as well as align their objectives with those of the local people and authorities. And rather than offering bribes to speed things up, they should try to get officials onside by outlining a common goal whose achievement will help them win promotions.

Foreign firms must not box themselves in or add more pressure by trying to get things done quickly. Paying bribes is a short cut. For example, you have been working on a project for a long time and the COO is coming over to sign the contract. But the Chinese side tells you that they need to change one clause before signing.

What do you do? If you cave in and pay, such demands will never stop.

To avoid such confrontations, firms need to lay the groundwork by establishing a solid presence and gaining the support of senior Chinese officials. Many Canadian firms have participated in Team Canada Trade missions. Photos depicting the Canadian prime

minister and local leaders prominently displayed in your lobby send a signal to officials that they should not mess with you because you have friends in high places.

Establishing strong local business partnerships also helps smooth over other concerns. Foreign firms must do everything possible to protect their intellectual property (IP) rights. Chinese courts are unlikely to do it for you. (Some observers estimate that less than 50 per cent of China's judges are trained lawyers.)

If you can cultivate enough influence among local leaders, you may be able to get them to help resolve the problem by asking them, "What does this action do to China's reputation in the global economy?" You know you have reached that level of comfort when they invite you to have a bowl of noodles not shark's fin soup.

Bribing foreign officials is not only morally wrong, it is illegal. The legal muscle behind that for Canadian companies is both the Canadian Corruption of Foreign Public Officials Act and the US Foreign Corrupt Practices Act (FCPA). In China, the definition of foreign official is very broad since the government is deeply involved in everything from huge state-owned enterprises (SOEs) to almost every economic sector.

The FCPA has both sharp teeth and long arms. As a result of extraterritoriality, the US Department of Justice (DOJ) and the Securities & Exchange Commission (SEC) claim jurisdiction even when the alleged activities do not take place on US soil or involve US firms. In the past five years, almost half of FCPA convictions implicated non-US firms.

Jurisdiction is based on two tests. One is that the offending firm is listed on a US stock exchange or otherwise raises capital in the US. The other is that any part of the improper payments such as e-mail grants has gone through a US-based bank.

Proof of such payments is not decided on legal evidence but on accounting standards. If it can be proven that a firm claimed a bribe as a sales commission or entertainment expense, it is guilty of misrepresenting its financial statements to investors. Norway's national oil firm, Statoil ASA, and the German electronics giant, Siemens AG, were convicted for violating these rules. In fact, Siemens set a precedent by being a criminal conviction.

The FCPA also states that firms are responsible not only for the activities of their own employees but also for those of all third-party agents, etc. That vastly increases their risk exposure when doing business in China. Some have described the potential threat as the equivalent of unprotected sex for corporations.

The quantity of corruption has not changed. But its sophistication and complexity has. In China, officials and others no longer ask for brown envelopes or sightseeing trips to Bangkok, Las Vegas and Disney World. They are more likely to request help for their children to attend elite universities, placing friends and family on the payroll or favouring certain partners, consultants or agents with contracts.

Even if such requests appear innocent or nebulous, a bribe is still a bribe. And the smell test still works.

9. The Dodd-Frank Act: Implications for Canadian Foreign Filers with the SEC

Moderator: Bruce N. Futterer, Vice Pres., General Counsel & Secretary, GE Canada
John W. Boscariol, Partner & Head, Int'l Trade & Investment Law Group, McCarthy Tétrault
Brian Chilton, Of Counsel, DLA Piper
Dimitri Lascaris, Partner, Class Actions Department, Siskinds LLP
Ian Putnam, Partner, Stikeman Elliott LLP
Rapporteur: Emily Cole, Associate Counsel, Litigation & Business Law Groups, Miller Thomson

This round table focused on three aspects of the *Dodd-Frank Act* which will have an effect on Canadian companies listed in the United States.

1. Resource Extraction Issuers

Section 1504 of the *Dodd-Frank Act* requires SEC reporting issuers in the extraction industry to disclose any payments made to a foreign government or the U.S. federal government for the purpose of commercial resource development. Note that this includes all payments including legal payments such as taxes and facilitation payments, etc. The payments are to be disclosed in their annual report on a project-by-project basis which could prove to be quite challenging. One of the participants advised the group that they had been trying to seek guidance on what was required and it remained to be seen how onerous this reporting would be.

2. Conflict Minerals

Section 1502 of the *Dodd-Frank Act* introduced a new disclosure obligation on SEC reporting issuers to disclose whether materials that are necessary either to produce their product or for it to be functional originated in the Democratic Republic of the Congo (DRC) or an adjoining country.

Minerals such as tin, gold and tungsten are commonly used in aerospace, electronics, computers, micro-chips and processors and other products, etc. Issuers are required to certify whether their products contain or do not contain conflict minerals and therefore whether they are contributing to the armed conflict in the DRC. If their products contain conflict minerals, issuers are required to file a report with the SEC which discloses not only the products that contain conflict minerals but the due diligence undertaken to inquire into the origin of their products, including the chain of custody.

Section 1502 is not a prohibition against using conflict materials but requires disclosure of the use of conflict minerals such that an investor can make an informed decision. A

comment was made that it was interesting to see the securities laws used for humanitarian purposes.

3. Whistleblower Provisions

The SEC has proposed rules to implement the whistleblower provision mandated by the *Dodd-Frank Act*. The SEC will give substantial monetary awards to whistleblowers that voluntarily provide "original information" about violations of securities law that lead to successful enforcement actions resulting in monetary sanctions exceeding US$1 million. This includes settlements.

The discussion around the whistleblower provisions was quite animated. One issue was whether the introduction of a whistleblower provision together with a bounty payment takes away from compliance programs. On one hand, participants talked about trying to create an environment of compliance through the introduction of compliance programs post Sarbanes-Oxley. Others questioned what was meant by undermining compliance programs and what was wrong with that. The point was made that if someone believes that a compliance system is not good, you should not force them to utilize it. An observation was made that compliance programs are by and large too passive.

There was much discussion about the philosophical divide between whether companies are comprised of good people who continually strive to improve and can become more compliant or whether companies are comprised of bad people who are inherently greedy and are only concerned about making a profit. A comment was made that the problem is located in our corporate law and the structure of corporations such that they have a single purpose which is to earn a profit.

The addition of a bounty is effective not so much because it acts as a carrot to encourage people to come forward and report malfeasances, but that it brings with it resources to address the malfeasances and bring enforcement actions forward.

There was discussion about why it is necessary to pay a bounty. Participants commented the whistleblower provisions ask the informer to put their career on the line. While there is anti-retaliation legislation, the norm is, if you are a whistleblower, you will be let go. There was some discussion about the extent to which people would report under the whistleblower provision given that the payment is only made if the information is "original" and if it results in a successful settlement or prosecution. If whistleblowers are putting their lives at risk they may want more certainty. There was also discussion about the exemptions in director and officer liability policies. There was a query whether the whistleblower who is

a director and officer is in breach of their fiduciary duty. Do they have an overriding duty to report internally first?

10. Corruption abroad by Canadian Charities and NGOs: Does it happen? Should it now be penalized by Canadian Law?

Moderator: Janet Keeping, President, Sheldon Chumir Foun. for Ethics in Leadership
Rosemary McCarney, President & CEO, Plan Canada
Bruce Moore, former Director, International Land Coalition
Archana Sridhar, Asst. Dean, Graduate Program., Faculty of Law, Univ. of Toronto
Rapporteur: Elliot J. Burger, Associate, International Trade and Customs, Bennett Jones LLP

There seems to be little known about whether there is corruption in Canadian NGOs and, if there is, what exactly is the nature of that corruption? For example, is the corruption systemic? Is it transactional?

There is virtually no public discourse about whether there is corruption in Canadian charities. If there is such corruption, it is probably occurring at such a low level that it is below the radar. For example, it was claimed that charities often fall into the practice of paying small facilitation payments, for example, $20, to process a permit faster.

On the other hand, it was noted that there is large-scale corruption of charities in Europe, much more significant than facilitation payments, and there are OECD publications suggesting there are Canadian NGOs involved in corrupt pharmaceutical schemes. It was also suggested that some of the NGOs that are causing the biggest problem are athletic associations, or fly-by-night NGOs that develop in the wake of disasters.

The OECD Phase 3 review of Canada points out that the "for profit" element of the Corruption of Foreign Public Officials Act (CFPOA) prevents that statute from applying to NGOs. One Discussion Leader suggested that the "for profit" provision of the CFPOA should be reconsidered so as to include NGOs, thereby adding a level of accountability. (In passing it was noted that government due diligence process at the front end appears to be a problem: there should be a higher standard to ensure that organizations that receive charitable status are in fact operating in the field as they purport.)
Does the NGO community think that the CFPOA should apply to non-profits? Not surprisingly, Canadian charities think not: they say that it's a very small number of charities that are causing the majority of the problems. The claim was made that the vast majority of large NGOs can account for the use of donations nearly to the penny. So making the law applicable to non-profits would be like taking a sledgehammer to a tiny problem.

The claim was made that a lot of corruption by charities is swept under the carpet in order to reduce the impact on a charity's ability to raise funds.
There was some discussion about the non-profit sector's ability to regulate itself. It was noted that Imagine Canada has launched a governance standard starting with the largest NGOs in an attempt to improve NGO governance from the top down. The first reporting on these accountability and transparency requirements will take place in fall 2011. On the other hand, the ability of the sector to self-regulate is diminished by the fact that the Canadian Council for International Cooperation (CCIC) has been gutted. CCIC's code of conduct includes a mechanism to "whistle-blow", or lay a complaint, but lack of funding heavily hampers the outcome.
So how do we overcome the lack of expertise on accountability for NGOs? It is clear that if charities want a governing organization they need to be less dependent than they were on CCIC.
Notwithstanding objections of the kind noted, there was considerable sympathy for the view that, if there is corruption in NGOs, it should be penalized by Canadian law.

But worries about the consequences of imposing legal responsibility for corruption in projects run by Canadian NGOs were also expressed. Some comments focused on the NGOs' struggle with mission. There is a lot of concern on the part of NGOs about building capacity and allowing for as much local ownership as possible. How this would work with legal responsibility for corruption is unclear. Flying in Canadian experts is a model that does not work. One must consider the tension between accountability and stewardship of money with the balance of building capacity. Most of the partners of Canadian non-profits around the world are local NGOs. They want to develop their capacities, too.

It also has to be remembered that, internationally, Canadian charities do not work by themselves. They work with groups above and below them.

Interestingly, concerns about corruption in NGOs and charities in the developing world can work to the benefit of North American institutions. One example is millions of dollars from Indian millionaires flowing into North American universities. The theory is that giving to these universities also helps their children get in these schools and leads to greater recognition for the philanthropist. Most importantly, they don't want to donate in India, as it is known to be a corrupt country.

Quite apart from concerns about corruption *per se* there were concerns expressed about the transparency and accountability of NGOs. Failures of transparency and accountability may lead to questions of corruption in time. At this point, there is some accountability, for example, in the filings required by law, such as Canada Revenue Agency requires of

charities. But what about access to information requirements?: would a charity feel an ethical imperative to adhere to access to information laws?

One thing is obvious: financial controls and accountability cost money and implementation of them can have a negative impact on a charity's ability to achieve its goals. So, the question arises, how do you achieve a balance amongst enforcing anti-corruption standards and effectiveness, as well as not eroding donor confidence?

11. Perception of corruption in provincial governments

Moderator: Thomas C. Marshall, former General Counsel, Attorney General of Ontario
Ian Greene, Professor, School of Public Policy and Administration, York University
Shelly Jamieson, Secretary of the Cabinet & Head of Ontario Public Service Organization
Janet Leiper, Toronto Integrity Commissioner
Robert MacDermid, Associate Professor, Political Science, York University
Lynn Morrison, Ontario Integrity Commissioner
Rapporteur: Margaret Kim, Student, Ethics, Society, & Law Program, University of Toronto

There were two central questions for this session: First, how important are perceptions? Is it important to address this question in the democracy we currently live in that is relatively "clean"? Second, are the professionals involved in regulating codes of conduct doing any good?

- Perceptions are important. The more the general public perceives elected officials as corrupt, the less the political participation on the part of the public, and the lower the level of trust. A survey of Canadian Provinces and Municipalities to identify levels of perceived corruption would be important to generate meaningful discussion and counter measures.
- One Discussion Leader has counted the conflict of interest stories about elected politicians in newspapers since the late 1980s. The number has gone down significantly in the provinces since the creation of independent ethics commissioners, but not those regarding the House of Commons because that system is flawed.
- In the municipal sphere, Toronto was the first to have a Code of Conduct and Integrity Commissioner. Ethics education is key: last year the Commissioner's office had 298 information requests from the public and 44 from city staff. Codes of Conduct by themselves are not sufficient. Engagement in real ethical problem solving in the many activity areas must be part of any ethics program.
- One Discussion Leader highlighted the danger of stories being hyped up in headlines. In reality, many allegations are not substantiated with accurate facts.
- A Law Society survey found that although trust in "lawyers" as a whole is not high (based on perception), individual lawyers are trusted highly (based on experience).
- Perceptions are important, but citizens need to follow up with action.
- In 2006, the *Public Service of Ontario Act* created clear conflict of interest rules for public servants and ministerial staff. Subsequently, the Ontario public service launched a "Doing the Right Thing" campaign. Purpose: create discussion on right and wrong. A web portal was created with all the relevant information. It is

important to distinguish between knowing all the rules and regulations of ethics vs. actual practice.

- Ethics education is the highest priority of the Integrity Commissioner's Office.
- Ethics education should be mandatory for MPP staffers.
- As indicated in the Annual Reports of the Integrity Commissioner, the office of the Integrity Commissioner receives about 350 questions annually from MPPs and their staff. Answering these questions is an important part of the ethics education process.
- Whistleblowing is a difficult area because of the worry of reprisals. However, Ontario Ministries are very quick to rectify problems identified by whistleblowers.
- In a 2008 survey, 38% of Canadians thought that "quite a lot of politicians are crooked," and 36% thought politicians are "a little crooked." Perceptions of corruption are based on real situations, which is why corruption needs to be tackled.
- We need higher standards regarding conflict of interest, undue influence, lobbying, and campaign financing, and we especially need tougher and more independent enforcement, particularly at the municipal level.

Questions and Discussion

How can we prepare public servants to resist the many incentives for corruption? It is important for Ministers, deputies and their staff to spend a considerable amount of time understanding their ethical responsibilities.

How can we tackle ethics issues at the municipal level? Ideas: Annual ethics certification of elected officials and employees; an annual discussion of progress or lack thereof at TI; train division heads on ethics rules and rely on them to train their staff.

12. Due diligence and effective anti-corruption compliance programmes

Moderator: Peter Dent, Part. & Nat'l Leader, Forensic & Dispute Services, Deloitte & Touche
Ruth Fothergill, Head, Corporate Responsibility, EDC
Chris Mathers, chrismathers inc, former sr. undercover operator, RCMP Proceeds of Crime
Frank McShane, Manager, Corporate Respon. Policy & Ethics, Talisman Energy Inc.
Martin Mueller, VP & Chief Compliance Counsel, Integrity Resource Centre, Nexen Inc.
Joe Zier, Partner, Deloitte Financial Advisory Services
Rapporteur: Moez Bawania, Manager, Financial Advisory, Deloitte and Touche LLP

This panel focused on the effectiveness of anti-corruption compliance programmes as viewed from the perspectives of corporate executives and third-party lenders.

Because they are on the front lines of the fight against corruption, corporations must have strong anti-corruption compliance programmes.

Components of an anti-corruption compliance program

There are several factors that make a compliance program effective, but, above all, organizations must ensure that the "tone at the top" is appropriate and that a consistent "zero tolerance" perspective towards corrupt practices is established at all levels of the organization. In addition, senior executives should ensure their actions are consistent with their messaging to others in the organization, meaning they cannot communicate to middle management that bribery is unacceptable but then pay bribes themselves. Another key factor that makes a compliance program effective is explaining to employees the value proposition related to anti-corruption compliance– for example, to protect the company's reputation and reduce risk to individuals – and incentivizing it similar to other corporate performance metrics. This is likely to be a more successful approach than simply stating that compliance is necessary because "it is the law."

Additional key success factors for effective anti-corruption compliance programmes noted by panelists were: a) independent – and third-party, where possible – evaluations of an organization's approach and methodologies, and b) a well-established whistleblower program.

At a policy level, organizations need to ensure they have a statement of values or code of ethics to deal with corruption-related issues. It was noted that small- and medium-sized entities (SMEs) usually do not have such policies and that they do not often realize that they are accountable for actions of third parties acting on their behalf. To this end, SMEs should

seek specialized anti-corruption advice to understand the extent to which they need to monitor and evaluate corruption risk in their supply chain and provide training to employees to impart a sense of what may or may not be allowed in different markets based on real-life scenarios.

Effective Due Diligence

One component of an effective anti-corruption program is due diligence. The UK Government discusses, as part of its anti-bribery guidance, the idea that due diligence procedures used should be proportional to the risk of bribery in the target area. The panelists generally agreed that this was an important concept for corporations to internalize: to perform due diligence effectively, organizations need to utilize a risk-based approach to leverage the limited resources available to them. Such an approach would, at a minimum, include the following four steps: a) gather information to allow profiling of all geographies, industries, products, channels and business partners, b) identify the risk level for each factor (i.e., each country, industry, product, channel and business partner would have a risk ranking) based on information obtained, c) conduct an initial screening of all business opportunities using a risk assessment tool, and, d) conduct additional due diligence as necessary, focusing greater resources on business opportunities identified as potentially higher risk for corruption. In addition to the above steps, organizations often have third parties provide attestations that they are FCPA-compliant prior to doing business with them.

The panel discussed key success factors of a due diligence program and one that was consistently mentioned was physically sending in a team to the local area to build relationships and meet in-person with key influencers. The team should be staffed with professionals with various skill sets and backgrounds with a common objective of understanding the lay of the land.

Panelists also noted a positive trend regarding the use of automated solutions to fulfill a requirement of anti-bribery laws that can prove to be very costly, that of performance of due diligence on all third parties. Large organizations - such as US technology companies with sales channels in Asia – that have hundreds if not thousands of third party business partners, suppliers and customers are using automated solutions to pose questions to each of their third parties, and, based on the responses collected, the automated solution develops a risk profile for each third party.

Red Flags

Several “red flags” were identified that could lead to a determination during the due diligence phase that a transaction may be of higher risk. These include: a) foreign region

has a reported history of corruption, b) lack of transparency with regard to corporate and government agency structures in the region, c) decision-making power is highly centralized and local business partners "promise" accelerated decision-making, d) persons lacking necessary qualifications occupy senior positions, and, e) local business partners "guarantee" a positive outcome from a bidding process.