

15 March 2012

**CANADA
2012 QUESTIONNAIRE FOR NATIONAL EXPERT RESPONDENTS**

I. NUMBERS AND DETAILS OF FOREIGN BRIBERY CASES, INVESTIGATIONS & ALLEGATIONS

A. NUMBERS

PLEASE NOTE: Foreign bribery cases (and investigations) shall include all cases involving bribery of foreign public officials, criminal and civil, whether brought under laws dealing with corruption, money laundering, tax evasion, fraud, or accounting and disclosure. See Guidelines for definition of "case". Information is requested for foreign bribery cases brought since the OECD Convention became effective in your country.

Please also include information on investigations or cases involving parent companies charged for bribery committed in foreign countries by their subsidiaries, agents and other intermediaries.

1. PENDING CASES

- a. Total number of pending cases: **1**
- b. Cases pending brought since 1 January 2011 (NEW): **0**

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

- a. Total number of concluded cases: **2**
Please list all concluded foreign bribery cases brought since the OECD Convention became effective in your country.

R. v. Hydro Kleen Group Inc. (convicted January 2005)
R. v. Niko Resources Ltd. (convicted June 2011)

- b. Cases concluded since 1 January 2011: **1**

3. TOTAL CASES (Sum of 1. and 2. above): **3**

4. INVESTIGATIONS

Please provide available information on 2011 government investigations of allegations of bribery of foreign public officials:

- a. Total number of known investigations under way in 2011: **34**
- b. Number of those investigations begun since 1 January 2011:

The RCMP confirmed in January 2011 that there were 23 investigations under way at that time. The current number, 34, was confirmed by the RCMP and Government of Canada at the OECD Anti-Bribery Working Group Meeting on March 14, 2012. Since we do not know how many, if any, investigations were dropped in 2011, the best estimate would be that at least 11 investigations were initiated between January 2011 and March 2012, and possibly more.

- c. Developments during 2011: If possible, please provide information on any investigations that (1) turned into prosecutions or (2) were dropped in the course of the year.

(1) Investigations turning into prosecutions: 1
(2) Investigations dropped: Not known

B. DETAILS ABOUT CASES, INVESTIGATIONS & ALLEGATIONS

1. **PENDING CASES:** For each pending case that was not included in last year's country report please list if possible the following:

The only pending case is R. v. Karigar, which was reported last year. Additional information has come to light regarding the matter, as follows:

1. The accused has brought a motion to dismiss the charges for lack of jurisdiction on the basis that the matter does not have a "real and substantial connection with Canada" (i.e., the Canadian test for criminal jurisdiction). The motion will be heard by the Court in May 2012.

2. The trial has been scheduled to commence in September 2012.

3. A recent news report in the Globe & Mail has provided extensive factual background on the case. See "Canadian accused of bribing cabinet minister in India is a test case for Canada's foreign anti-corruption law", by Greg McArthur, David Montero and Stephanie Nolan, at

<http://www.theglobeandmail.com/news/politics/canadian-accused-of-bribing-cabinet-minister-in-india/article2323342/>

The alleged bribe involved payments to Mr. Praful Patel, India's Minister of Heavy Industries and the Minister of Aviation at the time of the alleged offence. The accused is alleged to have paid CAD \$250,000 to Mr. Patel in 2007 in an effort to obtain a USD \$100 million security contract with Air India. The accused is alleged to have conspired with Mr. Hasan Gafoor, the then Director of Security for Air India and subsequently Mumbai Police Commissioner.

2. **CONCLUDED CASES:** For each concluded case that was not included in the last country report please list if possible the following:

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

R. v. Niko Resources Ltd.

- b. Is this a major case? (See Guidelines for definition.) Yes No

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

- c. Is it a civil or criminal case?

Criminal

- d. Summary of principal charges, including name of the country whose officials were allegedly bribed

The company pleaded guilty to having given a luxury SUV valued at approximately \$190,000 and paid for personal travel for the Minister of Energy of Bangladesh in relation to the negotiation of a gas purchase contract and to obtain favorable treatment in relation to claims for compensation following an explosion at one of Niko's gas wells.

e. Disposition of case, including penalties or other sanctions imposed including: Please indicate whether

- penalties against individuals or companies;

The court imposed a criminal fine of \$8,260,000, plus a 15% victim surcharge, for a total of \$9.5 million.

- court decision or settlement out of court:

Guilty plea and decision of the Court.

- requirements for compliance programmes imposed, including provisions for verification

In addition to the fine and victim surcharge, the Alberta Court of Queen's Bench imposed a probation order on the company requiring that, *inter alia*, the company adopt a detailed anti-corruption compliance programme, that it appoint an independent auditor to review implementation of the programme and report annually to the Court, the Royal Canadian Mounted Police and the Attorney General of Alberta.

- if settlement

i. was there court approval?

ii.

This was a guilty plea accepted by the Court.

iii. was there public consultation?

The Canadian criminal law system does not provide for public consultation in connection with the settlement of criminal charges. The settlement (plea and joint recommendations on sentence) is presented to the Court, and the Court decides whether it is acceptable and in the public interest to adopt it in its decision. The final decision is made by the Court.

iv. was the agreement published with accompanying explanation of the terms?

"Settlements" are not published. Rather, the terms of the "settlement" are presented to the Court as agreed facts and an agreed recommendation on disposition. The Court makes the final decision. Canadian Courts are not bound by the terms of any "settlement" between the prosecution and the accused.

f. To your knowledge were there any obstacles, holding up the case? If so, please explain:

As with many complex cases, there was considerable delay between the initiation of the investigation and the charge process. In this case, there was also some delay as the prosecution and defence counsel were having discussions prior to the plea being entered. While details of those discussions are not public, it is evident from both the Agreed Statement of Facts file with the Court, as well as submissions of counsel at sentencing, that the issue of jurisdiction was a subject of those discussions.

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

We understand that there has been a separate investigation of the matter in Bangladesh.

NOTE: Please state source of information for each case.

3. **INVESTIGATIONS UNDER WAY IN 2011:** Please provide any available details about the following:

(a) **SNC-Lavalin International**

The investigation was made public in September 2011 when the RCMP executed a search warrant at the offices of SNC-Lavalin in Oakville, a suburb of Toronto.

The allegations are that SNC-Lavalin made payments to a Bangladeshi official with regard to a World Bank funded bridge construction project in Bangladesh. Further information regarding this matter may be found at <http://blogs.wsj.com/corruption-currents/2011/09/02/mounties-raid-snc-lavalin-in-corruption-probe/>

(b) **Blackfire Exploration Ltd. (reported in 2011)**

The matter was initiated following a complaint to the RCMP by Mining Watch Canada in March 2010 (see < <http://www.miningwatch.ca/en/groups-file-documentation-with-rcmp-canadian-mining-company-s-involvement-mexican-corruption-case>>)

Recent developments include the execution of a search warrant by the RCMP at the company's corporate offices in Calgary, Alberta.

(See CBC News <http://www.cbc.ca/news/canada/calgary/story/2011/08/29/calgary-blackfire-rcmp-probe.html>>)

NOTE: Please state source of information for each investigation.

4. **ACCESS TO INFORMATION:** Information available about foreign bribery cases

- a. Is information on numbers of cases accessible?

The best information is that confirmed by the RCMP and Government of Canada on March 14, 2012 at the OECD Anti-Bribery Working Group to the effect that there are currently 34 active investigations. Other than these periodic reports, information regarding the number of active or discontinued cases is not generally available.

- b. If not, please indicate the official or other reasons why not:

RCMP officials cite the need to maintain confidentiality of criminal investigations and a concern for potential litigation claims in the event of adverse publicity to the targets of the investigation.

- c. Is information on case details accessible? **No.**

If not, please indicate the official or other reasons why not:

As a matter of historical practice, Canadian law enforcement officials generally do not disclose information regarding the subject of a criminal investigation until after charges are laid.

As noted above, the number of current investigations confirmed by the RCMP is 34. The author is aware of two matters that have been brought to the government's attention as a result of voluntary disclosures.

In addition to investigation and enforcement of the CFPOA, the RCMP Anti-Corruption Unit has also taken an active role in promoting education and prevention in relation to anti-corruption, including working with government departments and agencies, industry, trade associations, the legal community and others to promote greater familiarity with the CFPOA.

5. Recommendations on the basis of case related information

The author believes that the Corruption of Foreign Public Officials Act should be amended to introduce nationality jurisdiction with regard to the actions of Canadian companies and their subsidiaries. Under the current situation, the prosecution is required to devote scarce resources to establish that the facts disclose a "real and substantial link to Canada".

II. UPDATE ON INFORMATION ON THE LEGAL FRAMEWORK AND ENFORCEMENT SYSTEM

The comments made by the author in the 2011 report on the potential weaknesses in the legal framework and enforcement system and areas for improvement remain valid to this day.

Despite those weaknesses, as a result of the efforts of the RCMP and prosecutorial authorities, there has been a substantial increase in enforcement activity in 2011 relative to previous years. This increase is, in part, due to the coming to fruition of enforcement actions taken in previous years that were not publicly known. However, the number of active investigations has increased by almost 50% over the past year (34 reported in Marcy 2012, compared with 23 reported in January 2011). In addition to the conviction of Niko Resources Ltd. and the execution of search warrants against SNC-Lavalin International and Blackfire Exploration Ltd., the author is aware of several new matters and enforcement actions being taken, including two voluntary disclosures.

It is also important to note that the Government has taken significant steps to review various aspects of the administration and enforcement of the CFPOA during the past year with a view to further improvements. In particular, in the autumn of 2011 the Department of Foreign Affairs and International Trade initiated a consultation with informed stakeholders in the business, legal, NGO and government communities and solicited views on a number of issues including: possible amendments to the CFPOA, voluntary disclosure, facilitation payments, bribe solicitation, awareness raising, small- and medium sized enterprises, sectoral initiatives and education and training.

Finally, in February 2011, Parliament adopted the *Freezing Assets of Corrupt Foreign Officials Act*, S.C. 2011, c. C-10. The Act allows the federal Cabinet, in circumstances of internal turmoil or political uncertainty in a foreign state, to issue an order to freeze the assets in Canada of a person where the foreign state has advised the Government that the person has misappropriated property of the foreign state or acquired property inappropriately by virtue of their status as a foreign official or their relationship to a foreign official. The authority to issue such orders is discretionary and the Government must be satisfied that such action is "in the interest of international relations". The Act was adopted during the "Arab Spring" events in 2011 and does not appear to have yet been invoked.

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

Yes

Report prepared by:

[Original Signed by Milos Barutciski]

Name of respondent: **Milos Barutciski**
Affiliation: **Director, Transparency International Canada**
Professional experience: **Partner with Bennett Jones LLP**
Member of the BIAC Anti-Bribery Task Force since 1996

Appendix

List of persons consulted (with affiliation):

Cheryl Cruz, Department of Foreign Affairs & International Trade
Insp. Gordon Drayton, RCMP International Anti-Corruption Unit
Staff Sgt. George Prouse, RCMP International Anti-Corruption Unit
Cpl. Lloyd Schoepp, RCMP International Anti-Corruption Unit
Marke Kilkie, Public Prosecutions Service of Canada
Steven Johnston - Crown Attorney, Specialized Prosecutions Branch, Alberta Justice, Calgary, Alberta

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

R. v. Niko Resources Ltd., Agreed Statement of Facts and Probation Order

Media reports (see above)

Interviews and meetings with:

- RCMP International Anti-Corruption Unit,
- Public Prosecutions Service of Canada,
- Alberta Justice,
- defence counsel, and
- corporate compliance counsel.