

2008 TI Progress Report Card on OECD Convention Enforcement - Canada

Date: May 9, 2008

I Current Status of Enforcement.

A. TOTAL FOREIGN BRIBERY CASES, PENDING AND CONCLUDED

Total number : One.

B. PENDING CASES

Total number of pending cases: None

C. CONCLUDED CASES

Total number of concluded cases: One

Cases concluded since 1 January, 2007: None

- (1) Name of case – R. vs. Hydro Kleen Group Inc, its president and one employee
(no major multinationals involved)
- (2) Is this a major case? - No.
- (3) Date and court where filed – Alberta Provincial court, 2002
- (4) Civil or criminal case – criminal
- (5) Summary of principal charges – payments allegedly made of about \$28,000 to a US immigration official in Calgary International airport to secure preferential treatment over competitors in terms of gaining access into the United States in order to do business there.
- (6) Penalties sought – fines

- (7) Disposition of case – At trial in January, 2005, the company pleaded guilty and was convicted and fined \$25,000 (which is generally in line with other similar cases of economic crime). The case against the two officers of the company was stayed.
- (8) To your knowledge has a case involving the same facts or defendants been brought in another country? – We believe the US immigration official was charged and convicted in a United States court of accepting a bribe.

D. INVESTIGATIONS UNDER WAY

Total number of known investigations: Don't know.

Number since January 1, 2007: Don't know.

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

In 2002 a Canadian company, Acres International, was convicted in the Lesotho High Court of having paid bribes to a Lesotho government official in relation to the Lesotho Highlands Water project. The judgment was subsequently upheld (in part) on appeal. A review, we understand, was commenced shortly thereafter by the Canadian authorities but was subsequently terminated prior to any investigation as the events in question were determined to have preceded the enactment of the *Corruption of Foreign Public Officials Act* (CFPOA).

There have evidently also been several investigations of other Canadian companies relating to possible infractions under the CFPOA since the legislation came into force in Canada in February, 1999 and we understand that a number of investigations of potential CFPOA offences are currently in process.

E. ACCESS TO INFORMATION

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

Prosecutions are a matter of public record and would also be reported in detail in the annual report to Parliament that the Minister of Foreign Affairs and International Trade and the Minister of Justice are required by law to prepare on the implementation of the

OECD Convention and on the enforcement of the Corruption of Foreign Public Officials Act (the CFPOA).

The eighth annual report to Parliament, which was tabled in Parliament in November, 2007, reported that, other than the Hydro Kleen case previously referred to, there had been no other prosecutions under the Act (either federally or provincially) and we understand that no prosecutions are currently outstanding.

F. SERIOUS ALLEGATIONS

Total number of serious allegations: - Not aware of any.

We are not aware of any serious allegations of foreign bribery or related offences by companies or individuals based in Canada that (a) have been published in reputable international or domestic publications and (b) with respect to which, as far as we know, no investigation or prosecution has been undertaken.

II Actions to Promote Enforcement

A. Organization of Enforcement

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

NO, but, with Canada's ratification of the United Nations Convention Against Corruption in October, 2007 and as part of Canada's increasing efforts to fight international corruption, two seven-member Royal Canadian Mounted Police (RCMP) international anti-corruption teams (IACTs), under the leadership of a senior RCMP officer in Ottawa, are currently in the process of being formed within the Commercial Crime Branch of the RCMP. The role of these IACTs will be to focus on the detection, investigation and prevention of international corruption such as bribery, embezzlement and money laundering.

Note that responsibility in Canada for criminal law enforcement rests concurrently with federal, provincial and local law enforcement agencies (i.e., police forces), all of which have authority to carry out an investigation in relation to the CFPOA. However, since the CFPOA is a federal statute and the RCMP has a specialized Commercial Crime division (soon to include two specialized international anti-corruption teams centrally coordinated by the RCMP Commercial Crime Branch at RCMP headquarters in Ottawa) and acts under contract from the municipal and provincial police in most regions (other than Ontario and Quebec), the RCMP generally has federal investigative responsibility for the

CFPOA and would also track CFPOA cases, if any, being handled by other Canadian police agencies.

Although the two IACTs referred to above will be regional (one located in Ottawa and the other out west in Calgary), they will work closely with one another as well as with other foreign enforcement bodies and also with Canadian partners such as the Department of Foreign Affairs and International Trade (DFAIT) and Justice Canada. Functional oversight and co-ordination of their activities will be provided by a dedicated senior RCMP officer – the Officer in Charge of Sensitive Investigation and International Corruption – a position established by the RCMP in early 2005.

The two teams will gather intelligence and identify tactical targets for investigation. They will also serve as a preventive anti-corruption body, gathering and disseminating knowledge, encouraging appropriate anti-corruption policies and assisting foreign partners in the international fight against corruption

Investigations under the CFPOA will constitute a significant aspect of the IACT mandate and, in addition, the full resources of the Commercial Crime Branch (some 450 officers and support staff) will be available to support their activities, as required. This “dedicated resources” approach will allow, in future, for corruption cases to be thoroughly addressed without stretching resources across other ongoing investigations and should lead to greatly enhanced activity in Canada in the area of detection, investigation, prosecution and prevention of offences committed under the *CFPOA*.

*If (and to the extent that) foreign bribery enforcement is not centralized, what level of coordination and supervision is provided by the Canadian government for foreign bribery enforcement? - **SATISFACTORY***

Explanation for choice (See comments above).

B. Complaint Procedure

*How would you assess the Canadian government’s efforts to provide publicly-known and accessible procedures for reporting foreign bribery allegations, such as hotlines and websites? - **SATISFACTORY***

Explanation for choice:

- Under the Canadian system of criminal law enforcement, complaints are not made to prosecutors (who have no authority to investigate or lay charges or to

direct that an investigation take place or that a charge be laid). They are usually made to a law enforcement agency, such as the local police, the provincial police or the Royal Canadian Mounted Police (RCMP) - either in its capacity as a federal law enforcement agency or in its role of providing, under contract, law enforcement services in all but two of the provinces.

- Investigations by the police are usually the result of a complaint received from an injured party or, in the case of foreign bribery as a result of information received from a government or police official, an NGO or some other source such as a newspaper report. In this regard, the RCMP Commercial Crime Program carries out a comprehensive daily media scan.
- The RCMP also has around 35 liaison officers located in 25 strategic locations around the world who are briefed on foreign bribery and the CFPOA before they leave on foreign assignment. Reports from these officers back to the newly created Officer in Charge of Sensitive Investigation and International Corruption regarding suspicious transactions in the region for which they are responsible play an important role in helping to detect bribery of foreign public officials.
- In addition, the RCMP operates a web site called “Reporting Economic Crime On-Line” (www.recol.ca) where complaints can be made by anyone on-line, although it does not appear that that this mode of communication has to date generated anything of significant substance.
- Canadian government agencies, such as the Canadian International Development Agency (CIDA) and Export Development Canada (EDC), who provide money in support of international contracts, are also valuable potential sources of information.
- CIDA has in place a Protocol for Dealing with Allegations of Corruption which outlines internal procedures for assessing and reporting allegations of corruption to the relevant Director and the Director of the Internal Audit Division for appropriate action. The Protocol ensures a thorough assessment of the allegations regarding CIDA financing so that senior management can ascertain whether 'credible evidence' of a violation of the CFPOA has occurred. If the allegations are substantiated, then the Protocol provides for law enforcement authorities to be informed.
- In 2004, EDC introduced its Anti-Corruption Policy Guidelines which outline the measures EDC will apply to combat corruption, including a section on disclosure to law enforcement authorities. This has been further developed into an internal procedural document for EDC to follow when faced with this situation.

- The Trade Commissioner Service of DFAIT has developed specific instructions to foreign representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Canada. On March 1, 2006, a broadcast message was sent to all staff of the Department both in Canada and overseas advising employees of the Department's policy regarding Canadian companies and individuals involved in cases of corruption and bribery. The message mentioned the OECD Convention and the *CFPOA* and indicated that staff who have concerns regarding the conduct of Canadian companies or individuals should bring these concerns to the attention of their supervisors, the Post Support Unit or to the Values and Ethics Division of DFAIT.
- We are not aware of any such allegations having been reported either within CIDA, EDC or DFAIT or by such organizations to the law enforcement authorities. Consideration might well be given by such government agencies to possibly involving law enforcement agencies at an earlier stage of the process as their experience and expertise could be helpful in the determination as to whether the evidence is or is not "credible."

C. Whistleblower Protection

How would you assess the level of whistleblower protection in Canada, in law and in practice, in the public sector for foreign bribery complaints? - **SATISFACTORY**, since the Criminal Code of Canada was amended in 2004 and the *Public Sector Disclosure Protection Act* (PSDPA) was subsequently enacted and came into effect a year ago.

Explanation for choice:

- In 2004, the Canadian Criminal Code was amended to protect employees of both the public and private sectors from reprisal from their employer when reporting breaches of provincial or federal law (such as the *CFPOA*) to a law enforcement agency. This amendment provides some comfort to, and should serve to encourage, employees in both the public and private sectors to blow the whistle if they have a serious suspicion of the payment of a bribe to a foreign public official.
- The following year, the Canadian government enacted specific whistleblower protection legislation applicable to public sector employees (the *PSDPA*), and the Act subsequently came into force on April 5, 2007, after amendments to

increase the protection offered to public servants were passed in the Federal Accountability Act. The purpose of the *PSDPA* is to encourage employees in the public sector to come forward if they have reason to believe that serious wrongdoing has taken place (which could include the payment of a bribe to a foreign public official) and to prohibit reprisal against them if they do so. It also provides a fair and objective process for those against whom allegations are made.

- In addition, the *PSDPA* establishes the Public Sector Integrity Commissioner as an agent of Parliament and gives the Commissioner a mandate to conduct independent reviews of disclosures of wrongdoing, issue reports of findings and provide annual and special reports to Parliament.

D. Statutory and Other Legal Obstacles

Are there significant inadequacies in the legal framework for foreign bribery prosecutions in Canada? **YES**, there is one in particular, the absence of “nationality” jurisdiction. There are also, as noted below, some other issues and concerns.

- inadequate definition of foreign bribery - A CONCERN

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

This “for profit” requirement in the Canadian legislation was raised as an issue in the Phase 2 review of Canada, it being noted by the Working Group that the Convention does not draw a distinction between transactions that are “for profit” and “not for profit”. Recommendation 5(b) in the Working Group’s Phase 2 Report of March, 2004 recommended that Canada consider amending the part of the definition of “business” in the CFPOA that results in the requirement that the purpose of the bribe be for obtaining an advantage in the course of business “for profit”. (Convention, Article 1).

In its written report of March, 2006 on actions taken to implement this, and other, recommendations, Canada reported that, following careful consideration, and since the title of the Convention refers to “Business Transactions” and business transactions imply a profit motive, it would retain a definition including “for profit.” Canada considered this definition of “business” in the *CFPOA* to be consistent with the requirements of the Convention, both in language and in spirit, since the title of the Convention refers to “Business Transactions” and

business transactions imply a profit motive. Therefore, in Canada's view, the Convention applies to transactions that are carried on to generate some form of profit.

In their Follow-up Report of June 21, 2006 on the Phase 2 review of Canada, The Working Group noted that the Convention does not draw a distinction between transactions that are "for profit" and "not for profit" and that, therefore, the Working Group continued to consider that this additional criterion imposed by the *CFPOA* could create a problem in the enforcement of the foreign bribery offence in Canada, notably as many non-profit organizations operating internationally are based in Canada. They therefore concluded in their Report that Recommendation 5(b) requires further consideration from Canada.

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

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

- **short statutes of limitation - NO.** There is no statute of limitation for foreign bribery offences

- **jurisdictional limitations - YES**

Canadian courts apply "territorial" jurisdiction in criminal matters and the interpretation by the courts in this regard is not overly broad. A significant portion

of the activities constituting the offence must take place in Canada and there must be a “real and substantial link” between the offence and Canada.

Where specifically provided by statute, Canadian courts also have jurisdiction to prosecute Canadian nationals for offences committed outside of Canada. The Canadian government, however generally only applies such “nationality” jurisdiction to those specific offences where there is universal agreement, confirmed by treaty or international consensus, that the specific act is recognized as a criminal offence and should be prosecuted on the basis of nationality (for example, war crimes, hi-jacking and terrorism). It could be argued, however, that there have been some exceptions to this requirement (for example, bigamy and child sex tourism).

Although, following ratification of the OECD Convention, the US, the UK and, more recently, Ireland, have amended their laws to add jurisdiction based on nationality, Canada has not on the basis that to do so would not be “according to the same principles” (as per Article 4.2 of the Convention) that Canada applies to the extension of jurisdiction based on nationality to other offences.

Canada is now evidently the only country not to have adopted “nationality” jurisdiction in its legislation implementing the OECD Convention and with every other country having done so, there would now appear to be a clear “international consensus” among the parties to the Convention that this should be done. In the opinion of most experts, the Canadian government should promptly rectify this omission.

This view is shared by the National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, a multi-stakeholder group established by the government which, in 2006, held a series of roundtables across the country culminating in a detailed written report which was presented to the government in March of 2007. The Report specifically recommended that, “in the interest of harmonizing Canadian law with the best practices of other OECD countries, reducing uncertainty as to the scope of that law and to address recent criticism by the OECD, the Government of Canada should amend the CFPOA to clarify that it applies extraterritorially to Canadian nationals”.

The Canadian government, through an interdepartmental process, is developing a response to the Advisory Group report that will be tabled in Parliament.

We understand that the government will likely accept this recommendation and will then proceed to adopt “nationality” jurisdiction. We can only hope that this will be done in the very near future as there appears to be no valid reason for the government’s continued apparent reluctance to do so.

- **lack of criminal liability for corporations - NO**
- **inadequate sanctions - NO**
- **additional inadequacies or concerns**

Canada's apparent reservation of an exception to Article 5 of the Convention with respect to investigation and prosecution of a CFPOA offence where "proper" considerations of "national economic interest, the potential relations with another state, or the identity of the natural or legal entities" are involved. This could allow certain cases of foreign bribery to escape investigation and prosecution.

E. Political control over enforcement actions / Independence of prosecutors

Are you aware of any instances where a foreign bribery investigation or prosecution has been terminated by political decision-makers? - NO.

Some Comments on the separation of powers in Canada relating to investigation and prosecution and on some of the safeguards in place that deter political interference:

- Law enforcement agencies in Canada have the responsibility for the laying of charges against an accused. In this regard the RCMP, the principal investigative agency with respect to foreign bribery, operates independently from Parliament and is not subject to political influence or political commitment in its determination of which cases it will investigate and when it will lay charges.
- With respect to prosecution, the Attorney General of Canada has specific, but concurrent with provincial Attorneys General, jurisdiction to institute and conduct prosecutions of offences under the CFPOA and the Federal and provincial Attorneys General enjoy a good working relationship in determining who should prosecute in a particular case.
- In determining which cases to prosecute, the Attorney General (usually through local Crown Counsel) exercises a broad discretion in the public interest. Among the list of public interest factors to be considered, as set out in the Federal Prosecution Services Deskbook, is "whether prosecuting would cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest."

- Although no one at the political level in Canada is involved in decisions by crown counsel relating to whether or not to prosecute or to continue with a prosecution and Crown prosecutors are generally considered to be independent and free from political influence, there is a perceived risk that the above factors required to be considered in the public interest could result in a decision not to prosecute in very sensitive cases. Since 2004, however, a prosecutor is expected to provide written reasons why he or she does not proceed with a case.
- In December, 2006, the Public Prosecution Service of Canada (PPSC) replaced the Federal Prosecution Service, which was part of the Department of Justice. The PPSC is headed by the Director of Public Prosecution, who acts under and on behalf of the Attorney General of Canada and reports to the Parliament of Canada through the AG. By law, the Attorney General can only give instructions to the Director in writing to refrain from or discontinue prosecution and those instructions must be published in the Canada Gazette.
- Not surprisingly, a specialized office with responsibility for both investigating and prosecuting foreign bribery cases such as the Serious Fraud Office model in the UK, Australia and New Zealand (where prosecutors direct serious crime investigations), has been rejected in Canada in favour of preserving the segregation of authority between the police – federal, provincial and municipal (who investigate) and Crown prosecutors – federal and provincial (who prosecute).

F. Actions Needed in Canada

1. adoption by the Canadian government of “nationality” jurisdiction in addition to the existing “territorial” jurisdiction. This would no doubt, as per Article 4 of the Convention, be more effective in the fight against bribery of foreign public officials by permitting Canadian courts to hold Canadian nationals accountable for their illicit actions outside the country. This could be of particular benefit in reaching the activities of foreign subsidiaries where Canadian nationals are involved. As mentioned in Section D above, there is now some reasonable expectation that the government will proceed in the fairly near future to amend the CFPOA to adopt nationality jurisdiction in response to the recommendation to that effect put forward a year ago in a report from a series of Roundtables organized by the government itself.
2. greater efforts within government agencies involved in foreign countries or with foreign trade initiatives to report up the line, and ultimately to enforcement agencies, information relating to suspicions or allegations of bribery so as to increase the number of investigations being carried out and

thereby increasing the likelihood of further prosecutions of Canadian companies under the CFPOA.

3. consideration to be given within the Canadian government to amending the CFPOA to eliminate the present requirement that the transaction must be “for profit” and/or to placing this issue of whether “not-for-profit” transactions should or should not be covered by the Convention, on the agenda for discussion in Phase 3.
4. greater efforts to promote anti-bribery compliance programs in Canada among small and medium size businesses (SME’s).

G. Enforcement Trends

How would you assess the current level of foreign bribery enforcement in Canada?

- **SATISFACTORY**

Did the Canadian government’s enforcement efforts increase since last year?

YES, there was “**INCREASED ENFORCEMENT**” - **See Section IIA**

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