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Foreign corrupt practices: issues and developments in the Canadian context

Among OECD countries, Canada has historically been perceived to be 'soft' in combatting foreign corruption activity. In response Canada ratified the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions on 17 December 1998. Shortly thereafter, on 14 February 1999, Canada passed the Corruption of Foreign Public Officials Act (the 'Act'), thereby implementing Canada's treaty obligations with respect to foreign corruption. The centrepiece of the Act is section 3 which contains the prohibition against bribing foreign public officials.

There is a practical and very real difference between enacting law and its enforcement. Thus, although Canada has had a Foreign Corrupt Practices Act (FCPA) law on its books the reality is that for the decade following passage of the Act there were no real efforts made to enforce it. In response to further criticism in 2008 the Royal Canadian Mounted Police (RCMP) created a tactical unit dedicated to prosecutions under the Act.

The recent increase in enforcement activity in Canada has garnered significant media attention. In addition to the recent charges laid against former SNC Lavalin executives (including its former CEO), 2011 saw the first significant prosecution to that point in time in the case of *Niko Resources*. In this case, Niko Resources ultimately plea-bargained for a $9.5m fine for paying and delivering a Toyota Land Cruiser to the Minister for Energy and Mineral Resources of Bangladesh.

Moreover, the law in Canada on foreign corrupt practices is bound to be clarified (hopefully) in the first half of 2013 as an Ottawa court is hearing the matter of *Regina v Karigar*, an Indian-born Canadian citizen who has pleaded not-guilty to charges that he violated the Act. Closing arguments are expected to begin in March 2013 [at the time of writing]. The prosecution alleges that Mr Karigar funnelled a $250,000 bribe to Praful Patel, India's Minister of Heavy Industries and former Minister of Aviation. According to a *Globe and Mail* report, the charge relates to Mr Karigar's work on behalf of a high-tech security company that was pursuing a $100m contract with Air India for a facial recognition security system.

International foreign anti-corruption watchdog Transparency International has issued a report that Canada has improved its foreign anti-corruption enforcement and the *Vancouver Sun* published this headline: 'Canada among "most improved" in anti-bribery enforcement: Report' (5 September 2012). But the consensus still appears to be that Canada can, and should, do more to combat foreign corruption, as a *Globe and Mail* headline attests: 'Canada must do more to fight bribery' (12 September 2012).

In the result, the risk of an FCPA prosecution under the Act is more real than ever. According to reliable sources there are currently about 40 ongoing active FCPA investigations afoot in Canada. Accordingly, companies need to be aware of the Act and implement procedures to decrease the risk of investigation and prosecution both in Canada and abroad.

The design of the Canadian Act

There are a few particularly noteworthy elements to the Act:

- There is no maximum fine.
- There is no limitation period to a prosecution under section 3 (the *Niko*

Resources prosecution was preceded by a six-year investigation).

- Authorities can obtain wire-tap warrants to investigate.
- A bribe is defined broadly as obtaining or retaining an advantage in the course of business. This wording is intended to cover bribes to secure business or an improper advantage in the course of business.
- The Act applies to both corporations and individuals.
- When prosecuting a corporation, the general principles of corporate criminal liability including those in sections 22.1 and 22.2 of the Criminal Code will likely apply, which means the activities of the senior officers of a company will become crucial to the prosecution and defence of charges under the Act.
- The Act also refers to a situation where a person *directly or indirectly* gives, offers, or agrees to give or offer a loan, reward, advantage or benefit of any kind. This wording is of course critical and in particular the use of the word *indirectly*. Bribes can be deemed to be made through an agent.
- The Act also contains built-in defences: for example, *facilitation payments*, are permitted under the Act, which is not the case under UK Bribery Act. However, caution should be used when making such payments since it can be difficult to distinguish a bribe from a facilitation payment under the Act. Proportionate and bona fide hospitality or 'reasonable business expense' for promotion, demonstration, explanation of a product are not bribes under the Act, and neither are payments which are lawful in the foreign jurisdiction. Proof of legality should be demanded in these cases.
- The UK Bribery Act has a unique offence of a commercial organisation failing to prevent a bribe from occurring (ie, essentially an offence of negligence). It is, however, a defence if a commercial organisation can show that it had adequate procedures in place to prevent persons associated with it from bribing. Although the Canadian Act does not contain an explicit due diligence defence, bribery under the Act requires the prosecution to prove intent with the result that the due diligence of a company may constitute critical evidence to counter a prosecution contention that a company, through the actions of an agent or rogue employee, had the requisite intent to bribe a public official.

The centrality of a properly conducted internal investigation

In January 2013, Griffiths Energy International Inc, an oil and gas company based in Calgary, Alberta, entered into a plea agreement and accepted a fine of $10,350 in anticipation of charges being formally laid under the Act. As part of the Agreed Statement of Facts, Griffiths admitted to entering in a consultancy agreement to pay $2m to the wife of the Chadian Ambassador to Canada (located in Washington), which prosecutors alleged constituted a bribe to obtain rights to explore and develop oil and gas reserves in Chad. The fine was relatively low – due in large part to Griffiths' cooperation during the police investigation. Indeed, the bribe was discovered by a new management team conducting due diligence prior to an initial public offering. An internal investigation was initiated by a special committee of Griffiths' new board and conducted by independent counsel, which led to voluntary self-reporting to law enforcement authorities in *both* Canada and the United States (Agreed Statement of Facts, *The Queen v Griffiths Energy International Inc*, Alberta Court of Queen's Bench, 14 January 2013).

The Griffiths special committee (comprised entirely of the independent members of the board) instructed an independent law firm to conduct a: 'robust, credible and independent' investigation into not only the circumstances surrounding the subject consultancy agreement but also in respect to any other information relating to any other potentially improper payments. In the course of the investigation hundreds of thousands of pages of hardcopy and electronic records were collected and reviewed and 31 individuals were interviewed, including current and former employees, third-party consultants, external lawyers, and current and former government officials in Chad.

The *Griffiths* case demonstrates that the proper conduct of an internal investigation may be very beneficial in mitigating what would likely have been a harsher sentence and/or in discovering internal procedural/policy gaps that can be proactively addressed to avoid corruption (and corruption charges) in the future. However, certain steps should be taken and various issues carefully considered before initiating an internal investigation. A preliminary strategy will be needed that inevitably involves, but is of course not limited to, the following issues:

- Who should have independent representation? In most cases counsel will need to be appointed to represent the company, the primary shareholders, senior management and, if the business enterprise is a reporting issuer, then perhaps to advise the Board.
- Who will be retained to conduct the investigation so that a coherent, cost effective, hopefully joint investigation and response can be developed? Will there be a joint defence agreement? What will be the terms of that agreement? Who will be invited to become party to it?
- Who will lead the conduct of the internal investigation? Clear lines of authority and reporting must be established at the outset. Note that in-house counsel will almost always be ill suited to conduct the internal investigation because as in-house counsel often provides both business and legal advice it will be difficult for in-house counsel to preserve privilege particularly if in-house counsel's work product is shared with auditors and management. Furthermore, government agencies may not view in-house counsel as sufficiently independent or, worse, as compromised or complicit.
- All investigations should be driven by the circumstances giving rise to the need to investigate with the result that the commissioning counsel or client will need to set clear investigative goals, timelines and investigative standards at the very outset.
- It is important and entirely appropriate that employees be advised of their rights and obligations if contacted by government agents and that separate counsel be appointed by the company to provide this service. Questions will inevitably arise as to whether individual employees will be entitled to independent counsel and whether such employees will be indemnified by the company for such costs. Generally, there may be many advantages to key employees being represented by separate counsel, particularly by counsel with experience in the conduct of complex investigations who are prepared to work within the framework of a carefully designed joint defence agreement. While acting solely in the interest of the employee, independent employee counsel can prepare a key employee to be interviewed and gain a deeper understanding of the entire matrix of the facts and legal issues within the privileged confines of a collaborative joint defence agreement.
- Pre-indictment advocacy: the adverse consequences of indictment for foreign corruption (and the civil and/or administrative sanctions that may follow) can be devastating to the business enterprise and its personnel. Each case will be assessed individually but companies will inevitably consider whether or not a detailed factual and legal submission should be made to government to avoid sanctions taking into account that such a submission will necessarily provide the government with a guideline to the defence case. Consideration should be given to whether to seek a prior assurance that such a submission will not be treated as a waiver of work product or solicitor client privilege. The consideration of whether or not to make a pre-indictment submission will take into account whether an offence has been committed, whether the operating mind of the company or an employee possessed intent, whether there is a reasonable likelihood of conviction, whether alternative sanctions or remedial steps are available or appropriate and whether the prosecution is in the public or federal interest.
- Self-reporting combined with remedial proposals may minimise the risk of prosecution. Alternatively, cooperation may exculpate the company while leaving employees exposed. At minimum, if the enterprise is a closely held non-reporting issuer a competently conducted internal investigation will enable the enterprise and its principals to respond to any investigation with confidence and agility.

The critical questions of jurisdiction, concurrent jurisdiction and extra-territoriality

Whereas the UK Bribery Act and the FCPA have been characterised as having comparably broad scope, the Canadian Act has been criticised for having a narrow jurisdictional reach.

Generally speaking, Canada operates under the territoriality principle. An offence must have a 'real and substantial' connection to Canada before Canada will take jurisdiction. Note that in *R v Karigar*, the accused brought a motion to dismiss the charge for lack of jurisdiction on the basis that the 'real and substantial connection with Canada' test had not been met. The motion was dismissed by the court on 4 May 2012, while preserving the

right of the accused to bring this matter up again at a later date.

In addition to the territoriality principle, American and British legislation permits courts to take jurisdiction under the nationality principle. This means that regardless of where the offence was committed, if the accused is American or British (or, in the case of a corporation, incorporated in America or Britain; or is a reporting issuer or carries on part of its business in these countries), then American or British courts have jurisdiction. Under the FCPA, non-US companies may find themselves subject to the FCPA because some business activity that relates to the misconduct has a US connection, even though this connection is not otherwise substantial, for example, by using US mail.

Similarly, the UK Bribery Act also has broad extra-territorial reach. British citizens, citizens of British overseas territories and bodies incorporated under the law of any part of the UK, are deemed to have a 'close connection' with the UK and they may be prosecuted whether the offence takes place outside of the UK. The UK Bribery Act also applies to foreign nationals who commit bribery offences abroad while domiciled or habitually resident in the UK.

The most novel part of the UK Bribery Act is its criminalisation of a commercial organisation's *failure to prevent bribery*. Once it is established that a commercial organisation carries on a business or part of a business in the UK, regardless of where it is incorporated, if an employee, an agent or a subsidiary bribes another person or foreign public official for its benefit, the organisation may be guilty of the offence unless it can demonstrate that it had adequate procedures in place to prevent such conduct. This means if an 'associated person' of a Canadian organisation that carries on only a part of its business in the UK pays a bribe to a third party, the parent Canadian company can be guilty of failing to prevent the bribe under the UK Bribery Act, *unless* it can show that it had adequate procedures (due diligence) in place to prevent the bribe.

The various anti-corruption laws around the world and various approaches to jurisdiction make concurrent jurisdiction a reality to be mindful of. For example, a French citizen working for a Canadian company incorporated in Delaware, listed on the London Stock Exchange who bribes a government official in Nigeria can potentially be prosecuted in France, Canada, the US, Great Britain and Nigeria. In fact, the phenomenon of what is termed 'carbon copy' prosecutions has recently been extensively commented on in the American context (see publications by Andrew Boutros and T Markus Funk, '"Carbon Copy" Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World', [2012] The University of Chicago Legal Forum.

Strategies for the avoidance of international double jeopardy

The jurisdictional issue is particularly important in relation to the different approaches countries take to international double jeopardy. In Canada and the UK, the rule against double jeopardy also applies internationally so that if an individual is tried and convicted (or acquitted) of foreign corruption in one country, there is a general bar against re-prosecution in Canada or the UK.

However, this is not the case in other countries, most notably in the US and Germany. In the case of the *US v Jeong*, 624 F 3d 706 (2010), a South Korean national was tried in South Korea for paying bribes to American public officials. He was convicted and served 58 days in jail in addition to having to pay a fine of approximately $21,000. Pursuant to a mutual legal assistance treaty between the two countries, the US sought evidence from South Korean officials in relation to Mr Jeong. The Americans specifically noted in their request for information from the South Korean government that 'the Government [US] understands that Jeong was convicted earlier this year of the offence of interference with foreign trade in the...Republic of Korea, and therefore, it is not seeking to further prosecute Jeong'. Despite this 'assurance', Mr Jeong then travelled to the US, was arrested, indicted for bribery and conspiracy, and sentenced to five years' imprisonment and to a $50,000 fine for the exact same conduct.

Therefore, any FCPA settlement must take into account all countries that enjoy potential concurrent jurisdiction over the same conduct. In global settlements for corruption and bribery charges, it is important that primary negotiations be conducted with the nation(s) that do not recognise international double jeopardy such as the US and Germany (for a more detailed analysis on this subject

matter see: Tyler Hodgson, 'The gift that keeps on giving: Does the protection against double jeopardy have any application to international crime?' Vol 19 Iss 4 'Journal of Financial Crime', pp 326–331.

Conclusion

Investigations and prosecutions for bribing foreign public officials are on the rise in Canada. Canadian companies more than ever have to be mindful of this and tailor their internal policies and procedures accordingly to prevent bribes from being paid in the first place and to prepare their response when they suspect that bribery conduct may have taken place. Since there are many Canadian subsidiaries of US and foreign companies operating in Canada and overseas these companies (and their counsel) will be increasingly forced to deal with Canadian initiated investigations and prosecutions which will often be coordinated with US and foreign authorities. In such circumstances, lead defending counsel will be required to have extensive experience with and a deep understanding of the art and science of transnational criminal defence.