CANADIAN LAW ON CORRUPTION OF FOREIGN PUBLIC OFFICIALS

A. TIMOTHY MARTIN
VICE PRESIDENT AND GENERAL COUNSEL – INTERNATIONAL
CANADIAN OCCIDENTAL PETROLEUM LTD.
CALGARY, ALBERTA, CANADA

This article reviews the law of Canada on the bribery and corruption of foreign public officials. The author first examines existing Canadian law in this area and then reviews recent amendments to federal legislation, i.e., The Corruption of Foreign Public Officials Act. This Act is thoroughly discussed with regards to its interpretation and potential impact on Canadian companies doing business overseas. It is also analyzed in the context of the OECD Convention which precipitated this new legislation. Throughout the article reference is made to the experience of U.S. law which has been in existence for more than twenty years and serves as a useful precedent. In conclusion, the author presents some policy issues for the reader's consideration.

TABLE OF CONTENTS

I. INTRODUCTION ... 1
II. EXISTING LAW IN CANADA ... 2
  A. CRIMINAL ... 2
  B. INCOME TAX ... 3
  C. EXTRA-TERRITORIALITY ... 3
III. NEW AMENDMENTS TO CANADIAN LAW ... 4
  A. OVERVIEW ... 4
  B. DEFINITIONS ... 5
  C. OFFENCES ... 5
  D. DEFENCES ... 6
  E. KNOWLEDGE ... 8
  F. PUNISHMENT ... 9
  G. ACTIVITIES COVERED ... 10
  H. PERSONS COVERED ... 10
  I. EXTRADITION ... 12
  J. INCOME TAX ... 12
  K. ACCOUNTING ... 12
  L. ENFORCEMENT ... 14
  M. RESPONSIBLE AUTHORITY ... 15
  N. ANNUAL REPORT ... 15
IV. CASE LAW ... 15
V. FUTURE POLICY CONSIDERATIONS ... 15
VI. CONCLUSION ... 16

I. INTRODUCTION

Until recently, the law in Canada on the corruption of public officials has been very similar to laws in most other countries in the world. It was primarily focused on the corruption of domestic public officials. Unlike the United States with its *Foreign Corrupt Practices Act*[1] (*FCPA*), Canadian law did not directly address the situation of a Canadian citizen or company paying bribes to a foreign government official to acquire or retain business in such foreign country.

1 Pub. L. 95-213, 91 Stat. 1494 (1977), as amended by *Omnibus Trade and Competitiveness Act of 1988,* Pub. L. 100-418, Title V, Sec. 5003(c), 102 Stat. 1107, 1419 (1988)(codified at 15 U.S.C. 78dd-1,2), and further amended by *The International Anti-Bribery and Fair Competition Act of 1998*, s.2375.

The Canadian law in this area has now changed dramatically. Canada, along with other members of the Organization for Economic Co-Operation and Development (OECD), signed the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* [2] (the *OECD Convention* or the *Convention*) on 17 December 1997. As a result, the Canadian Government recently implemented legislation which put into law the obligations that Canada undertook under the *OECD Convention*.

This paper will first review the previously existing law in Canada with regards to the corruption of foreign public officials and will then provide an analysis of the recent amendments to Canadian law which brought it into compliance with the *OECD Convention*.[3]

II. EXISTING LAW IN CANADA

Canadian law for many years prohibited the making of bribes to Canadian public officials;[4] however, it previously did not contain specific provisions dealing with the corruption or bribery of foreign officials.[5,6]

A. CRIMINAL

The Canadian *Criminal Code* is extensive in its coverage of corruption of officials of the governments of Canada and the provinces. The following are the primary offences dealing with the bribery of domestic public officials in Canada.

(1) FRAUDS ON THE GOVERNMENT

A bribe made to a public official in Canada to exercise influence or an act of omission in connection with government business is subject to a penalty of up to five years in prison. Section 121 is broad in scope and covers influence peddling. It prohibits bribes to or for the benefit of government officials by or on behalf of those who have dealings with the government.[7] This section does not mention foreign public officials.

(2) BRIBERY OF JUDICIAL OFFICERS, ETC.

Everyone who, "being the holder of a judicial office," corruptly accepts or gives or offers any money or other valuable consideration in respect of anything to be done in his official capacity commits bribery. This offence is punishable by imprisonment for up to fourteen years. Section 119 covers the acceptance by or giving of bribes to holders of judicial offices or members of Parliament or of a provincial legislature.

(3) BRIBERY OF OFFICERS

Under Section 120, anyone who offers or accepts a bribe to a justice, police commissioner, peace officer, public officer, officer of a juvenile court, or employee in the administration of criminal law to facilitate the commission of an offence is guilty of an indictable offence. The punishment is imprisonment for up to fourteen years.

(4) OTHER DOMESTIC OFFENCES

Other forms of domestic public corruption provided for in the *Criminal Code* are: Breach of Trust by a Public Officer,[8] Municipal Corruption,[9] Selling or Purchasing Office,[10] and Influencing or Negotiating Appointments or

---

[2] *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* (17 December 1997). This convention was negotiated in the framework of the OECD but is not an official OECD document. For further information see (http://www.oecd.org/daf/cmis/bribery/20nov1e.htm).

[3] For a more detailed review of the history and development of corruption laws worldwide, please refer to this author's article: A.T. Martin, "Corruption and Improper Payments: Global Trends and Applicable Laws" (April 1998) Volume 36, No. 2 Alberta Law Review 416.

[4] *Criminal Code*, R.S.C. 1970, c. C-34, ss. 118-123.

[5] J.G. Castel, *Extraterritoriality in International Trade: Canada and United States of America Practices Compared* (Toronto: Butterworths, 1988) at 146.

[6] J.M. Klotz, "Bribery of Foreign Officials - A Call For Change in the Law of Canada" (1994) 73 Can. Bar Rev. 467 at 475.

[7] E.L. Greenspan & M. Rosenberg, *Martin's Annual Criminal Code* (Aurora: Canada Law Book 1998) at 226.

[8] Supra, S. 122

[9] Supra, S. 123

Dealing in Offices.[11]

B. INCOME TAX

The *Income Tax Act*[12] was amended in 1990 to prohibit the deductibility of illegal payments. Subsection 67.5(1) stated:

> "In computing income, no deduction shall be made in respect of an outlay made or expense incurred for the purpose of doing anything that is an offence under any of sections 119 to 121, 123 to 125, 393 and 426 of the *Criminal Code* or an offence under section 465 of that Act as it relates to an offence described in any of those sections."

This section clearly addressed bribes paid to Canadian public officials but did not specifically speak to the bribery of foreign officials. However, as a matter of administrative practice, Canadian tax authorities would likely not have approved the payment of bribes to foreign public officials as a legitimate deduction against income.

C. EXTRA-TERRITORIALITY

There are several general principles under international law which a court may use to determine whether it can exercise criminal jurisdiction beyond its country's borders. Canadian courts have applied the territorial principle which focuses on the place where the offence is committed. It uses a more restrictive test than other principles of international law and reflects the reluctance of Canadian courts to aggressively extend Canadian law into foreign jurisdictions unless there is a clear justification for it.

The leading case in this area concerning criminal offences is the Supreme Court of Canada decision, *R. v. Libman*[13] where the court considered the extraterritorial application of the conspiracy provisions of the *Criminal Code*, in particular Subsection 465(3). Indeed, this case has been the basis for Canadian officials arguing that previously existing Canadian criminal law was sufficient to cover the corruption of foreign officials. At an OECD meeting on 23 May 1997, Douglas Peters, who was then Secretary of State for International Financial Institutions, stated that Canada had legislation in place that the government considered adequate: "We have legislation that prohibits conspiracy and it is sufficient. If there is something further needed, then we will quickly do so. But as far as we know right now, the Canadian legislation is quite adequate."[14]

In the *Libman* case, the court determined that for an offence to be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting that offence must take place in Canada. There must be a "real and substantial link" between an offence and Canada before criminal liability will be imposed in Canada. The court used a two-stage test to determine if the crime was committed in Canada:

1. The court must take into account all relevant facts that take place in Canada that may legitimately give Canada an interest in prosecuting the offence, and

2. The court must then consider whether there is anything in those facts that offends international comity (i.e., respect or courtesy to another jurisdiction).

LaForest, J., speaking on behalf of the court, then set a fairly limited standard:

> "As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a 'real and substantial link' between an offence and this country, a test well known in

The Supreme Court did not provide any detail of the specific factors required to identify such a link. Instead, the

---

[10] Supra, S. 124
[11] Supra, S. 125
[12] S.C. 1970-71-72, c. 63.
[13] [1985] 2 S.C.R. 178.
[14] M. Drohan, "U.S. Pushes for Stringent Bribery Rules" *Globe and Mail* (27 May 1997) B1.

court provided a general guide for analysis of this issue, which required an examination of the facts in each case. In essence, where the scheme is "hatched" and largely put into effect in Canada, it is likely the court will conclude that Canadian criminal law will apply.

Given the above restrictions, one can conclude that the prior existing Canadian law on the bribery of public officials would have been hard pressed to extend to foreign jurisdictions. Indeed, this is evidenced by the fact that there have been no prosecutions of Canadian companies or individuals with regards to the bribery of foreign public officials up to this point of time.

III. New Amendments to Canadian Law

On 1 December 1998, the Canadian government tabled Bill S-21 with the intention of establishing a new Act of Parliament, the *Corruption of Foreign Public Officials Act* [15] (the *Corruption Act* or the *Act*). This *Act* created the new offence of bribery of foreign public officials in the course of business and is intended to fulfill Canada's commitments under the *OECD Convention*.

Bill S-21 received royal assent on 10 December 1998. Canada subsequently deposited its instrument of ratification of the *Convention* on 17 December 1998 at the OECD. Under Article 15 of the *OECD Convention*, the *Convention* entered into force on the sixtieth day following the date upon which 5 of the 10 countries with the largest shares of OECD exports, representing at least 60% of the combined total exports of those 10 countries, deposited their instruments of acceptance, approval or ratification. Canada's deposit of its instrument was the fifth country in this category and therefore the pass mark in Article 15 was reached which resulted in the *Convention* entering into force on 15 February 1999. Pursuant to Section 13 of the *Act*, the *Corruption Act* came into force on 14 February, 1999.

A. Overview

The Canadian government decided to implement changes in this area by enacting a new stand alone act rather than amending existing legislation, i.e., the *Criminal Code*. This allows the government to properly co-ordinate and administer a very complex and difficult area of law and at the same time, it provides "the flexibility to develop and evolve in the future if Canada wishes to sign and ratify additional international criminal law conventions against corruption."[16]

The *Corruption Act* incorporates the concepts and language of the *OECD Convention* in order to meet the *Convention's* requirements and to work in parallel with similar legislation in other OECD countries. It also adopts some of the principles and wording of the *FCPA*. This is not intended to mimic U.S. law, but rather is a pragmatic recognition that many Canadian companies with international operations fall within the ambit of the *FCPA*. Canadian companies which are active in U.S. capital markets are considered to be "issuers" under the rules of the Securities and Exchange Commission (SEC) and are thus subject to the provisions of the *FCPA*[17]. This results in Canadian companies potentially being subject to two sets of rules with regards to bribery of foreign officials on the same transaction. If Canadian and U.S. law are basically similar in this area, Canadian companies should not have to worry about complying with two inconsistent sets of rules and will likely not be placed in an uncompetitive position to their American colleagues.

The third set of rules which impact Canadian companies in dealing with corrupt foreign officials is, of course, the laws of the host country in which the potential bribe may take place. The vast majority of countries in the world have laws which prohibit corruption and bribery of their government officials. However, in many foreign jurisdictions in which Canadian companies operate, these laws are often confusing and even contradictory. They tend not to reflect local customs and practice and are therefore often ignored. They are also often applied arbitrarily and inconsistently. In some instances, these local laws may be inconsistent with Canadian or U.S. law. Legal counsel will need to review each situation on a case by case basis and provide advice based upon the specific facts. Unfortunately, they may not find any relief or exception under the *Corruption Act* for circumstances where

---

15 *Corruption of Foreign Public Officials Act*, S.C. 1998, c.34.

16 Backgrounder on "Highlights of the Corruption of Foreign Public Officials Act" attached to News Release No. 277 issued by the Government of Canada (1 December 1998) at 1.

17 R.A. Bassett "Canadian Companies Beware: The U.S. Foreign Corrupt Practices Act Applies to You" (April 1998) Volume 36, No. 2 Alberta Law Review 455.

there are conflicting host country laws.

B. Definitions

The *Corruption Act* in Section 2 defines "foreign public official" in similar language used by the *OECD Convention* (Article 1.4.(a)) and specifically includes an official or agent of a public international organization:

> " '*foreign public official*' means
> (a) a person who holds a legislative, administrative or judicial position of a foreign state;
> (b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
> (c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations."

The concept of a public official using his position to influence a decision even if it is "not within the official's authorised competence" is not explicitly stated as such in the *Corruption Act*, but rather is addressed in general terms in Subsection 3(1)(b) of the *Act* which talks about the official using his or her position in the organization to influence any acts or decisions.

The *Act* also provides an expanded definition of a foreign country based upon the principle stated in Article 4.4(c) of the *OECD Convention*:

> " '*foreign state*' means a country other than Canada, and includes
> (a) any political subdivision of that country;
> (b) the government, and any department or branch, of that country or of a political subdivision of that country; and
> (c) any agency of that country or of a political subdivision of that country."

Aside from the definitions listed in the *Convention,* the *Corruption Act* has three additional definitions. A "business" is defined as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit." This definition appears to exclude organizations which are engaged in charitable or not for profit transactions but nevertheless is broad enough to cover a business activity anywhere in the world.

A "person" is defined as per Section 2 of the *Criminal Code* and includes the governments of Canada, public bodies, bodies corporate, societies, companies and inhabitants of the various districts of Canada. It does not specifically mention Canadian citizens abroad nor foreign nationals working for Canadian companies in overseas locations.

Finally, a "peace officer" is defined for purposes of Section 6 of the *Act* which allows a Canadian police force to carry out an investigation without being in breach of Sections 4 or 5. Thus a peace officer can be in possession of a bribe or its proceeds or can be involved in the laundering of a bribe or its proceeds during the course of an investigation without being liable under the *Act*. However, police forces are not exempt from Section 3 of the *Act* which means that it is an offence for a peace officer, similar to any other person, to offer a bribe to a foreign public official.

These definitions along with the offence of bribery as defined in Section 3(1) of the *Act* establish Canada's jurisdiction over both the foreign bribery activity and Canadian entities as contemplated in Articles 4.1 and 4.2 of the *Convention.*

C. Offences

There are three new offences created under the *Corruption Act*. Since they qualify as indictable offences, no limitation period applies.

(1) Offence of Bribery

The *Corruption Act* establishes that bribery of foreign public officials is a criminal offence under Section 3(1):

> "Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
>
> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions."

The above language is similar to that of the *OECD Convention* and establishes the following principles as required under the *Convention*:

1) The bribery of foreign public officials is a criminal offence under Canadian law; and

2) The burden of proof required under the *Corruption Act* parallels the elements stated in Article 1.1 of the *OECD Convention*:

   "…..it is a criminal offence….. for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

(2) OFFENCE OF POSSESSION

Section 4(1) of the *Corruption Act* establishes that anyone who possesses property or proceeds obtained or derived from the bribery of foreign public officials or from laundering that property or proceeds is guilty of a criminal offence. Subsection 4(1)(b) extends the territoriality of the *Act* to "an act or omission anywhere that, if it had occurred in Canada, would have constituted" such an offence. The above section goes beyond Article 3.3 of the *OECD Convention* which only requires that such proceeds "are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable" by making possession of such proceeds a criminal offence and extending the act of possession beyond the boundaries of Canada.

The *Act* under Section 7 provides a far reaching ability to seize the proceeds of bribery by incorporating Sections 462.3 and 462.32 to 462.5 of the *Criminal Code*. Using these sections, Canadian government authorities will be able to search, seize and detain the proceeds of the crime, including not only the bribe itself but also the profits obtained as a result of the bribe. Thus, a company who obtained or retained business as a result of the payment of a bribe to a foreign public official could potentially have to account for the bribe, be subject to substantial financial penalties and, at the same time, be forced to forfeit all of its profits from such business to the Canadian government who has the right to dispose of it as it directs.

(3) OFFENCE OF LAUNDERING

Article 7 of the *OECD Convention* requires that countries that have money laundering laws associated with bribery of their domestic public officials "shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred."

The *Corruption Act* under Section 5(1) fulfills this requirement by making it a criminal offence to launder the property or proceeds obtained or derived from the bribery of foreign public officials. This section not only applies without regard to where the bribe took place, but also as a result of Subsection 5(1)(b), without regard to where the laundering of the proceeds occurred.

if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law." This interpretation is analogous to the affirmative defence provided in Section 104A(c)(1) of the *FCPA*.

Even though this defence is provided for in the *Corruption Act*, the chances of it being used are for all intents and purposes non-existent simply because few countries, if any, have such laws.

(2) REASONABLE EXPENSES

Subsection 3(3)(b) of the *Act* provides that reasonable expenses incurred in good faith and directly related to the promotion, demonstration or explanation of products and services or to the execution or performance of a contract with the foreign state do not qualify as a bribe and can therefore be argued as a defence.

The *OECD Convention* does not directly provide for such a defence nor is it mentioned in the *Commentaries*. On the other hand, it does not explicitly prohibit such a defence. Indeed, the United States has provided such a defence for many years under Section 104A(c)(2) of the *FCPA* and this defence has not been revoked by the recent enactment of *The International Anti-Bribery and Fair Competition Act* which expanded the *FCPA* in response to the American government signing the *OECD Convention*.

The net result of this subsection is that the Canadian government has set the same rules for Canadian companies and persons providing reasonable expenses to foreign public officials as found in the rules set by the American government for American companies and persons.

(3) FACILITATION PAYMENTS

The *Commentaries* state that small facilitation payments do not constitute payments made to obtain or retain business or other improper advantage and are not an offence. However, neither the *Convention* nor the *Commentaries* provide any explanation or definition of what constitutes facilitation payments.

Section 3(4) of the *Corruption Act* provides that facilitation payments do not qualify as a bribe and lays out in detail "acts of a routine nature" that would be considered facilitation payments. The categories and even the language in this section are very similar to that used in the *FCPA*[19]; however, the *Act* does not provide for a

---

[18] *Commentaries on the Convention on Combatting Bribery of Officials in International Business Transactions* (update 11 December 1998). For further information see (http://www.oecd.org/daf/cmis/bribery/20nov2e.htm).

[19] The *FCPA* defines a facilitating payment as:
The term "routine government action" means only an action which is ordinarily and commonly performed by a foreign official in:
(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
(ii) processing governmental papers, such as visas and work orders;
(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
(v) actions of a similar nature.
The term "routine government action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

general catchall that covers "actions of a similar nature" as is provided in the *FCPA*. It could be argued that failure to provide such a catchall may result in a restrictive definition of facilitation payments being applied and could thus potentially minimize this defence. However, Section 3(4) is drafted so as to first define the components of a facilitation payment and then uses the word "including" to introduce a number of examples of facilitation payments. The counter argument is therefore that these examples are not all inclusive and that other kinds of similar acts fall within the definition in the main body of the clause. This latter interpretation is reinforced by the Department of Justice's Guide to the *Act*.[20] However, one needs to note that this Guide does not have the force of law.

E. KNOWLEDGE

One issue which is not directly addressed in the *Corruption Act* is the amount of knowledge that the accused must have of the bribe to incur liability.

(1) INTERMEDIARIES

A company or an individual may plead as a defence that they did not make a bribe because they had no knowledge that a bribe actually occurred. This generally happens when there is an intermediary such as an agent, consultant or contractor involved. The company or individual pays a sum of money or provides something of value such as a "bonus" to the intermediary during the course of acquiring or retaining business. No questions are asked, innocently or otherwise, and as promised, new business from a foreign government is delivered by the intermediary. This "head in the sand" approach which potentially results in an accused arguing an "ostrich" defence is not addressed in the *Corruption Act*. It does state that a bribe which is given directly or *indirectly* to a foreign public official *or to any person for the benefit of a foreign public official* (emphasis added) is an offence, but the concepts of "knowledge" or "vicarious liability" are not clearly enunciated in the *Act*. U.S. foreign corruption law speaks more directly to this issue.

The *FCPA* provides that for third party payments, a person must "know" that all or a portion of the money given to a third party will be used for a proscribed purpose. A person is deemed to have knowledge if he:

1. is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

2. has a firm belief that such circumstance exists or that such result is substantially certain to occur.

The result is that "conscious disregard", "willful blindness" or "deliberate ignorance" is not a defence under the *FCPA*. A person does not need to have "actual" knowledge that his payment will be used as a bribe to be liable. However, this knowledge requirement is not equivalent to "recklessness", "simple negligence" or "mere foolishness." The difficulty is determining the dividing line between recklessness and conscious disregard. U.S. case law is not helpful with regards to clarifying this uncertainty on payments to intermediaries.

Given that the *Corruption Act* does not provide for any specific "knowledge" test, Canadian courts must

---

The *Corruption Act* defines a facilitation payment as:

3(4) For the purpose of subsection (1), a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage in the course of business if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including

(a) the issuance of a permit, licence or other document to qualify a person to do business;

(b) the processing of official documents, such as visas and work permits;

(c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and

(d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

3(5) For greater certainty , an "act of a routine nature" does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business , or encouraging another person to make any such decision.

[20] D. R. Breithaupt "A Guide to the Corruption of Foreign Public Officials Act" issued by the Department of Justice, Canada (3 February 1999) at 8.

therefore turn to common law principles to determine the degree of *mens rea* required. Under Canadian law, when a true crime, such as the bribery offence under the *Corruption Act*, is silent as to the requisite *mens rea*, the courts will presume that subjective *mens rea* was intended by Parliament. Subjective *mens rea* is normally satisfied by proving the prohibited act was committed "intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness to them."[21] Proof of negligence is not sufficient.

Other than in exceptional circumstances, the courts in Canada have not imposed vicarious criminal liability on corporations. Rather, the courts have used the "identification theory" where the acts and states of mind of senior officers of a company (its "directing minds") are deemed to be the acts and state of mind of the corporation. In comparison to the English experience, Canadian courts are willing to locate the directing mind at a lower level in the corporation.[22]

(2) SUBORDINATES

The other situation where knowledge is a critical factor is where subordinates in an organization carry out the bribery activity in isolation without the knowledge of officers or directors of the company. Certainly, if the bribery activity is proven, the subordinate who is directly involved in the transaction would be liable and the company and any "directing minds" of the company would be liable if any of the "directing minds" knew of, or were wilfully blind to, the bribery activity. However, other members of the board of directors or other senior officers in the company who had no knowledge of the bribery activities and who were not wilfully blind to those activities, could not be held criminally liable for the bribery offence.

The existence of knowledge at the top of large corporations is usually very difficult to prove in these cases. This is evidenced by the U.S. experience where no chief executive officer of a major company has ever been found liable for a bribery offence. The recent *Lockheed* [23] and *Triton* [24] cases illustrate this point. In the *Lockheed* case, the company ended up paying fines of nearly U.S. $28 million and two employees on the front lines were found guilty but no other senior management were liable. A settlement was reached in the *Triton* case in which it was noted that Triton in Dallas did not expressly authorize or direct improper payment or book false accounts. However, the local management in Indonesia were nevertheless found liable.

F. PUNISHMENT

The *OECD Convention* (Article 3.1) states that the range of penalties shall be comparable to that applicable to the bribery of that country's own public officials. The *Corruption Act* establishes the following punishments for the three new offences.

(1) BRIBERY OF FOREIGN PUBLIC OFFICIAL

Section 3(2) of the *Act* states that every person who bribes a foreign public official "is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years." This punishment is similar to the penalty imposed on anyone bribing a public official in Canada as stated in Sections 121(1)(a) and 123 of the *Criminal Code*.

(2) POSSESSION OF BRIBERY PROCEEDS

Under Section 4(2), anyone who has possession of the proceeds of bribery can be found guilty of either an indictable offence with imprisonment of up to ten years or a summary conviction that can receive either or both a fine up to $50,000 or imprisonment up to six months. This correlates to similar terms under Section 355 of the *Criminal Code* which sets out the punishment for having possession of property obtained by crime (Section 354 of the *Code).*

---

21 *R. v. Sault Ste. Marie* (1998), 3 C.R. (3d)30, at 40 (S.C.C.).

22 For a thorough discussion of this area of law, please refer to: G. Ferguson "Corruption and Corporate Criminal Liability" which was prepared for the Seminar on New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions, 5 February 1999, Vancouver, British Columbia.

23 *U.S. v.Lockheed Corporation, Suleiman A. Nassar and Allan R. Love*, Cr. No. 1:94-CR226(N.D., Ga. Atlanta Div. June 1994).

24 *SEC v. Triton Energy Corp*., No. 1:97 CV00401 (D.D.C. 10 February 1997, SEC Litig. Rel. No. 15266, 1997 SEC LEXIS 439.

(3) LAUNDERING OF BRIBERY PROCEEDS

The *Act* under Section 5(2) establishes the same punishment for laundering the proceeds of a bribery offence as applies to possessing the proceeds of bribery. This is similar to penalties established for domestic money laundering under Section 462.31(2) of the *Criminal Code*.

(4) MAXIMUM PENALTIES

The *Corruption Act* does not provide specific financial penalties for indictable offences similar to the kind of detail found in the *FCPA* which provides criminal penalties of US $2,000,000 and civil penalties of US $100,000 for corporations and criminal penalties of US $100,000 and civil penalties of US $10,000 for individuals per violation. Instead, under Canadian criminal law, the imposition of fines for indictable offences is at the complete discretion of the court. This is confirmed in Section 735(1) of the Criminal Code which reads "a Corporation that is convicted of an offence is liable, in lieu of an imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law, that is in the discretion of the courts, where the offence is an indictable offence." In effect, the financial penalty for such criminal offences in Canada is unlimited.

G. ACTIVITIES COVERED

Anyone who reads the *Corruption Act* would naturally assume that it covers bribery activities in foreign lands. However, the *Libman* case raises some issues of extra-territoriality that must first be addressed. In effect, the standard applied in the *Libman* case is quite limiting when considering foreign corrupt activities. Given that most, if not all, of the bribery will take place outside of Canada, it would not be possible to meet the *Libman* standard of "…all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada." Simply put, since most of the activities will take place in a foreign country or countries, this standard cannot rigidly be met.

Therefore, the courts will have to apply its two-stage test in light of this new legislation. Firstly, the courts need to look at the facts "that may legitimately give Canada an interest in prosecuting the offence," rather than just the "relevant facts that take place in Canada." The definition of "business" allows the courts to look at profit oriented business transactions anywhere in the world. The definition of "foreign public official" is very clear and broad in its coverage of people working for a foreign state or public international organization. The offences described in Sections 3, 4 and 5 of the *Corruption Act* state Parliament's intent that such activities are criminal. All of the above should meet the first part of *Libman's* two-stage test and establish Canada's legitimate interest in prosecuting such offences.

The second part of the *Libman* test is that the facts do not offend "international comity." The existence of the *OECD Convention* clearly indicates that many jurisdictions have set the same standards as stated in the *Corruption Act* and it would therefore not be offensive in international law to prosecute such facts. The ratification of other treaties such as the "Inter-American Convention Against Corruption"[25] which was signed in Caracas, Venezuela in March, 1996 by twenty-five countries in the Organization of American States (OAS) adds further strength to this argument.

Given the above, the two-stage test in *Libman* should be satisfied in determining that the activity of bribing foreign public officials falls within the jurisdiction of Canadian courts.

H. PERSONS COVERED

Article 2 of the *OECD Convention* states that each signatory country "shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official." The *Convention* does not define "legal persons" but rather leaves it to the laws of each signatory country to determine what persons are covered. Therefore, to determine what persons are covered by the *Corruption Act*, one would look at the definition of "person" in the *Act* and then apply the standard of a "real and substantial link" used in *Libman*. However, in this instance a real and substantial link needs to be established

[25] *Summary of the Organization of American States Inter-American Convention Against Corruption*, U.S. Department of Commerce, Chief Counsel for International Commerce (30 April 1996) at 5.

among the offence, the *person* and this country and not just the link between the offence and Canada (emphasis added). The following is a brief analysis of the jurisdiction of the *Act* over various entities using the above test.

(1) CANADIAN INCORPORATED COMPANIES

Companies which are either federally or provincially incorporated in Canada are clearly subject to the *Corruption Act*. They fall within the definition of Section 2 of the *Criminal Code* as bodies corporate and companies of Canada and have a substantial link to this country.

(2) FOREIGN SUBSIDIARIES OF CANADIAN COMPANIES

Foreign subsidiaries do no fall within the definition of Section 2 of the *Criminal Code*; however, they do have a real and substantial link to a Canadian incorporated company, especially if they are wholly owned. Depending upon the facts, this link should bring them within the scope of the *Act*.

(3) FOREIGN JOINT VENTURES

Foreign join ventures, by their nature, tend to be independent and autonomous creatures. It becomes more difficult and tenuous to establish a link between Canada and these kinds of entities. One has to look at such facts as the amount of interest and control that the Canadian shareholder has in the joint venture and the circumstances around the alleged activity to determine if there is a strong link to Canada.

(4) CANADIAN NATIONALS IN CANADA

Any Canadian citizen while resident in Canada is covered by the *Act*. This would apply in all cases including acting individually or as an employee or agent of either a Canadian or foreign company.

(5) FOREIGN NATIONALS IN CANADA

Foreign nationals resident in Canada are also covered by the *Corruption Act*. Similar to the application of any other provision of the *Criminal Code*, foreign nationals can be prosecuted for Canadian criminal offences while domiciled in Canada.

(6) CANADIAN NATIONALS ABROAD

Given that Canadian courts establish their jurisdiction based upon the principle of territoriality and not nationality, the fact that a suspected bribee is a Canadian citizen will not necessarily bring him within the jurisdiction of the *Corruption Act*. Rather, one must look to the link to Canada. If he works or acts on behalf of a Canadian company, then some sort of link may be established. However, the link becomes tenuous when he is domiciled abroad and acting solely for himself or a non-Canadian entity.

(7) FOREIGN NATIONALS ABROAD

The same arguments as above apply. There has to be a real and substantial link to Canada as established in the *Libman* case and that will depend upon the facts.

(8) PERSONS AIDING OR ABETTING

There is no direct statement in the *Act* that complicity in the act of bribery is a criminal offence as required in Article 1.2 of the *OECD Convention*. However, Section 34(2) of the *Interpretation Act*[26] states that: "All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by enactment…" This results in these three offences being brought under Sections 21(1)(b) and (c) of the *Criminal Code* which are the aiding and abetting provisions of the *Code*. The result is that any party who either does or omits to do anything for the purpose of aiding any person to commit such an offence or abets or encourages any person in committing such an offence is a party to that offence and can thus be prosecuted

[26] *Interpretation Act*, R.S.C. 1985, c. I-21.

under the *Act*.

(9) U.S. APPROACH

American courts have tended to apply a much broader principle of international law when considering the issue of extra-territoriality. They have used the nationality principle which looks to the nationality or national character of the person who committed the offence. This coupled with the broad and sometimes vague language of the *FCPA* along with aggressive prosecution tactics by U.S. authorities has resulted in a fairly large net being cast for persons covered by the *FCPA*.

Persons subject to the anti-bribery provisions of the *FCPA* are "domestic concerns" and "issuers". The definition of domestic concern covers a large group of persons and entities, including individual U.S. citizens (wherever located), U.S. resident aliens, corporations and other business entities (including partnerships) organized under the laws of the U.S. or having their principal place of business in the U.S., and officers, employees and agents of any of these entities, regardless of their nationality. Issuers include companies that register securities or file reports with the SEC. Essentially, it covers companies, domestic or foreign, who are active in U.S. capital markets.

The recent amendments to the *FCPA* under *The International Anti-Bribery and Fair Compensation Act of 1998* expand the population of persons covered by the *FCPA*. Interestingly, U.S. authorities justified these modifications as being required by the *OECD Convention*. The amendments expand the *FCPA's* anti-bribery laws to cover activities of any person as long as some element of the illegal activity occurred within the United States. Foreign affiliates and employees can be held vicariously liable. The overall result is that U.S. courts have relatively modest territorial requirements to meet in order to establish legal jurisdiction.

I. EXTRADITION

The *OECD Convention* (Article 10) requires that bribery of a foreign public official shall be an extraditable offence under the laws of the signatory countries and the extradition treaties between them. The *Corruption Act* does not specifically state that any of the offences listed are extraditable; however, under Canadian law such offences are considered to be extraditable.[27]

The law of extradition in Canada is based on the principle of dual criminality. The criteria to be met under proposed amendments to the *Extradition Act* before extradition can proceed are:

1. There must be an extradition agreement with the country requesting the extradition;

2. The offence in question is punishable in the country requesting the extradition by imprisonment for a maximum term of two years or more; and

3. The offence, had it occurred in Canada, would be punishable by imprisonment for a maximum term of two years or more.

The last criteria is met under the *Corruption Act* since Section 3 provides for a maximum sentence of five years and Sections 4 and 5 provide for maximum sentences of ten years. The first two criteria depend upon the country requesting the extradition but will likely be fulfilled for each of the signatory countries to the *OECD Convention* since Article 10.2 of the *Convention* provides that if there is no extradition treaty between the parties, they "may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official."

J. INCOME TAX

The *Convention* does not discuss income tax matters; however, a *1996 Recommendation*[28] of the OECD

---

[27] *Extradition Act*, R.S.C. 1985, c. E-23. Bill C-40, 1998 has been approved by the House of Commons but not the Senate as of the date of this article.

[28] OECD, Committee on International Investment and Multinational Enterprises (CIMF), *Implementation of the Recommendation on*

Council provided for OECD member countries to implement legislation denying the tax deductibility of bribes paid to foreign public officials. Canada endorsed the *1996 Recommendation* and has followed through with its undertaking by revising its *Income Tax Act*.

Section 10 of the *Corruption Act* amends Subsection 67.5(1) of the *Income Tax Act* so that deductions are disallowed for income tax purposes on expenses incurred for bribes paid to foreign public officials as per Section 3 of the *Act*.

K. ACCOUNTING

The *OECD Convention* in Article 8 provides that signatory countries take such measures as may be necessary "to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or hiding such bribery" and to "provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications."

U.S. law specifically addresses this issue under the provisions of the *FCPA.*[29] Section 13(b)(2)(A) of the *Securities Exchange Act of 1934*[30] was included as § 78 m(b) (2)(A) of the *FCPA*. It states that every issuer under the SEC shall "make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." Given the emphasis on transactions and dispositions of assets, this legislation is intended to cover any situation where "anything of value" that is owned or controlled by the company is provided to a foreign public official in order to obtain or retain business. Companies governed by this legislation therefore have a clear obligation to keep accurate records and accounts in reasonable detail. Failure to do so or establishing off-the-books accounts or "slush funds", will quickly get companies into trouble. Under s.10A of the *Securities Exchange Act*, the auditor of a company must report to the board of directors certain uncorrected illegal acts of the company such as an *FCPA* violation. If the board receives such a report, it must notify the SEC within one day after receipt and furnish a copy of the notification to the auditor. If the auditor fails to receive a copy of the notice within one day, it must furnish a copy of the report given to the board (or the documentation of any oral report) to the SEC immediately. An investigation by the SEC would follow shortly thereafter.

The *Corruption Act* does not address accounting issues. Therefore, one must turn to existing Canadian corporate and financial laws for guidance on this issue. Federally incorporated companies are governed by the *Canada Business Corporations Act* [31] (NB an analysis of equivalent provincial legislation is not addressed in this article). It provides that:

S. 155(1) … the directors of a corporation shall place before the shareholders at every annual meeting comparative financial statements as prescribed…(and) the report of the auditor, if any;

S. 44 The financial statements…shall…be prepared in accordance with the standards, as they exist from time to time, of the Canadian Institute of Chartered Accountants as set out in the CICA Handbook.

S.45 The auditor's report…shall…be prepared in accordance with the standards of the Canadian Institute of Chartered Accountants set out in the CICA Handbook.

Therefore, for federally incorporated companies at least, one must turn to the *CICA Handbook*[32] (or *Handbook)* to

Bribery in International Business Transactions (OECD, 1996). This report was presented to the 1996 meeting of the OECD Council at the ministerial level. See also OECD "Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials," adopted on 11 April 1996, c(96)27/FINAL.

29 M.S. Spindler "What You Always Wanted to Know About the Accounting Provisions of the Foreign Corrupt Practices Act (But Were Afraid to Ask)" (April 1998) Volume 36, No. 2 Alberta Law Review 473.

30 15 U.S.C. § 78a (6 June 1934, c.404, Title I, § 1, 48 Stat.881).

31 *Canada Business Corporations Act*, R.S.C. 1985, c.C-44.

32 *CICA Handbook* (December 1997) The Canadian Institute of Chartered Accountants at Sections 5135 and 5136.

determine whether the accounting measures required under the *Convention* are provided. The *Handbook* is issued by the Canadian Institute of Chartered Accountants and is meant to provide broad and emerging guidelines to the accounting profession on the presentation and auditing of financial statements. It is the CICA's version of Generally Accepted Accounting Principles (GAAP) and as the Supreme Court of Canada has recently stated "well-accepted business principles, which include but are not limited to the formal codification found in GAAP, are not rules of law but interpretive aids."[33]

Thus, the *Handbook* does not place detailed legal requirements on a company's management on how it records financial transactions. Rather, it gives general interpretative guidelines or recommendations on how accountants should present financial statements:

> "Any information required for fair presentation of financial position, results of operations, or cash flows, should be presented in the financial statements including notes to such statements and supporting schedules to which the financial statements are cross-referenced."[34]

The *Handbook* does not directly prohibit a company's management from establishing off-the-books accounts, etc. for the purpose of bribing foreign public officials or other illegal activities. Therefore, one has to turn to the Assurance Recommendations or audit standards of the *Handbook* which state the auditor's responsibility to detect *material* misstatements in an audit of financial statements. Such misstatements can arise from "error" or "fraud and other irregularities" or from the consequences of "illegal acts". If the auditor detects such misstatements, he or she must first determine whether they have a material impact on the company's financial statements. This is a matter of professional judgment and is not determined by statute. If the auditor is of the opinion that it is a material misstatement, then the auditor should ensure (NB the *Handbook* does not say *shall)* the audit committee and other appropriate levels of management are informed. The *Handbook* goes on to state:

> "Management is responsible for taking appropriate action after being informed about an illegal act……Communication of illegal acts to parties other than management and the audit committee is not ordinarily the auditor's responsibility. In fact, the auditor's duty of confidentiality would normally preclude such communication except in connection with the expression of an opinion on the financial statements. However, the auditor may in some circumstances have a statutory duty to communicate certain matters to third parties, such as regulators."[35]

Compared to the measures envisaged in the *Convention* and the strict legal requirements laid down in the *FCPA*, one is left to conclude that with respect to federally incorporated companies in Canada:

1. There is no clear legal prohibition on a company's management with regards to establishing off-the-books accounts.

2. Reliance is placed on the auditing provisions of the *Handbook,* but before an auditor can report a misstatement, the auditor must satisfy the requirement of the materiality of the misstatement on the financial statements.

3. Assuming that it is deemed material, the auditor is only required to report the misstatement to the audit committee and it is then up to the management of the company to take action.

4. There does not appear to be a clear statutory duty to communicate the misstatement to third parties, such as regulators.

5. There does not appear to be "effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications."

This area will likely prove to be a weakness in the future enforcement of this legislation. The U.S. experience is that a majority of the prosecutions have occurred under the accounting section rather than the bribery section of the

[33] Canderel Limited v. M.N.R., 98 DTC 6100.
[34] Ibid at Section 1500.05.
[35] Supra at Section 5136.30.

FCPA.[36]

L. ENFORCEMENT

Article 5 of the *Convention* states that "investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party." There is no mention of enforcement in the *Corruption Act.* Therefore, the existing rules in Canada for enforcing each of the relevant areas apply. Depending upon the facts and circumstances, either a federal, provincial or municipal police force could be involved in the investigation. At the present time, there is no designated department or agency or level of government that would co-ordinate the prosecution of these cases.

Section 9(2) of the *Act* adds the three offences of 1) the bribery of a foreign public official, 2) the possession and 3) the laundering of the proceeds of the bribe to the definition of "enterprise crime offence" in Section 462.3 of the *Criminal Code*. One of the results of this addition is that investigators of such bribery activities can use the provisions of Section 183 of the *Code* which allows wiretapping of those involved in foreign corruption.

M. RESPONSIBLE AUTHORITY

The *OECD Convention* (Article 11) requires that each country notify the OECD Secretary-General of its primary contact or responsible authority for making and receiving requests on such matters as consulting on the most appropriate jurisdiction for prosecution when more than one country has jurisdiction, on providing mutual legal assistance and on extradition. The government of Canada at this time has not designated any Minister as the responsible authority.

N. ANNUAL REPORT

The *Convention* in Article 12 states that all signatory countries "shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention." In alignment with this requirement, the *Corruption Act* provides for a reporting system.

Section 12 of the *Act* requires that the Ministers of Foreign Affairs, International Trade and Justice jointly prepare a report on the implementation of the *OECD Convention* and the enforcement of the *Act*. It is to be prepared within four months of each fiscal year and submitted to Parliament within the first fifteen days it is sitting after the report is completed. Interestingly, this section was not in the original Bill submitted to Parliament but was added later at the request of the Senate.

IV. CASE LAW

There is no case law in Canada with regards to the bribery of foreign public officials. Indeed, there have been no prosecutions on this matter initiated by Canadian authorities at any time. The *Libman* case referred to earlier in this article had nothing to do with bribery but rather is noteworthy for its deliberation on the extraterritorial application of the *Criminal Code.*

The enactment of the *Corruption Act* will inevitably change this situation. Canadian courts will of course look to its own precedents dealing with the bribery of Canadian domestic officials but they may find it helpful to refer to the U.S. courts' experience on dealing with the bribery of foreign public officials. The U.S. is in effect the only jurisdiction in the world which has dealt with these kind of cases since the passing of the *FCPA* in 1977. Canada, along with the other signatories to the *OECD Convention,* can possibly learn from the lessons of the U.S. courts.

V. FUTURE POLICY CONSIDERATIONS

(1) CIVIL OFFENCES

Article 3.4 of the *OECD Convention* states that "each Party shall consider the imposition of additional civil or

[36] W.F. Pendergast, "Foreign Corrupt Practices Act: An Overview of Almost Twenty Years of Foreign Bribery Prosecutions" (1995) 7 Q. 187.

administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official." The Canadian government has chosen not to impose additional civil sanctions at this time but should consider making the bribery of foreign public officials a civil offence also.

The prosecution of foreign bribery transactions tend to be difficult and complex affairs. Evidence is gathered in overseas and often unfriendly environs which result in lengthy and expensive investigations. When the burden of proof is "beyond a reasonable doubt", it is often impossible to complete a successful prosecution under such circumstances. Therefore, the Canadian government needs to consider the additional option of making such activities a civil offence. This would provide two results: a lower burden of proof and hitting companies who break the law in a place that matters most to them – the pocketbook.

(2) ACCOUNTING

The accounting provisions of the *FCPA* have proven to be the most effective and widely used parts of U.S. foreign corruption law. That is because it is easier to gather such evidence and prove such offences. This area of enforcement therefore needs to be more closely examined by the Canadian government especially since there is relatively little Canadian law which is directly on point. The implementation of such measures will result in a more effective anti-corruption regime.

(3) ADMINISTRATION OF ENFORCEMENT

The co-ordination of the investigation and prosecution of foreign bribery offences may prove to be awkward and difficult under existing law. The last thing one needs to deal with in these kinds of investigations is a jurisdictional dispute.

Also, there are limited financial resources and expertise within the criminal justice system to pursue these kinds of prosecutions. Given the difficulties one can expect to encounter in such investigations, the various levels of government within Canada should make a concerted effort to concentrate these limited resources in the most effective manner.

VI. CONCLUSION

The enactment of the *Corruption Act* will result in a dramatic change in Canadian law on the bribery of foreign public officials. It follows the requirements laid down in the *Convention* and is similar to equivalent legislation in other OECD countries. The U.S. experience, i.e., the administration of the *FCPA,* may be a useful precedent for Canadian authorities dealing with this difficult issue.

The Canadian government fully supports this new legislation and the enlightened purpose for which it is intended as witnessed by the rapid approval and bipartisan support for the *Act* displayed in both the House of Commons and the Senate. However, to make the *Corruption Act* effectively work will require a great deal of political will and a commitment of substantial financial resources from the government.

Canada, along with the other *OECD Convention* signatories, has entered into an era where international business transactions and dealing with foreign government officials should be carried out on a level playing field. It will be interesting to see if any potholes develop in the various home pitches around the world as foreign corruption laws in the *OECD Convention* signatory countries take effect.