Canada Takes Aim at Foreign Corruption

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Earlier this year, Canada was criticized by Transparency International, a group that monitors global corruption, and the OECD's Working Group on Bribery for lax enforcement of its foreign bribery legislation and its failure to adequately handle complex high-profile white collar criminal cases generally.[2] The criticisms were perhaps premature, however, as the work of two dedicated Royal Canadian Mounted Police ("RCMP") task forces has begun to bear fruit. A criminal conviction in June under Canada's *Corruption of Foreign Public Officials Act*[3] ("*CFPOA*"), followed by the launch of two high-profile investigations may help overturn that perception and work towards changing Canada's reputation from a jurisdiction that is laggard in anti-bribery legislation enforcement to one that is serious about fighting corruption, at home and abroad.

Canada's stepped-up enforcement of the *CFPOA* is part of a recent global trend towards increasing enforcement for foreign anti-corruption measures. Since the late 2000's, the United States has significantly stepped up its enforcement measures, with more than two hundred civil or criminal enforcement proceedings initiated since 2007 under the *Foreign Corrupt Practices Act* ("*FCPA*"), resulting in more than $3.7 billion in fines.[4] The United Kingdom only recently began enforcing international anti-corruption measures, with its first prosecution for foreign corruption occurring in 2008.[5] It also recently passed new bribery legislation, the *Bribery Act 2010*[6] ("*Bribery Act*"), to address both domestic and foreign corruption in a clear and comprehensive manner, marking a departure from its previous patchwork of statutory and common law offenses.

In addition to exposure under the *CFPOA*, the *FCPA*, the *Bribery Act* and others, companies that bribe foreign officials also risk penalties under the host country's own laws.[7] It is critical for companies doing business abroad to understand behaviors that give rise to risk of violations, to understand their legal exposure, and to institute measures to ensure compliance.

1. Global anti-corruption measures and trends

Prior to 1997, the United States was the only country in the world to have adopted legislation specifically prohibiting the bribery of foreign officials. A strong global push towards the enactment of foreign anti-corruption measures took the US out of isolation in the late 1990s. Among the factors credited for initiating this global trend were a shift in the power balance between governments and the public, due to higher education and the development of the information age; the ending of the Cold War and immergence of an integrated global economy; and the increase of democracy on a world-wide basis, which led to stronger national medias and an increased ability to hold politicians accountable.[8]

This anti-corruption trend was also the result of lobbying by the United States government. Since the implementation of the *FCPA* in 1977, American corporate executives and politicians had been concerned that American companies were operating at a disadvantage compared to their foreign competitors whose national laws did not prohibit the bribery of foreign officials, and in some cases expressly condoned it. (For instance, Germany allowed companies to deduct foreign bribes from their taxes until

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1996.[9]) A 1996 study by the US Commerce Department and various US intelligence agencies estimated that, in the preceding two years, American businesses had lost $11 billion in business to competitors involved in the bribery of foreign officials.[10]

The United Nations ("UN") took its first significant step towards fighting international corruption during the mid-1990s, albeit initially only in the form of a "political commitment." In 1996, however, the UN General assembly adopted the *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, which, among other things, called on member states to enact and enforce laws prohibiting corruption in international transactions, criminalizing the bribery of foreign officials, and ensuring that bribes were not tax deductible. Eight years later, in October of 2008, the UN General Assembly adopted the *United Nations Convention Against Corruption*, which came into force in December of the following year, and has now been ratified by 154 member states. Article 16 of the Convention requires Parties to criminalize the "promise, offering or giving" of an undue advantage to a foreign public official or an official of a public international organization in order to obtain or retain business or some other advantage in relation to the conduct of international business. It also requires that states consider adopting legislation that would make it illegal for a foreign public official to solicit or accept such bribes.

The mid-1990s also witnessed the adoption by the World Bank of new regulations to address corruption in the projects it funds. Such regulations include rules temporarily or indefinitely barring firms from participating in Bank-funded contracts if they are found to have engaged in any corrupt or fraudulent practices in competing for or executing a Bank-funded project.[11]

Efforts to achieve international standards for foreign corruption laws also led to the OECD's 1997 *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("OECD Convention"). The Convention, which came into force in 1999, has been ratified by the 34 OECD-member states, as well as four other states (Argentina, Brazil, Bulgaria and South Africa). Among its requirements, the Convention mandates that parties implement laws prohibiting the bribing of foreign officials, and impose "effective, proportionate and dissuasive criminal penalties" for violations of those laws (or non-criminal sanctions if a state's criminal legal system does not apply to non-natural persons). Parties are also required to exercise jurisdiction over their nationals who commit bribery offenses abroad. The Convention implements a peer monitoring system, through which the Working Group on Bribery (composed of members from all state Parties) publishes regular reports detailing each Party's legislative compliance with all aspects of the Convention.

Canada took an active role in the negotiation of the OECD Convention, which was completed in November of 1997 and signed by Canada the following month. In fulfillment of its obligations under the OECD Convention, Canada passed the *CFPOA* in December of 1998.

2. Enforcement of anti-corruption laws abroad

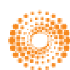
In order to understand how Canada's approach to anti-corruption laws measures up internationally, it is instructive first to briefly consider the approaches taken in the United States, a pioneer in the area of foreign anti-corruption legislation, and in the United Kingdom, a country that, like Canada, has relatively recently begun to enforce foreign anti-corruption laws.

a) United States

The *FCPA* was passed in 1977, in the wake of the so-called Lockheed scandal, in which executives of the US aircraft manufacturer were found to have bribed high-ranking government officials in various countries, including Japan, the Netherlands and Italy, even as Lockheed sought financial support from the US government. A report from the House of Representatives explained that the legislation was necessary because of widespread admitted bribery by corporations.[12] Anti-corruption legislation, it was believed, would make it easier for American corporations to resist demands for foreign bribes, as American law could be pointed to as an excuse or justification for the refusal to give bribes.

Under the *FCPA*, it is illegal to give anything to a foreign official for the purpose of obtaining or retaining business. The Act provides an exception for "facilitating payments," meant to expedite or secure routine governmental action. A defense is also provided for payments that are legal under the relevant foreign law, or that would qualify as "reasonable and *bona fide*" payments related directly to "the promotion, demonstration, or explanation of products or services," or "the execution of performance of a contract with a foreign government or agency thereof." The *FCPA* also contains provisions requiring companies traded on an American stock exchange to maintain appropriate accounting standards.

The *FCPA* provides for both criminal enforcement by the Department of Justice, and (when a company is publicly traded in the United States) civil enforcement by the Securities and Exchange Commission ("SEC"). Over the past several years there has been a sharp increase in the size and number of fines levied pursuant to the *FCPA*, and in the number of investigations initiated by both the Department of Justice and the SEC. 2010 saw an 85 per cent increase in combined enforcement of the *FCPA* over 2009. Forty-eight criminal enforcement actions were launched by the Department of Justice, and 26 civil enforcement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actions were launched by the SEC (compared to 26 criminal and 14 civil enforcements in 2009). In contrast, combined enforcement in 2004, 2005 and 2006 resulted in only five, 12 and 15 enforcement proceedings, respectively.[13] There has also been a push to charge individuals, as "part of a deliberate enforcement strategy to deter and prevent corrupt practices in the future."[14]

Even more notable than the sharp increase in enforcement activity is the sheer size of some of the fines recently handed out. To date, the largest fine imposed by American authorities was against Siemens AG, which agreed to pay a total of $800 million in civil and criminal fines after pleading guilty to *FCPA* violations in December 2008. Other significant fines have been levied on companies found to be in violation of the *FCPA* since the Siemens case, including KBR/Halliburton ($579 million, February 2009), March 2010), BAE ($400 million, March 2010), Technip ($338 million, June 2010) and ENI ($365 million, July 2010).

Contrary to a perception once held by many in the US business community, the *FCPA* is not only applied to large corporations doing business in emerging markets. Enforcement activity in the last several years has been broader in terms of the size of the corporations targeted, the nature of their businesses, and the regions in which they have or are alleged to have committed bribery.[15]

b) United Kingdom

The United Kingdom's *Bribery Act* came into force on July 1, 2011. Previously, the United Kingdom's bribery law emanated from a number of different statutory and common law sources, many of which were inconsistent and not comprehensive. Like Canada, the United Kingdom ratified the OECD Convention in 1998. The United Kingdom originally maintained that its current law already met the requirements of the OECD Convention.[16] However, in reaction to its poor Phase 1 OECD assessment, the United Kingdom passed the *Anti-terrorism, Crime and Security Act 2001*.[17] Section 108 of the Act clarified that, for the purposes of any common law offense of bribery, it would be immaterial "if the functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom." It also provided small amendments to three corruption-related statutes, which had the effect of extending their application to bribery or corruption occurring in foreign countries.[18]

The *Bribery Act* provides a more comprehensive scheme for addressing corruption. It creates six criminal offenses related to bribery, including an offense for bribing a foreign public official in order to retain or obtain an advantage in the conduct of business (but there is no offense where the official is permitted or required by the applicable written law to be influenced by the advantage). An organization may also be liable for a separate offense if a person associated with it commits bribery. However, the organization will have a defense if it has adequate procedures in place to prevent bribery. The Act contains a maximum penalty of 7-10 years in prison, and/or fines in the discretion of the court.

The government body responsible for enforcing corruption laws in the United Kingdom is the Serious Frauds Office ("SFO"), an independent government agency founded in 1988 to investigate and prosecute serious or complex fraud and corruption. The first United Kingdom prosecution for foreign bribery occurred in 2008 against Neils Jorgen Tobiasen, the Danish managing director of The CBRN Team, a UK-based company specializing in countering chemical threats, who pleaded guilty to bribing Ugandan government officials. Since then, there have been 10 instances of criminal or civil enforcement actions related to foreign corruption.[19] To date, the largest combined monetary penalty has been against BAE Systems, which was ordered to pay £29.5 million to the people of Tanzania and costs of £225,000, as well as a £500,000 fine in December 2010 (BAE was also fined $400 million in the US for the same infraction).

While the enforcement of the *Bribery Act* is in the early stages, the recent increase in enforcement activity under older United Kingdom legislation suggests that the United Kingdom is on course to follow the American lead and ramp up the enforcement of its foreign corruption legislation in the years to come.

3. Enforcement of anti-corruption laws in Canada

a) The *Corruption of Foreign Public Officials Act*

The *CFPOA* came into force in 1999 and brought Canada into compliance with the OECD Convention. The *CFPOA* prohibits giving or offering to give a benefit of any kind to a foreign public official, or any other person for the benefit of the foreign public official, where the ultimate purpose is to obtain or retain a business advantage. It is applicable both to individuals and corporations, whether acting directly or through an agent or third party. An individual need not be Canadian to be charged. The extraterritorial reach of the *CFPOA* means that a Canadian business could be liable both in Canada and elsewhere for the same actions — double jeopardy does not prevent liability in Canada.

As in the United States, the *CFPOA* does not prohibit "facilitation payments" made to "expedite or secure" the performance of a "routine nature that is part of the foreign public official's duties or functions." The *CFPOA* also provides a defense for payments that are permitted or required under the laws of a foreign state, or are incurred in good faith and related to the

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promotion, demonstration or explanation of a person's products and services or to the execution of a contract.

Violation of the *CFPOA* is an extraditable offense and is punishable, in the case of an individual, by imprisonment for up to five years and/or fines. A company can receive an unlimited fine for failing to prevent bribery. There is no limitation period for indictable offenses. Because sanctions under the *CFPOA* are solely criminal, proof "beyond a reasonable doubt" is required.

b) Recent Cases

On June 24, 2011, Niko Resources Ltd. ("Niko"), a Calgary-based oil & gas exploration and production company with operations in a number of countries around the world, pleaded guilty to bribery under the *CFPOA* and was sentenced to a fine of C$9.5 million.[20] Niko had provided the Energy Minister of Bangladesh with a C$190,000 vehicle for personal use as well as with trips to Calgary and New York following an explosion at one of Niko's natural gas fields in that country. At the time, the Minister was assessing how much compensation was owed to Bangladeshi villagers for water contamination and other environmental concerns caused by the explosion. Niko's sentence for the bribery includes a three-year probation order, which requires Niko to implement a detailed compliance program subject to review by an independent auditor.

Although small in comparison to some fines levied in the United States for similar offenses, the Niko fine contrasts in its magnitude with the fine levied pursuant to the only previous conviction under the *CFPOA*. In January 2005, the Hydro Kleen Group Inc. ("Hydro Kleen"), an Alberta-based pipeline maintenance company, admitted to bribing a US immigration officer working at the Calgary International Airport and was ordered to pay a fine of C$25,000 — less than the C$30,000 bribe involved. Two other charges, against a director and an officer of the company, were stayed as part of a plea agreement.

Niko's guilty plea was followed by the news of two high-profile investigations under the *CFPOA*. On July 20, 2011, the RCMP raided the offices of Blackfire Exploration Ltd., a Calgary mining company with operations in the Mexican state of Chiapas. Blackfire's activities in Chiapas have faced vocal opposition from the local population and the company is being investigated for allegedly bribing the mayor of the town in which it operates a barite mine.[21] The company has explained that it thought the money was being used for the benefit of the citizens of the town and that it stopped the payments as soon as it became aware that the funds were possibly being used for other purposes.[22]

More recently, on September 1, 2011, the offices of Montreal-based SNC-Lavalin, one of the ten largest engineering firms in the world, were raided by the RCMP in connection with its bid to supervise the contractor responsible for the construction of a bridge in Bangladesh. The RCMP reportedly initiated its investigation at the request of the World Bank, which lent $1.2 billion to the government of Bangladesh for the construction of the bridge. The company said it was collaborating fully with the investigation and had launched its own internal inquiry to determine the cause of the situation.[23]

4. Criticisms from the OECD

In its Phase 3 Report on Canada issued in March, 2011,[24] the OECD's Working Group on Bribery (the "Working Group") criticized Canada's legislative and institutional framework to combat foreign corruption as lacking in four major respects:

a) "Business for Profit" Requirement

The Working Group noted that the foreign bribery offense under the *CFPOA* only applies to bribes for the purpose of obtaining or retaining an advantage in the course of "business", which is defined in the *CFPOA* as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit," and that Canada is the only party to the OECD Convention to have included such a requirement in its foreign bribery offense.[25] (The Convention does not differentiate between business for profit and not for profit.)

Recognizing that the interpretation of the "business for profit" requirement in the *CFPOA* is unclear and that it might limit the scope of corporate liability, the Working Group recommended that Canada amend the offense of bribing a foreign public official in the *CFPOA* so that it is clear that it applies to bribery in the conduct of all international business, not just business "for profit".

b) Sanctions

While the statutory maximum penalties prescribed for violations of the *CFPOA* appear appropriate, the Working Group noted that sanctions applied in practice in the only *CFPOA* case at that time were too low to be effective, proportionate and dissuasive.[26] As noted above, the sanction applied in the recent Niko case is much higher than the sanction applied in the Hydro Kleen case, and thus it appears that although there has only been one guilty plea under the *CFPOA* since 2005, the Working Group's concern about the effectiveness of sanctions may have been addressed.

c) Jurisdiction

Unlike parallel enactments in most other OECD countries, including the United States and the United Kingdom, where jurisdiction is based on the nationality of the accused, the *CFPOA* only applies when the bribery has a "real and substantial"

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connection to Canada (*i.e.*, presence, action or effect in Canada). The Working Group favored the implementation of the nationality jurisdiction, claiming that the current "real and substantial requirement" may doom certain foreign bribery prosecutions "for lack of sufficient jurisdictional link over the act(s) in question."[27] That being said, the involvement of a Canadian parent or subsidiary may be sufficient to establish a "real and substantial" connection to Canada.[28]

In 2009, the Minister of Justice introduced legislation (Bill C-31) that would have added provisions to the *CFPOA* based on the nationality principle so that, in certain cases, offenses committed outside Canada would be deemed to have been committed in Canada. The Bill died on the order paper with the prorogation of Parliament in December 2009 and has not since been reintroduced, but it nevertheless indicates that the OECD recommendations are being seriously considered.

d) Prosecutorial Discretion

Article 5 of the Convention states that the "investigation and prosecution of the bribery of a foreign public official [. . .] shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

Canada has indicated that it interprets Article 5 as prohibiting consideration in investigations and prosecutions of "improper" considerations of "national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." The Working Group recommended that Canada clarify that consideration of the Article 5 factors can never be "proper."[29]

5. Canada: Serious About Fighting Foreign Corruption

The Niko case, as well as the Blackfire and SNC-Lavalin investigations, indicate that Canada is beginning to take a stronger stance against foreign corruption. The limited number of convictions under the *CFPOA* contrasts with the American experience, where enforcement efforts have increased dramatically in recent years. However, the increase in the number of foreign bribery investigations shows that Canada is increasing its focus and investing more resources in the fight against foreign corruption.

The *CFPOA*'s increased enforcement is attributable in large measure to the establishment of the RCMP's International Anti-Corruption Unit in 2008. This unit, which is comprised of two teams located in Ottawa, Canada's capital, and Calgary, a hub for Canada's resource industry, is currently conducting over 20 investigations of Canadian companies allegedly involved in overseas bribery. There is also a pending case involving an individual accused of bribing an Indian government official in connection with a contract for the supply of a security system.[30]

While Canada still lags well behind the United States in the volume of enforcement proceedings, it can be assumed that it will be coordinating its enforcement approach with the US, UK and other international counterparts.

Moreover, the fine given in the Niko case is relatively on par with most of the fines levied in the United Kingdom to date. Although much publicity has been given to the handful of extremely high fines given out in the United States, the reality is that most of the fines given fall well below the $100 million threshold, and many fines have been smaller than that given in Niko. Fines are necessarily fact-specific, and there is no reason why, in the right case, Canada might not also levy a significant fine.

In light of the above, it is important for Canadian companies with overseas business activities (especially in countries with high levels of corruption[31]) to review their accounting processes to ensure tight control over foreign expenditures and to put in place effective corporate compliance programs, which can help fulfill their obligation to prevent bribery and other unlawful payments in their overseas – as well as their domestic – operations. ■

1. Susan M. Hutton is a partner at Stikeman Elliott LLP and a member of the Competition and Foreign Investment Group. Paul Beaudry is an associate at Stikeman Elliott LLP and also a member of the Competition and Foreign Investment Group.
2. See Transparency International, *Progress Report 2011, Enforcement of the OECD Anti-Bribery Convention* (2011), online: <http://www.transparency.org/news_room/in_focus/2011/oecd_progress_2011> and OECD Working Group on Bribery in International Business Transactions, *Canada: Phase 3, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions* (18 March 2011) [OECD], online: <http://www.oecd.org/dataoecd/55/25/47438413.pdf>.
3. S.C. 1998, c. 34.
4. Gibson Dunn, "2011 Mid-Year FCPA Update" (11 July 2011): online: < http://www.gibsondunn.com/publications/Documents/2011Mid-YearFCPAUpdate.pdf> and Shearman & Sterling, "Patterns in the Enforcement of the Foreign Corrupt Practices Act" (July 2011), online: <http://shearman.symplicity.com/files/ef6/ef696d76ef6a9b953f4cf5c1aeb3910a.pdf>.
5. See City of London Police, "Guilty plea sets legal landmark," online: <http://www.cityoflondon.police.uk/CityPolice/Departments/ECD/anticorruptionunit/guiltypleatobribery.htm>.
6. 2010 c. 23.
7. For instance, in 2002, Acres International Limited, a Canadian construction firm, was convicted by the Lesotho High Court of paying bribes to the head of a water transfer and hydropower infrastructure project between Lesotho and South Africa, and was ordered to pay a fine of C$3.8 million, reduced to C$2.6 million on appeal.
8. See Patrick Glynn, Stephen J. Kobrin & Moisés Naím, "The Globalization of Corruption" in Kimberly Ann Elliott, ed., *Corruption and the Global Economy* (Washington: Institute for International Economics, 1997) [Glynn].
9. *Ibid*, at 22.
10. *Ibid*, at 18.

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11. For a summary of the anti-corruption measures implemented by the World Bank during this period see: Ko-Yung Tung (Vice President and General Counsel, The World Bank), "The World Bank's Institutional Framework for Combating Fraud and Corruption" (Speech delivered at the International Monetary Fund's Seminar on Monetary and Financial Law, 8 May 2002), online: <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/tung.pdf>.
12. US, House of Representatives, *Unlawful Corporate Payments Act of 1977* (HR Doc No 95-640) (1977).
13. Gibson Dunn, "2010 Year-End FCPA Update" (3 January 2011): online: <http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx>.
14. Lanny Breur (Assistant Attorney General, Criminal Division, Department of Justice), "International Criminal Law Enforcement: Rule of Law, Anti-Corruption and Beyond" (Speech delivered at the Council on Foreign Relations, 4 May 2010), online: http://www.cfr.org/international-law/international-criminal-law-enforcement-rule-law-anti-corruption-beyond/p22048.
15. Mike Koehler, "The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence," (2010) 43(2) *Indiana Law Review* 389 at 396-398.
16. See OECD, *United Kingdom: Review of the Implementation of the Convention and 1997 Recommendation- Phase 1 Bis Report* (3 March 2003), online: <http://www.oecd.org/dataoecd/12/50/2498215.pdf>.
17. 2001, c. 24.
18. The relevant statutes are the *Prevention of Corruption Act 1906*, 1906 c. 34 (Regnal . 6_Edw_7); the *Public Bodies Corrupt Practices Act 1889*, 1889 c. 69 (Regnal. 52_and_53_Vict); and the *Prevention of Corruption Act 1916*, 1916 c. 64 (Regnal. 6_and_7_Geo_5).
19. United Kingdom, "Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (16 August 2011), online: <http://www.oecd.org/dataoecd/17/30/48362318.pdf>.
20. Royal Canadian Mounted Police, "Corruption Charged Laid Against Niko Resources" (24 June 2011), online: <http://www.rcmp-grc.gc.ca/ab/news-nouvelles/2011/110624-niko-eng.htm>.
21. Stephanie Massinon, "RCMP launch probe into bribery allegations against Calgary's Blackfire Exploration", *Calgary Herald* (August 29, 2011), online: <http://www.calgaryherald.com/story_print. html?id=5324782@sponsor-curriebarracks>.
22. Greg McArthur, "RCMP raid Calgary miner over bribery allegations" (August 29, 2011), *The Globe and Mail*, online: <http://m.theglobeandmail.com/news/national/rcmp-raid-calgary-miner-over-bribery-allegations>.
23. SNC-Lavalin, "Clarification on the Current RCMP Investigation" (September 6, 2011), online: <http://www.snclavalin.com/news.php?lang=en&id=1527; Jeff Gray, "SNC co-operating with RCMP investigation", *The Globe and Mail*, online at <http://www.theglobeandmail.com/globe-investor/snc-co-operating-with-rcmp-investigation/article2155640/>.
24. OECD, *supra* note 2.
25. *Ibid.* at para. 15.
26. *Ibid.* at para. 125.
27. *Ibid*. at para. 116.
28. The OECD Report does mention that "it appears [. . .] that police and prosecutors are willing to pursue a case of foreign bribery with a broad understanding in mind of what amounts to a "real and substantial link" to the territory of Canada and to do so until either the Canadian courts say this is going too far, or until nationality jurisdiction is introduced into law."
29. OECD, *supra* note 2 at para. 110.
30. Royal Canadian Mounted Police, "Press Release- Canadian Citizen Arrested and Charged under the *Corruption of Foreign Public Officials Act*", online: <http://www.rcmp-grc.gc.ca/ottawa/documents/IACU-eng.pdf>.
31. Transparency International publishes the Corruption Perceptions Index, which measures the perceived levels of public sector corruption in 178 countries around the world. The 2010 edition of the Index can be consulted online: <http://www.transparency.org/policy_research/surveys_indices/cpi/2010>.

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