THE UNIFINISHED REFORM OF THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT

The Need for American-Style Non-Criminal Enforcement in Canada

By Matthew Summers

In 2013, Parliament enacted Bill S-14, *An Act to Amend the Corruption of Foreign Public Officials Act*.[1] Bill S-14 was the Government of Canada's attempt to reform the *Corruption of Foreign Public Officials Act* (*"CFPOA")*, which was originally passed in 1999 to bring Canadian law in line with international anti-bribery standards.[2] However, the *CFPOA* has thus far failed to achieve that goal, and has been widely criticized for its ineffectiveness. Bill S-14 has corrected many of the *CFPOA*'s most glaring problems, but has left one major deficiency unaddressed: the lack of non-criminal enforcement. The adoption of non-criminal enforcement options, including non-prosecution agreements ("NPA"), deferred prosecution agreements ("DPA"), and civil penalties, will further improve the *CFPOA*'s effectiveness.

This paper will make its argument for non-criminal enforcement in three parts. Part One will outline how the *CFPOA* has developed and why its enforcement has been ineffective. Part Two will detail how non-criminal enforcement can improve the *CFPOA*'s effectiveness. Part Three will illustrate the successful use of NPAs, DPAs, and civil penalties in enforcing the United States' *Foreign Corrupt Practices Act* ("*FCPA*").[3] The adoption of non-criminal enforcement options is the final reform necessary to make the *CFPOA* a world-class anti-bribery regime, which will allow Canada to become a leader in the realm of foreign anti-bribery enforcement.

I. The Failure and Reform of the Corruption of Foreign Public Officials Act

Passed in 1999, the *CFPOA* was Canada's attempt to implement the principles of the Organization for Economic Co-operation and Development's ("OECD") *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("*Anti-Bribery Convention*").[4] To achieve that purpose, the *CFPOA* was modelled after the *FCPA*, but with a distinctly Canadian flavor; reflected in how its provisions fuse the language of Canada's *Criminal Code* with that of the *Anti-Bribery Convention*.[5] That fusion is the genesis for the

development of the *CFPOA* as an exclusively criminalized regime. However, in practice, that fusion has resulted in the law being largely ineffective.

In 2011, Transparency International ("TI") ranked Canada last among G7 nations in combatting bribery, placing it in the "little or no enforcement" category.[6] That ranking was a response to the poor performance of the *CFPOA*, which resulted in only one successful conviction in its first 11 years. TI's ranking identified several legal loopholes and poor enforcement practices contributing to the *CFPOA*'s failure, including the lack of a civil enforcement option. The Government of Canada's response to that failure was slow but deliberate. Since 2011, the government has increased the resources dedicated to *CFPOA* enforcement and passed Bill S-14, which reformed all but one of TI's criticisms: the lack of a civil enforcement option.

In 2015, TI upgraded Canada to the "moderate enforcement" category.[7] However, Canada has still yet to attain the "active enforcement" designation held by the United States. To remedy Canada's second tier status, TI offers three further recommendations to reform the *CFPOA*, including a renewed plea for a civil enforcement option.[8] According to TI, the adoption of civil enforcement will provide "greater flexibility and enhanced anti-bribery enforcement."[9] However, civil enforcement is just one possible non-criminal enforcement option available. In addition to civil enforcement, the adoption of NPAs and DPAs are also a necessary step in improving the effectiveness of Canada's anti-bribery laws.

II. The Need for Non-Criminal Enforcement

Non-criminal enforcement includes two categories: civil enforcement and prosecution agreements (NPAs/DPAs). Civil enforcement refers to civil penalties, which are an administrative, non-judicial fine. Alternatively, prosecution agreements are the diversion of a criminal prosecution, whereby authorities decline to proceed with (or defer) criminal charges in exchange

for a fine and the meeting of certain conditions.[10] The benefits of non-criminal enforcement include: (1) the creation of incentives for offenders to self-report and cooperate to avoid criminal prosecution; (2) faster and cheaper enforcement processes; and (3) the increased likelihood of successful enforcement through limiting the complexities of investigating and prosecuting foreign bribery.

A criminal prosecution for bribery requires a complicated and time-consuming trial. A successful conviction will require a complex investigation, the meeting of a higher burden of proof, and an adversarial process with an uncertain outcome.[11] Excluding the fear of conviction, the *CFPOA* has no formal mechanism that incentivizes offenders to self-report, cooperate, or take preventative steps to avoid bribery.[12] The introduction of non-criminal enforcement would change that. Offenders, especially corporations, often wish to avoid especially negative criminal consequences, such as disbarment from future government contracts.[13] By dangling the "carrot" of a civil penalty, NPA, or DPA, authorities provide offenders with an alternative that avoids the worst-case scenario of a criminal conviction. In order to access those alternatives, offenders are more likely to proactively self-regulate, such as by developing anti-bribery compliance programs.[14]

When a bribe is discovered, non-criminal enforcement allows prosecutors to obtain substantially similar outcomes to that of a criminal conviction. But with much less effort and cost.[15] That similarity is illustrated by the sentence imposed by the Alberta Court of Queen's Bench in *R v Niko Resources Ltd.*[16] In 2011, Niko Resources pled guilty to violating the *CFPOA*, was fined $9.5 million, received three years probation, and was placed on a corporate compliance program. That same outcome, with the exception of actually registering a criminal conviction, could have been achieved through a prosecution agreement.

For example, the $9.5 million fine imposed in *Niko* was much smaller than that often imposed through prosecution agreements under the *FCPA*, [17] and "the corporate compliance program imposed by the court […] used language taken almost verbatim from […] DPAs under the *FCPA*."[18] If Canadian authorities are willing to model *CFPOA* penalties after those of the *FCPA*, then why not also adopt *FCPA* enforcement processes? The effectiveness of non-criminal enforcement in the United States illustrates that a dual civil/criminal approach can achieve more successful enforcement actions than criminal prosecutions alone.

III. The Success of Non-Criminal Enforcement in the Foreign Corrupt Practices Act

Unlike the *CFPOA*, the *FCPA* is both criminal and civil in nature; allowing for criminal convictions and non-criminal enforcement. And while Canadian authorities continue to struggle to secure convictions under the *CFPOA*, the US Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") have achieved dozens of successful enforcement actions in just the past few years. In 2010 alone, the Criminal Division of the DOJ imposed $1 billion in fines for *FCPA* violations; the largest amount in its history up to that point.[19] Yet enforcement of the *FCPA* has not always been so successful.

Between 1977 and 2006, the *FCPA* resulted in few successful enforcement actions, which often relied on guilty pleas and the cooperation of the accused.[20] This changed in the mid-2000s, primarily due to the introduction of non-criminal enforcement. The result has been more *FCPA* prosecutions in the last 10 years than in the preceding 28.[21] Non-criminal enforcement is now the most widely used form of *FCPA* enforcement. Most DOJ prosecutions end in either an NPA or DPA, and 86% of the SEC's corporate enforcement is done through civil penalties.[22]

The rationale behind the DOJ and SEC's reliance on non-criminal *FCPA* enforcement relates to the difficulty in securing criminal prosecutions; the same difficulty still experienced by

the *CFPOA*. *FCPA* enforcement would be significantly less effective under a criminal-only prosecution model.[23] Neither the DOJ nor SEC has ever successfully prosecuted an *FCPA* violation at trial; every successful enforcement action has resulted from a guilty plea, NPA, DPA, or civil penalty.[24] But the difficulty of criminal prosecution does not necessarily mean that it should be abandoned completely.

Critics argue that an overreliance on NPAs and DPAs has led to a reduction in transparency and a move away from the rule of law in *FCPA* enforcement.[25] Similarly, the OECD has cautioned against the overuse of prosecution agreements, concluding that "[i]t seems quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S. However, their actual deterrent effect has not been quantified…"[26] Yet despite this criticism, the benefits of non-criminal enforcement far outweigh the drawbacks when used to complement, but not replace, criminal prosecution.

IV. Conclusion

The adoption of non-criminal enforcement will increase the effectiveness of the *CFPOA*. NPAs, DPAs, and civil penalties: (1) enhance anti-bribery effectiveness by increasing the number of successful enforcement actions; (2) make it easier to achieve enforcement successes; and (3) encourage offenders to cooperate and self-report violations. The result will be a rise in enforcement similar to the experience of the *FCPA* in the United States. Whereas the *FCPA* once shared the *CFPOA*'s problems with lack of enforcement and difficulty obtaining convictions, the DOJ and SEC now achieve dozens of successful enforcement actions each year.

To achieve increased enforcement, American authorities have employed non-criminal enforcement in more than three quarters of *FCPA* cases. Canada can achieve comparable results using the same enforcement methods, while remaining cognizant of the problems that the complete

abandonment of criminal prosecutions can create. The increase in *CFPOA* enforcement will allow Canada to finally achieve an "active enforcement" ranking in TI's next anti-bribery progress report. At that point, Canada will have officially gone from international laggard to global leader in the realm of anti-bribery enforcement.

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[1] 1st Sess, 41st Parl, 2013.
[2] SC 1998, c 34.
[3] 15 USC § 78dd-1 (1977).
[4] OECD, 17 December 1997, Can TS 1999 No 23 (entered into force on 15 February 1999).
[5] Stuart H Deming, "Canada's Corruption of Foreign Public Officials Act and Secret Commissions Offense" (2014) 29.2 Am U Int'l L Rev 369 at 373-74.
[6] Fritz Heimann, Gillian Dell & Kelly McCarthy, *Exporting Corruption Progress Report 2011: Assessing Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Transparency International, 2011) at 25-26.
[7] Fritz Heimann, Adam Foldes & Sophia Cole, *Exporting Corruption Progress Report 2015: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* (Transparency International, 2015) at 12.
[8] Transparency International, *Canada: Recommendations*, online: Exporting Corruption: Assessing Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions <http://www.transparency.org/exporting_corruption/Canada>.
[9] *Ibid.*
[10] Sarah Marberg, "Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act" (2012) 45 Vand J Transnat'l L 557 at 566-68.
[11] Lauren Giudice, "Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement" (2011) 91 BU L Rev 347 at 365-66.
[12] Michael Dixon and Mark Morrison, "Canada" in Mark F Mendelsohn, ed, *The Anti-Bribery and Anti-Corruption Review* (London: Law Business Research Ltd, 2013) 46 at 55.
[13] Robert Card, CEO of SNC-Lavalin, has stated that convincing Canadian authorities to consent to an *FCPA*-style DPA to resolve his company's outstanding *CFPOA* charges is his "day-and-night focus." See: Nicolas Van Praet, "SNC-Lavalin could restructure in wake of fraud, corruption charges" The Globe and Mail (10 March 2015), online: <http://www.theglobeandmail.com/report-on-business/international-business/snc-lavalin-could-restructure-in-wake-of-fraud-corruption-charges/article23396969/>.
[14] Marta Munoz de Morales, "Corporate Responsibility and Compliance Programs in Canada" in S Manacorda et al, eds, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Switzerland: Springer International Publishing, 2014) 441 at 446.
[15] Mike Koehler, "An Examination of Foreign Corrupt Practices Act Issues" (2013) 12.3 Rich J Global L & Bus 317 at 365-66.
[16] 101 WCB (2d) 118, 2011 CarswellAlta 2521 (Alta QB) [*Niko*].
[17] Marberg, *supra* note 10 at 560.
[18] Adan Nieto Martin & Marta Munoz de Morales, "Compliance Programs and Criminal Law Responses: A Comparative Analysis" in S Manacorda et al, eds, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Switzerland: Springer International Publishing, 2014) 333 at 346-47.
[19] Marberg, *supra* note 10 at 560.
[20] *Ibid* at 591-92.
[21] *Ibid*.
[22] Marberg, *supra* note 10 at 566-67.
[23] Koehler, *supra* note 15 at 326-27.
[24] Hee Won (Marina) Moon, Jennifer Rimm, & Philip Urofsky, "How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act?" (2012) 73.5 Ohio St LJ 1145 at 1169.

[25] For an overview of such criticism see: Christopher A Buscaglia, Jason Peterson & Miriam F Weismann, "The Foreign Corrupt Practices Act: Why It Fails to Deter Bribery as a Global Market Entry Strategy" (2014) 123.4 J Bus Ethics 591; Giudice, *supra* note 11.

[26] OECD Working Group on Bribery, *Phase 3 Report on Implementing The OECD Anti-Bribery Convention in the United States* (OECD, 2010) at 20.