Spotlight on Canada – James Klotz

[00:00:06] Welcome back to the podcast Bribe, Swindle or Steal. I'm Alexandra Wrage and today I'm speaking with James Klotz. James is a partner with TRACE's partner firm in Toronto, Miller Thompson LLP, where he oversees the firm's anti-corruption and international governance crew. He's also a past chair of Transparency International, Canada. James, thanks so much for joining me.

[00:00:27] My pleasure.

[00:00:28] There is a general sense that Canada has been pretty sleepy on the anti-bribery enforcement front. Do you agree with that? This is your chance to defend to Canada.

[00:00:37] Well clearly there have not been a lot of prosecutions in Canada and Canada has been faulted for this in the past by the OECD. By 2012 we only had one serious prosecution to come out of our law, the Corruption of Foreign Public Officials Act, since its enactment in 1999 and that compared with over 100 at the time in Germany and over 200 in the U.S. But since then the Canadian government stiffened up the CFPOA, as we call the act, with amendments increasing the penalties, adding books and records offence, widening the jurisdiction and eliminating the exemption for facilitation payments. But that done, Alexandra, Canada has only produced in total three notable convictions, has only a few known cases in the pipeline and we don't actually know how many ongoing investigations there are.

[00:01:30] In fact since the CFOPA always enactment, Global Affairs Canada has released an annual report on the act's implementation showing that in 2014 there were 27 investigations ongoing. In 2016 there were 10. And now they no longer provide that statistic. While some might say that Canada should get tough with white collar crime, there are actually a host of reasons why Canada has such a modest enforcement record and, if you allow me, I'll give you some of those reasons. First of all the CFPOA is very similar to the U.S. FCPA except that it does not have the SEC non-criminal enforcement provisions. And this means that all CFPOA cases are wholly criminal actions and they require the prosecution to prove guilt beyond a reasonable doubt rather than the lesser non-criminal standard of guilt that are in the SEC sections of the FCPA. And we're unlikely to get a similar securities act regulation provision in Canada because we don't have a unified national securities regulator and we're unlikely to see one in the future or at least the foreseeable future. Secondly to convict the company in Canada, the bribery offence must be proven to have been committed beyond a reasonable doubt with the knowledge or acquiescence or under the direction of a senior officer. And this is a higher standard than in the U.S. where if the authorities can show that a lower level employee authorized abroad, the knowledge does not have to reach the upper echelons of the company to be liable. The third reason is that when the accused are charged with a white collar crime in

Canada, there is a greater likelihood that they will fight the charges vigorously. Our criminal trials and our criminal process are more cumbersome and time consuming than in the U.S. and, as a consequence, our record in white collar prosecutions, at least at the trial level, relative to the U.S. is quite poor. In addition while no one wants to go to jail in Canada, Canada's parole rules are extremely favorable when compared to the U.S. In Canada it would be the rare white collar criminal that would serve many years in prison as day parole is generally available after serving only one sixth of the sentence and full parole is available after serving just a third. Whereas in the U.S. white collar criminals can be given extremely long sentences without much parole and there is much more of an incentive to plead guilty to obtain a lesser offense. In addition Canadian authorities have not had the tool of deferred prosecution agreements and these are agreements where parties can come forward enter into an agreement with the authorities to suspend their prosecution provided they cooperate. The U.S. has had DPAs, as you know, for more than 25 years and the UK since at least last I guess four years or so. But without this tool Canadian companies who uncover a problem with corruption, they have a choice. They can either come forward and hope for leniency or they can stay silent as there's no obligation in Canada to self-report. And the likely reason that so few Canadian companies come forward is that the reporting authority, the RCMP, and the prosecutors that they work with cannot bind the judge even if they work something out. And as a result until now there have been very few cases. And that is regrettable because having cases does enable the business community to really understand the consequences of participating in corruption. And so that's just too bad.

[00:05:07] There's a lot to unpack there. Let's start with your last point about DPAs. There a lot of jurisdictions that are moving towards the U.S. model of permitting these deferred prosecution agreements. What is the climate in Canada right now with respect to DPAs?

[00:05:23] Well interestingly enough, Alexandra, just last month, royal assent was granted to the bill which creates the remediation agreement regime which is Canada's own version of deferred prosecution agreements. And as a result the regime will come into effect on September 19th 2018. Remediation agreements in Canada will be subject to prosecutorial discretion and court approval and the court will have to be satisfied that the agreement is in the public interest and that the terms are fair, reasonable and proportionate. And the features of a remediation agreement are going to have to include an agreed statement of facts, acceptance of responsibility for the wrongdoing, payment of a financial penalty and relinquishment of any benefit gained from the wrongdoing, a creation or enhancement of compliance procedures and, most interestingly, reparation to victims including overseas victims as appropriate. And there may also be instances where an independent monitor will need to be appointed. Frankly I wasn't in favor of this regime as I believe it's the wrong way to go about dealing with corruption. I would have preferred to see the introduction of an adequate compliance procedures defense instead. However, it is what it is and it will be interesting to see what happens when the regime is in place in September.

[00:06:51] You've highlighted an issue that I find really fascinating. When you refer to restitution to overseas victims, is there any indication of how that restitution should be made because it sounds like a great idea to make the victims of corruption whole but then when you ask people what exactly are you meant to do, do you give it back to the kleptocratic government that took the money in the first place? There is often just a blank stare in response.

[00:07:17] You and I are familiar with the complexity of this issue and that's why I said it was interesting. I have no idea. I think probably it will be on a case by case basis. It'll make for interesting times as will these agreements. We shall see.

[00:07:33] You also mentioned that there have only been three enforcement actions, I guess four if you count the individual but three corporate enforcement actions. Just because so many of our listeners are based outside of North America, it would be really helpful if you could talk us through those and any patterns or key takeaways. In the fairly distant past now, there hasn't been one for five years so they may have fallen from recent memory.

[00:07:59] Technically there are four cases. I discount the first case that took place many years ago, HydroKleen, it's just not an interesting case. We didn't learn much from it. But there have been three notable cases and they all share one important feature. So let me describe the three cases and then I'll talk about what they have in common. The first was in 2011 Niko Resources was a publicly traded company based in Calgary. It pleaded guilty to bribing a Bangladeshi official with a trip to North America and the use of a Toyota Land Cruiser and the company was fined nine point four million dollars. No one went to jail. Interestingly, given that this was the first real case under the CFPOA and the bribe amounts were comparatively small, the amount of the fine was actually quite significant. The case came to the attention of the RCMP in a roundabout manner. Following a gas explosion at one of Niko's sites in Bangladesh, Niko was required to pay compensation to the villagers whose drinking water had been contaminated.

[00:09:01] The compensation was to be set by the responsible government minister. A local newspaper reporter saw a new Toyota Land Cruiser parked in front of the minister's building, discovered that it was previously owned by Niko's Bangladeshi subsidiary and wrote a story about it. The president of the Niko subsidiary then met with Canada's high commissioner in Bangladesh and said something to the effect of “these things are done all the time in Bangladesh.” But unbeknownst to him Canada's foreign trade service had received new instructions in 2010 that they were to report suspected instances of bribery by Canadian companies and thus the case was brought to the attention of the RCMP. And one interesting take-away from that case was that the company was required to implement a robust anti-corruption program and engage an independent auditor as part of a three year probation order. But the probation order for Niko mirrored almost word for word, literally, a similar order made in the FCPA Panalpina case which have been resolved the previous year in the U.S. The second case was in 2013 when Griffiths Energy International, a privately held oil and gas company based in Calgary, pleaded guilty to bribing Chadian officials to expand their oil business in Chad. And they ended up paying a ten point three five million dollar penalty. What's

interesting about Griffiths was the company was going to pay a two million dollar consulting fee to a U.S. entity wholly owned by the Chadian ambassador to Canada. When its lawyers pointed out that that would contravene the CFPOA, they made the payment instead to a newly incorporated U.S. entity owned by the ambassador's wife. And the consulting fees were uncovered during the process of due diligence in preparation for a public offering and Griffiths immediately replaced its management team, appointed a bunch of new independent directors and undertook immediate corrective action including conducting a thorough investigation. It then voluntarily self-disclosed its investigation to the RCMP and representatives of the Public Prosecution Service of Canada and Alberta Justice as well as to their counterparts in the U.S. shortly thereafter. The third case was of an individual. Mr. Karigar was convicted for agreeing with others to offer bribes to foreign public officials contrary to the CFPOA. The RCMP laid charges against him for making a payment to Indian government officials to facilitate the execution of a multimillion dollar contract to supply the Mumbai airport with a facial recognition security system provided by a Canadian high tech company called Crypto Metrics. In 2014, Mr. Karigar was sentenced to three years imprisonment making him the first, and still the only, individual convicted under the CFPOA and the first time that the matter had gone to trial under the CFPOA. The two earlier cases Niko and Griffiths were both pleas. The last year his appeal to the Ontario Court of Appeal was dismissed and the case had some interesting nuances in that there was no evidence of any official actually receiving bribes. And thus it's clear that Canadian courts will interpret the CFPOA likely in a very broad way.

[00:12:22] The other nuance involved legal jurisdiction which has now moot followings amendments to the CFPOA to provide nationality jurisdiction. But what ties all three of these cases together is that the parties were all relatively unsophisticated when it came to understanding Canadian anti-corruption laws. In Karigar, Mr. Karigar himself reported the matter to the U.S. DOJ by email using a pseudonym, "Buddy," and after reporting it, he then asked for immunity. Well clearly it was too late for that. So those are the three cases. There are a few cases where charges were laid that have not resulted in a conviction. Let me quickly just hit those few. In 2013 charges were laid against a fellow named Kevin Wallace and two others. They were former executives of SNC Lavalin who the Crown had alleged had agreed with others to pay bribes to officials in Bangladesh to win a 50 million dollar contract to supervise the Padma Bridge construction project. And this was Canada's most significant and high profile anti bribery prosecution against corporate executives. The prosecution against one of them was stayed in 2014 and the case against the other two resulted in their acquittal after a judge ruled that the wiretap evidence against them was not admissible. And you may recall that this case was held up pending the 2016 decision by the Supreme Court of Canada on the World Bank's privileges and immunities in relation to information that it had referred to the RCMP about the foreign bribery allegations.

[00:14:00] In that case the Supreme Court found that in the absence of a finding an express waiver of immunity on the part of the World Bank, the World Bank's anti-corruption staff could not be compelled to appear in court in Canada to provide information about the whistleblowers

who first alerted the World Bank to the allegations. And that that immunity also covered the World Bank's records that the defense had sought. In any event it didn't matter much because the parties were acquitted. Prosecution against two other former employees of SNC Lavalin also resulted dismissal and the acquittal by virtue of the same inadmissible wiretap evidence. And the only other case was in December of 2016. Larry Kushniruk, who was the president of Canadian General Aircraft in Calgary, was charged with agreeing to offer a bribe to Thai officials in order to secure the sale of commercial jet from Thailand's national airline in violation of CFPOA. And that case was brought to the attention of Canadian law enforcement by the FBI in 2013. But last year the Crown stayed the proceedings against him.

[00:15:05] That is a very useful review of the Canadian cases to date. I take your point on HydroKleen which was the first one in in 2005, it's 13 years old and it was a tiny fine, just twenty five thousand dollars. But they do get full marks for creativity. That was the case where the bribe was paid to a U.S. immigration official to put HydroKleen's competitors, among other things, to put them on the terrorist watch list so they wouldn't be able to get into the United States to perform on their contract. So while it's probably not a striking case under the law or by dollar amount, it's still a pretty interesting case and unique, I think, in the anti-bribery world.

[00:15:47] Well unique in the sense I suppose. In that case as I understand it the prosecutor discovered the CFPOA and made use of that. We didn't actually learn a lot from that case. And as you said the fine of twenty five thousand dollars was not the kind of case that we'd want to hold up as a shining example of the deterrence value of paying bribes.

[00:16:08] That brings us up to date on enforcement actions that have concluded one way or the other. Are there any pending cases that you can discuss?

[00:16:17] Yeah there are a few. And charges are still pending against SNC Lavalin and two of its subsidiaries. And they were charged in 2015 with one count of bribery under the CFPOA and the count of fraud on the criminal code. And those charges include alleged payment of bribes in relation to major construction projects in Libya. And based on what I've read, SNC Lavalin hopes to take advantage of Canada's new deferred prosecution regime. Charges also remain pending against two former SNC Lavalin executives with respect to allegations of bribes to foreign public officials in Libya and we'll see where those go as well.

[00:16:57] Finally in relation to the Karigar case, two former officers of Crypto Metrics Canada, both U.S. nationals, and a UK agent for Crypto Metrics have been charged with agreeing to pay bribes to Indian officials in violation of the CFPOA. And those charges flow from the same events that led to the conviction of Mr Karigar. And that's about it at the moment and that I guess is I suppose the good news is we don't know how many cases are actually under investigation. We don't know how many companies have been sitting on their own discoveries of corruption matters that will now come forward once the new regime comes into place in September. So there is still hope. Part of the problem is foreign corruption offences are incredibly expensive to investigate and so it requires a tremendous effort by the authorities to

investigate these cases and bring them to trial and hopefully with more success than we currently have seen.

[00:17:58] Can you give us an update on the current status of facilitation payments under Canadian law?

[00:18:04] Prior to late last year the CFPOA excluded facilitation payments but as of October 31st 2017, they're no longer excluded and thus they are no longer permitted under Canadian law. And frankly, I'm delighted. And I was actively involved in the movement to obtain the ban. And I've always been bothered by the underlying policy reasons for the facilitation payment exemption. And unfortunately the exemption both in Canada and the U.S. came with very little guidance. In particular there was no language in the exemption indicating that it had to be minor, nor was there any guidance on the size of the payments under which you would qualify. And many years ago I asked the then deputy chief of the U.S. Department of Justice fraud section about the amount of the payment that would turn an exempted facilitation payment into a culpable bribe. And he indicated that 100 dollars was probably OK, that a thousand dollars might be OK but that a million dollars was not.

[00:19:07] Completely arbitrary.

[00:19:08] Well that was slim comfort particularly when you try to explain to a business person exactly what payments are permissible and what payments are not. And I found I was always troubled in doing training to have to explain that some bribes are allowable and some aren't. Corruption is already incredibly complex, teaching people to understand what a bribe is not the easiest thing. So when you had to dance around the facilitation payment exemption, you could see it was - it would be easy for a business person to say well this payment wasn't making the minister do his job differently, it was simply making him do it faster and you could see perhaps business people coming to their own moral justification for paying bribes. I was troubled by that.

[00:20:05] TRACE has been very consistent in its opposition to facilitating payments and I think one of the most telling things is always if you ask a Canadian or you ask an American what if a noncitizen, a foreigner, came to these countries, yours - Canada and the United States, and started tipping our customs officials. I mean that would be completely unacceptable. You jump the queue, you jump the queue in front of other businesses so you do get a business advantage and there's something really distasteful about saying we don't have any objection to you doing it overseas but we don't permit those same payments here.

[00:20:42] Exactly and I was troubled by it. I have little expectation that we'll see prosecution in Canada for something that would have otherwise been a facilitation payment. But you never know. What's curious about the removal of the facilitation payment exemption is that the penalty in Canada for making what was previously a legal bribe under the facilitation payment exemption is now subject to up to the maximum penalty under the CFPOA which is 14 years in prison. And that's interesting because it's an extraordinary maximum penalty for paying say

fifty dollars to a foreign visa officer. And more interestingly, it far exceeds the penalty for a similar wholly domestic payment to an official in Canada.

[00:21:30] It's still a norm-changing gesture, right, to not permit it under the law. There's still there's always going to be prosecutorial discretion, and we want that, but to have it the exception on the books I think is really corrosive. On that note for companies multinational companies entering the Canadian market for the first time, are there surprises or traps for the unwary that you would like people to know about?

[00:21:53] Just a few pieces of advice for multinationals entering the Canadian market for the first time and the first is to ensure that a risk assessment is done as to who exactly is a government official in Canada. We have many state owned enterprises here and we have a state owned hospital system. We also have First Nations Bands whose executives may or may not be considered to be public officials. Secondly where contacts are taking place with government officials, the company should have a very good understanding of Canada's lobbying laws which affect how you can deal with public officials. And finally Canadian employees, unless they have received good anti-corruption training, are generally completely unaware of Canadian anti-corruption laws. And many foreign nationals do not take the time to train their Canadian staff and I would tell them to make that a priority.

[00:22:52] We held a roundtable in Calgary last year and I was fascinated to hear the question come up more than once. There was considerable discussion around this issue of whether the senior members of First Nations communities should be considered government officials under the CFPOA.

[00:23:13] Yeah it's an open question and I've heard both views on it and I tend to, as a good lawyer, tend to err on the conservative side and make the assumption that you're dealing with public officials and work backwards from there. But it is an interesting question. I don't think there's been great guidance on it yet. And I know in our legal circles we have bandied about to question. Some hold very strong views that they are public officials and that would probably be, again, it may be on a fact basis because there are different flavors but your caution required, no question about it.

[00:23:51] And frankly all of this is solved by the trend, ultimately will be solved by the trend, towards flattening anti-bribery policies to include everybody - commercial, public, private. If you have a policy that just prohibits bribery you don't have to go through the analysis of whether they are a public official.

[00:24:12] It's very true. Unfortunately the international aspects make it complicated. But it is not that complicated at the end of the day.

[00:24:20] Thank you so much for your time today, James, and for your support of TRACE as our partner firm in Canada. It's a real pleasure to speak with you again.

[00:24:28] Likewise, Alexandra. A pleasure for me. Thank you.