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INSTITUTIONAL POLICY STUDIES – EXERCISE SOLO FLIGHT INTEGRITY, TRANSPARENCY AND ANTI-CORRUPTION IN GOVERNMENT AND DEFENCE PROCUREMENT

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Exercise Solo Flight

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EXERCISE *SOLO FLIGHT* – EXERCICE *SOLO FLIGHT*

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INTEGRITY, TRANSPARENCY AND ANTI-CORRUPTION IN GOVERNMENT AND DEFENCE PROCUREMENT

The standard you walk past is the standard you accept

– General (Retired) David Hurley,
Former Chief of the Defence Force (Australia)

Introduction

Corruption challenges the rule of law and undermines democracy within the public domain. Furthermore, it channels criminal activity, crippling commercial growth and healthy competition in the private sector¹. In the public domain, it presents a fundamental obstruction to effective and legitimate governance and can take many forms. In the extreme, it may be government officials entreating citizens or prospective clients for inducements to perform criminal activities, or bureaucrats receiving payments for exercising partiality, bias or partisanship. On a macro level, it has been reasoned that corruption is one of the main obstacles to sustainable economic, political and social development, for developing, emerging and developed economies alike². The myriad of processes, policies, mechanisms and stakeholders critical in the procurement of goods and services, necessary in a system of legitimate governance, presents a complex milieu where corporate wrongdoing can permeate. According to Transparency International³ (TI), a non-partisan global organisation, defence is perceived as a sector where corruption is widespread. Integrity, robust anti-corruption practices and

¹ Boisvert, A. L. Dent, P. and Quraishi, O. B. Public Safety Canada. Corruption in Canada: *Definitions and Enforcement*. Deloitte LLP. Report No.46, 2014. Pg8.

² Organisation for Economic Co-operation and Development (OECD). CleanGovBiz Initiative: Integrity in Practice. 2014.

³ Transparency International is a non-governmental organization. Its mission is to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society. <https://www.transparency.org>

transparency are critical to counter such transgressions. Achieving transparency and unconditional integrity is conceivably as complex as other government endeavours and can therefore said to be a wicked problem⁴ void of simple resolution.

Through inspection of selected strategies and instruments, and examples of government procurement, this paper will argue that a lack of transparency and the potential for corruption remains a pervasive threat to legitimate competitive defence procurement. The paper will illuminate the challenges of transparency and integrity before taking a concise look at the issue of corruption through the lens of the international defence market. Focussing on the subject in the domestic context the paper conducts a critical review of the governments Integrity Regime; frames the issues through a synopsis of a major defence procurement programme; and, along with examination of the governments Advance Contract Award Notice, will collectively reveal a potential breeding ground for corporate wrongdoing.

Global Corruption

The term corruption originates from the Latin word *corruptus* meaning ‘to break’, and while one can find many characterisations and concepts describing corruption, a broad definition within the public domain can be taken as ‘the exercise of official powers without regard for the public interest’⁵, or ‘the abuse of public office for private gain.’⁶ Outside of the public realm, it may be still be maintained that corruption will be the consequence of a breach of institutional

⁴ Rittel, Horst W.J., and Melvin M. Webber. "Dilemmas in a General Theory of Planning." *Policy Sciences* 4, no. 2 (June 1973). Pg155.

⁵ M. Patrick Yingling, *Conventional and Unconventional Corruption: Analysis and Solutions for the United States and Kenya*, 51 *Duquesne Law Review*, 2013. Pg263.

⁶ Margaret Beare. *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, University of Toronto Press, Toronto, Buffalo and London, 2003. Pg89.

interests by individuals at the expense of the communal interests⁷. While government mechanisms exist to counter corruption within the domestic and international arena, one may contend there exists a dichotomy when one considers the export of domestic defence products internationally to countries with poor reputations and statistical evidence of corrupt practices within government. It is perhaps relevant to gain a sense for how the issue is perceived through the international lens, where fostering integrity and reducing corruption are important elements in building state institutions and promoting democracy based on the rule of law. When one considers the problem on an international scale, the same characteristics of corruption, described above, can become markedly more complex due to the increase of external influencing factors.

One such factor which is debated in the context of defence sales to foreign nations is the corruption (or lack of anti-corruption) performance of the international partners that Canada engages with. A contemporary example is that of Canada's defence sales to Saudi Arabia. Noting that there exists, but not herein engaging in, the argument on the issue of promoting global violence through international arms trades, the export of Canadian defence products to Saudi Arabia raises questions of Canada's intent to develop its domestic defence industrial base. In her report 'Beyond LAVs: corruption, commercialization and the Canadian defence industry'⁸, Ellen Gutterman presents a persuasive argument on the topic of government-promoted arms sales to undemocratic, militarily aggressive regimes, thereby supporting violent and autocratic rulers, ignoring endemic bribery and corruption. A critical problem then becomes how the government can expect to extol integrity and virtuous behaviours in its own domestic arena, when the subordination of Canadian foreign policy is seen to be supporting corrupt nations⁹. This becomes

⁷ Boisvert, A. L. Dent, P. and Quraishi, O. B. Public Safety Canada ... Pg9.

⁸ Gutterman, E., and Lane, Andrea. Beyond LAVs: corruption, commercialization and the Canadian defence industry. Canadian Foreign Policy (CFP) Vol. 23 Issue 1. March 2017.

⁹ *Ibid* ... Pg79.

an untenable situation when one considers Canada's intent to be seen as a global force for good, a promoter of international peace and security, and a moral leader in global politics.

The Integrity Regime and Competition Bureau: The Canadian Governments Anti-corruption Mechanisms

Administered by Public Services and Procurement Canada (PSPC), the Integrity Regime consists of the ineligibility and suspension policy, and associated directives¹⁰. The policy frames the circumstances under which PSPC may disqualify a supplier from contracting with the federal government. The principle is one where a prospective supplier will be automatically ineligible if it is/has been convicted of specific domestic offences in the preceding three years under the Competition Act¹¹, the prosecuting mechanism. Canada's Competition Bureau, an independent law enforcement agency, is the organisation which investigates and supports the prosecution of offences under the Competition and other similar Acts. While the period of ineligibility under the regime will generally be set at ten years, there are allowances whereby the period can be reduced to five years pursuant to a negotiated 'administrative agreement'. For such an agreement to exist, the supplier must demonstrate that it co-operated with law enforcement authorities or has undertaken remedial action to address the conduct that led to its ineligibility.

One particular focus of anti-corruption is that of purging cartels¹²; cartels create agreements between businesses or individuals to control production or provision of goods and

¹⁰ Canada. Public Services and Procurement Canada. *Ineligibility and Suspension Policy*. April 4, 2016. <https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>

¹¹ Canada. Minister of Justice. *Competition Act: An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition*. Last amended December 12, 2017.

¹² Canada. Competition Bureau. *Investigating Cartels: Cartels in Canada*. <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02442.html>

services thereby limiting competitive markets. Indeed, the criminal offence of conspiracy¹³ can be applied against cartels, resulting in fines up to \$25M and/or imprisonment up to 14 years. Quite separate to the Integrity Regime's 'administrative agreement' described above, but in the same vein of encouraging cooperation, the Competition Bureau offers programmes of immunity and leniency put in place to incentivise individuals to come forward in return for immunity or reduced penalties. The Immunity Programme is promoted as 'one of the Bureau's most effective tools for detecting and investigating criminal anti-competitive activities'¹⁴.

A critical analysis of the separate inducements however, reveals a detrimental consequence of the Integrity Regime when applied alongside the Immunity and Leniency Programmes. While the Competition Bureau's programmes depend upon cartel participants being incentivised to come forward and cooperate in exchange for immunity from prosecution or reduced penalties, the Integrity Regime's strict and automatic disqualification of suppliers convicted of cartel offences under the Competition Act presents a juxtaposition. The Integrity Regime provides no allowance or consideration in the context of suppliers or persons who participate in the Competition Bureau's programmes, which ultimately are based upon those individuals entering into a non-contested guilty plea. This may be distilled to say that those who agree to cooperate with the Competition Bureau, under a voluntary guilty-plea, are treated by the Integrity Regime in the same manner as persons who have been convicted under a contested trial.

Commentary from within the legal community¹⁵ upon the statistics of the Competitions Bureaus contested cartel cases would suggest a limited degree of successful convictions by the

¹³ Canada. Minister of Justice. *Criminal Act*, Part XIII, 465, Conspiracy. Last amended December 12, 2017.

¹⁴ Canada. Competition Bureau ...

¹⁵ Hutton, Susan M. Canada's Competition Bureau loses major bid-rigging case: 60 not guilty verdicts. Stikeman Elliot. May 5, 2015. <https://www.stikeman.com/en-ca/kh/competitor/canada-competition-bureau-loses-major-bid-rigging-case-60-not-guilty-verdicts>

Public Prosecution Service of Canada (PPSC) in this arena. Not only does the poor track record bring into question the ability of the Competition Bureau and PPSC to build and win contested cases, but it highlights a fundamental issue in the Immunity and Leniency Programmes. Two cases in particular draw attention, *Durward* and *Nestlé*, as the cooperating parties whom pleaded guilty were fined, while those who contested were vindicated¹⁶. Results such as these are contradictory to the messaging of the Programmes, and while not necessarily likely to encourage corrupt activities, they are perhaps less likely to motivate individuals to come forward – rendering the entire premise of the Programmes ineffectual.

Transparency in the National Shipbuilding Strategy

Encumbered in the complexities of defence procurement, the National Shipbuilding Strategy¹⁷ (NSS) launched in 2010, and one particular progeny of the programme, has been no stranger to the challenges of integrity, issues of transparency and criticisms of perceived exploitation. Unique in its procurement approach, the underlying principle to the NSS was ensuring a viable and sustainable shipbuilding industry in Canada, providing vessels to the Royal Canadian Navy (RCN) and Canadian Coast Guard (CCG), by way of requesting qualified shipyards to bid on the *opportunity* to build – essentially an umbrella agreement. The vessels were categorised into two packages; combat and non-combat including the joint support ships (JSS). Irving Shipbuilding of Halifax won the competition for the combat package, while Seaspan of Vancouver won the competition for the non-combat package. After announcement, the government commenced the establishment of the long-term relationships aimed at ‘long-term

¹⁶ Katz, M. Banicevic, A. Competition Law Insight. Reviewing the situation: *Is Canada able to enforce its anti-cartel laws effectively?* Davies Ward Phillips & Vineberg LLP (Toronto). May 10, 2016.

¹⁷ Canada. Public Services Procurement Canada. Defence Procurement: National Shipbuilding Strategy. April 9, 2018. <https://www.tpsgc-pwgsc.gc.ca/app-acq/amd-dp/mer-sea/sncn-nss/index-eng.html>

strategic sourcing arrangements that define the working relationships and administrative arrangements under which the government will negotiate fair and reasonable individual contracts.¹⁸

Not envisaged as part of the original core NSS programme, the MV Asterix (Project Resolve - to convert an existing civilian supply ship) supplied by Chantier-Davie Shipyard is presently being leased to serve as an Interim Auxiliary Oiler Replenishment (iAOR) capability until such times as the NSS delivers the JSS. The \$668 million iAOR sole-source contract by the former Conservative government, signed under a letter of intent; and binding to the extent of \$89 million (should the government have withdrawn), has drawn media interest due to the vagueness and process of the procurement leading up to the actual lease. Arguably, the situation was clouded from the start whereupon the former Conservative government quietly changed the regulations governing sole-source military purchases. Shortly after the Liberals election in October 2015, the new government wanted to review the agreement and ordered a brief halt to the project. However, once the story was leaked to the media¹⁹ and the public domain respectively, the government yielded and allowed the project to continue. There is currently criminal charges and court proceedings pending²⁰ in relation to the acquisition, so while a fulsome analysis of the Project Resolve would perhaps be inappropriate due to the pending proceedings, it is perhaps reasonable to offer commentary on some of the evidences which are in the public domain, to question the projects transparency.

¹⁸ Canada. Public Works and Government Services Canada. (Archived) Canada signs long-term Agreements with NSPS Selected Shipyards. Gatineau, Quebec, February 15, 2012. <https://www.canada.ca/en/news/archive/2012/02/canada-signs-long-term-agreements-nsp-selected-shipyards.html>

¹⁹ Brewster, M. CBC News. Ship that may have sunk admiral's career to be unveiled in Quebec. Updated July 20, 2017. <http://www.cbc.ca/news/politics/norman-supply-ship-unveiled-1.4213498>

²⁰ Berthiaume, L. The Globe and Mail: Suspended Vice-Admiral Mark Norman's Case put over until July 10. The Canadian Press. May 16, 2018. <https://www.theglobeandmail.com/canada/article-suspended-vice-admiral-mark-normans-case-put-over-until-july-10-2/>

The circumstance under which the government saw reason to make an amendment to contracting regulations in June 2015, allowing federal cabinet authority to make agreement with a single supplier given urgent operational reasons, is an area for examination. There can be little doubt that the necessity for acquiring a supply capability was pressing for *operational reasons* – both existing supply ships, HMCS Protecteur and Preserver were forced out of service in 2014. However, a thorough literature or media search fails to reveal the detailed proceedings of the process of amending the federal contract regulations. While this does not immediately point to impropriety, it does raise a question of lack of transparency. This becomes more troublesome when one considers the apparent scheduling difficulties of Seaspan; the to-be-contracted supplier of the JSS, to deliver the vessels. The CCG vessels which are now behind schedule has effectively curtailed Seaspan being unable to commence construction of the JSS in 2018 as planned²¹. A lack of detailed information from the government regarding the delays of the CCG vessels, citing commercial confidence restrictions and the deeming delivery information as secret, again engenders a question of transparency or lack thereof.

Returning to examine the arrangements of the original umbrella agreement, one may contend that the conditions present a situation which may be open to criticism of subsequent preferential selection of sub-contractors by the prime contractor. The report entitled ‘Blank Cheque’ authored by Byers and Webb on behalf of the Canadian Centre for Policy Alternatives (CCPA) identifies this very issue. The report highlights that the prime contractors ‘will be free to select the *system integrators*’ which coordinate various aspects of the procurement, including

²¹ Pugliese, D. Ottawa Citizen. Supply ship project delay means DND postpones \$20 million payment. January 8, 2018. <http://nationalpost.com/news/politics/supply-ship-project-delay-means-dnd-postpones-20-million-payment>

selection and acquisition of communication sensor and weapon systems'²². Therefore, and notwithstanding the financial implications of costs for inclusion of the high-tech systems, which the prime contractor will be able to pass onto Canadian taxpayers²³, so long as the systems meet the requirements of the RCN the prime contractor will be in a position to control the selection of sub-contractors, without overtly strict adherence to the government procurement norms.

In the governmental procurement of any programme of goods or services, not only are taxpayers entitled to, and demand, value for money, but good governance requires transparency and integrity. One may submit that that the procurement methodology of the NSS provides a deficiency of either in this respect. This is typified in commentary from within industry, where some sources contented that the process had been styled in such a way as to enable suppliers with links to Irving Shipbuilders an unfair advantage, as published in a number of National Post articles²⁴. The same questions and debates will no doubt manifest themselves again, and perhaps more critically, following the recent promise by the Prime Minister of a shipbuilding contract to Davie for procurement of a number of ice-breaker ships for the CCG²⁵. It would seem that hard won lessons are (again?) quickly overtaken in the battlespace of gaining voter buy-in.

²² Byers, M. and Webb, S. Canadian Centre for Policy Alternatives. Blank Cheque: National Shipbuilding Procurement Strategy Puts Canadians at Risk. Ottawa. December 2013. Pg6.
https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2013/12/Blank_Cheque.pdf

²³ *Ibid* ... Pg15.

²⁴ Ivison, John. National Post: Accusations of Irving bid-rigging for friends taint selection process for \$7billion ship combat systems plan.

²⁵ Dougherty, Kevin. Trudeau promises icebreaker contracts for Davie. iPolitics. January 19, 2018.

Advance Contract Award Notice (ACAN)

Arguably a controversial approach to procurement, the Advance Contract Award Notice²⁶ (ACAN) allows a federal procurement process which can be articulated as competitive, but yet contains provisions for outright avoidance of a competitive process. The concept is based upon a fifteen calendar-day period whereby departments can publicly post, to the supplier community, a notice indicating a pre-identified supplier. If any number of potential suppliers submit statements of capabilities within the period, satisfying the requirements set out in the ACAN, then the department must conduct a full tendering process. If, however, no other supplier responds with a statement of capabilities that meet the requirements set out in the ACAN, then competitive requirements of the government contracting policy have been met and the pre-identified supplier can be awarded contract. Perversely, as a former Auditor-General observed, while ‘ACANs contribute very little to competitiveness...’ the title itself excels in the fundamental premise of transparency as ‘... it constitutes a notice that is given prior to awarding a contract.’

The ACAN has been criticised as an adverse method for the procurement of a number of military equipment programmes, in which competition was deterred from flourishing, to the likely detriment of unfavourable cost to the taxpayer, and the risk of technically inferior equipment. Indeed, ACAN was the mechanism used to designate Irving Shipyards (Halifax) as the prime contractor for the Arctic Offshore Patrol Ships (AOPS) and Canadian Surface Combatants (CFC), and the buying of Chinook airframes from Boeing without allowing AugustaWestland to bid. In the report *Smart Defence* by Michael Byers, Canadian Centre for

²⁶ Canada. Public Services and Procurement Canada. Buyandsell.gc.ca. The Procurement Process: *What is an Advance Contract Award Notice (ACAN)?* Date modified 2015-01-21. <https://buyandsell.gc.ca/for-businesses/selling-to-the-government-of-canada/the-procurement-process>

Policy Alternatives, the author draws upon a solid example offered by a colleague²⁷, whereby the ACAN process used for the purchase of strategic airlift capability for DND was partisan towards Boeing from the outset. Furthermore, subsequent challenges from two separate suppliers were rendered unsuccessful as qualified suppliers. A week after the challenges Boeing was confirmed as the lone qualified supplier. Michael Fortier the then Minister of Public Works and Government Services declared ‘I am pleased to see this process is moving in a fair, open, and transparent manner.’²⁸ The circumstances of the ACAN, however, draw the observer to the conclusion that the competitive process of the ACAN was anything but. Firstly, the notification on the government’s electronic tendering service, MERX, was explicit in that it stated ‘Generally, only one firm has been invited to bid.’ Secondly, the Ottawa Citizen published an article revealing that a key requirement of the program had been changed, that of doubling the payload requirement to 39 tonnes of cargo. This change in technical requirement, reportedly made only weeks before the ACAN, excluded the only other possible aircraft supplier of the time, Airbus. The reason behind the seemingly disproportionate increase in payload requirements was never explained by the Department of National Defence²⁹.

In the case of the ACANs, and perhaps arguably in the case of any procurement methodology, the determination of the technical specifications of the capability sought is a key milestone in influencing the pool of qualified suppliers, and as such is perhaps where greater transparency should be garnered. If indeed there is legitimate need for modification of the

²⁷ Staples, S. Canadian Centre for Policy Alternatives. No Bang for the Buck: Military contracting and public accountability. Ottawa. June 2007, Pg8.
https://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2007/no_bang_for_buck.pdf

²⁸ Byers, M. Canadian Centre for Policy Alternatives. Smart Defence: A Plan for Rebuilding Canada’s Military. Ottawa. June 2015. Pg38.

²⁹ Staples, S. Canadian Centre for Policy Alternatives. No Bang for the Buck: Military contracting and public accountability. Ottawa. June 2007, Pg8.

technical specification for a stated capability, then it would seem only proper that the change and indeed the process behind development of the technical specification in the first place should be made readily available. In the case of the strategic lift programme, the unavailability of details concerning the reported increase in payload by almost double, while not suggestive of corrupt motives, certainly fails the *globe and mail test* of transparency.

Conclusion

This paper has solicited and validated the argument that a lack of transparency and the potential for corruption remains a pervasive threat to legitimate competitive defence procurement. The export of Canadian manufactured defence products as a means to develop a Canadian defence industrial base, with the intent of domestic economic growth and subordination of foreign policy, opens Canada to criticism as a supporter of corrupt, anti-democratic regimes, with questionable human rights performance. Canada's intent to be viewed as a global force for good, a promoter of international peace and security, and a moral leader in global politics is at risk. Many will see this as the yielding of foreign policy and the abandonment of promotion of peace, for limited economic and perhaps electoral rewards. While struggling against perceptions of low principles in the international arena, the government faces challenges to the effectiveness of its domestic anti-corruption mechanisms. The governments Integrity Regime appears to be flawed and contradictory to other mechanisms designed to encourage whistleblowing against corruption. Furthermore, a palpable lack of pellucidity in the previous administrations amending of the rules on sole-source contracting, combined with the Trudeau government's reticence to reveal details of Vancouver based Seaspan's difficulties in delivering the Canadian Coast Guard fleet, point to an ongoing lack of transparency in defence

procurement. Similarly, while the Advanced Procurement Award Notice may be reasoned to be transparent by virtue of its promulgation, it belies a non-competitive avenue for the government to conduct monopolistic tactics in partisan procurement. All these elements continue to challenge transparent procurement, countenancing the circumstances favourable to growth and development of corporate wrongdoing in defence procurement.

The government is not sitting idle however. In late 2017, the government invited Canadians to participate in discussions and voice their views on whether the government has the right tools to address corporate wrongdoing. Titled ‘Expanding Canada’s Toolkit to Address Corporate Wrongdoing’,³⁰ the report sought to ensure the governments five principles aimed at protecting the integrity of federal procurement where being adhered to; 1) safeguard the expenditure of public funds within procurement and real property transactions; 2) conduct business in an open, fair, transparent, accountable and cost-efficient manner; 3) ensure rigour and due process without imposing undue administrative burden on suppliers or the Government of Canada; 4) promote ethical conduct by suppliers within the marketplace; and, 5) ensure consistent government-wide application while preserving operational efficiencies. While not a conclusive process, there are signs that government is enabling a more rigorous approach to issues of transparency, integrity and mechanisms to address corporate wrongdoing.

³⁰ Canada. Expanding Canada’s toolkit to address corporate wrongdoing: The Integrity Regime stream discussion guide.

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