

# New Trials Ordered for Defendants Convicted for Illegal Sales to Cuba

By Douglas N. Jacobson

In a stunning blow to federal prosecutors, a federal judge recently reversed the convictions and ordered a new trial for American and Canadian defendants who were found guilty of selling water purification products to Cuba. The defendants were charged with violating the Trading With the Enemy Act (TWEA) and the Cuban Assets Control Regulations (CACRs) (See *The Export Practitioner*, November 2002).

In a separate ruling, the judge acquitted the chief executive officer of the company that made the sales to Cuba of one count of conspiracy to violate the TWEA and CACRs.

While the judge's decision to grant a new trial was welcome news for the defendants, the decision is being viewed by them as "good news, but not great news."

On the one hand, the decision to grant a new trial meant that the defendants were able to remove the electronic monitoring devices that they were forced to wear following the conviction.

On the other, the judge's opinion ordering the new trial indicated that the decision was not based upon any evidentiary or legal deficiencies in the case.

## Tales of Sales to Cuba

Rather, the new trial was ordered as a result of inappropriate and inflammatory statements made by the Assistant U.S. Attorneys prosecuting the case during their closing arguments to the jury. As a result, the defendants still face the possibility of serving significant jail time if they are again found

guilty in a new trial.

In October 2000, following an investigation that lasted nearly five years, the U.S. Attorney for the Eastern District of Pennsylvania in Philadelphia won an indictment of Bro-Tech Corp., a Delaware corporation that trades under the name "The Puro-lite Company", for allegedly making illegal sales of ion exchange resins to Cuba. Ion exchange resins are used for water and waste water treatment.

Also indicted were Stefan Brodie, the company's co-owner, president and CEO, Don Brodie, the company's co-



owner and executive vice-president and James Sabzali, a Canadian citizen and the company's sales manager and director of marketing.

Each of them was indicted on one count of conspiracy to violate the TWEA and CACRs and 75 counts of substantive violations of TWEA and the CACRs.

The indictments alleged that during much of the 1990s, Bro-Tech sold ion exchange resins to Cuba through intermediary companies in Canada, Mexico and Europe. The indictment also alleged that several U.S. based employees of Bro-Tech were aware of and facilitated such sales and that sev-

eral Canadian Bro-Tech employees, including James Sabzali, were reimbursed for their business-related travel to Cuba by staff located in the company's Pennsylvania headquarters.

During the three-week trial held before Judge Mary A. McLaughlin, the prosecution and defense focused on whether the defendants had "knowingly" and "willingly" violated the provisions of U.S. law that prohibits U.S. persons from engaging in or facilitating the unlicensed sales of goods to Cuba.

## Memo on Cuba Sent

Among other things, the defense argued that Bro-Tech Corporation and the individual defendants never intended to violate the U.S. trade embargo on Cuba, citing a 1993 memorandum issued by CEO Stefan Brodie.

The memorandum, purportedly issued to management and the company's sales offices, advised that no shipments of the company's products were to "be shipped to, redirected to, or transshipped to Cuba," since "Brotech Corporation is a US Corporate citizen, and as such, has no intention of violating US policy, now nor in the future."

In addition, the defense argued that Canada's blocking legislation, the Foreign Extraterritorial Measures Act (FEMA), which forbids Canadian citizens from complying with the U.S. embargo against Cuba, justified the Canadian defendant's actions. The defense also contended that the sales to Cuba were legal since they were made through subsidiaries located in

Canada, Britain and Mexico -- countries in which trade with Cuba is legal.

The prosecution portrayed the transshipments to Cuba through Canada, Mexico and Europe as evidence of the company's intent to violate U.S. law.

The prosecutors dismissed the Canadian blocking legislation as irrelevant, noting that the "bottom line is that this case has nothing to do with Canadian commerce . . . All you really have is a sales agent working for a U.S. company."

certain Cuban sales, and reimbursing employees for travel to Cuba, while in the United States.

#### Acquittal of Stefan Brodie

In reviewing Stefan Brodie's motion for judgment of acquittal, Judge McLaughlin noted that the court must determine whether, "upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

of the sales or reimbursements of expenses alleged in the indictment.

The only substantial evidence involving Stefan Brodie related to a 1992 sale to a Canadian company named Galax, a company based in Canada that was named as a "specially designated national" by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC).

The sale, which was discovered during an audit of Bro-Tech's books by its outside auditor, had been recorded on the company's sales accounts in the



The jury agreed with much of the government's case and convicted Bro-Tech of 45 counts of violating TWEA, Sabzali of 21 counts, Donald Brodie of 34 counts and Stefan Brodie of one count of conspiracy to violate TWEA.

Sabzali's convictions were on counts relating to his role in certain sales to Cuba and his approval of reimbursements to a Canadian salesman for travel expenses to, from, and within Cuba. Donald Brodie's convictions arose from his "causing" and "approving"

She noted that "the question the Court must answer is whether a rational jury could find beyond a reasonable doubt that the defendant knowingly and willfully joined a conspiracy to violate TWEA and the CACRs."

In reviewing the evidence presented at trial, the court found that very little of the evidence presented by the government during the six days of its case-in-chief related to Stefan Brodie, Bro-Tech's CEO. The judge found that there was no direct evidence presented demonstrating his involvement in any

United States, but the product had been shipped to Cuba from the company's subsidiary in the United Kingdom.

Following the discovery of the sale by the outside auditors, Stefan Brodie issued a memorandum to the company's sales offices advising that it was a violation of company policy to ship the company's products to Cuba. (See Accompanying Box).

## Steve Brodie's Memo to Bro-Tech Staff

April 7, 1993

TO: ALL SALES OFFICES

FROM: Steve Brodie

CC: Don Brodie/Ed Grossman

It has come to our attention, during the 1992 audit, that a sale was made to the Canadian company, Galax. The Galax credit was checked in our Philadelphia office, and approved. Subsequent to the approval of the order, our shipping department in the UK was ordered to drop-ship this order to Cuba.

While it is proper to ship this order from the UK in terms of UK law, it is contrary to USA policy and law to ship material of any kind to the island nation of Cuba in violation of the US embargo. Brotech Corporation is a US Corporate citizen, and as such, has no intention of violating US policy, now or in the future.

No shipment or Purolite merchandise is to be shipped to, redirected to, or transshipped to Cuba. Any requests to do so are to be reported to Don or me.

Steve Brodie

At trial, it was the government's theory that this memorandum was a sham to cover up the alleged conspiracy. In fact, the government put on the stand a salesman who testified that he never received the memorandum. The implication was that the memorandum was not sent out as indicated.

During the trial it was shown that after the memo was issued by Stefan Brodie, the company continued to make numerous sales to Cuba. All these future sales to Cuba were made through Purolite International, the company's U.K. subsidiary.

However, there was no evidence pre-

sented by the government that Stefan Brodie played any role in any future sales. When reviewing the willfulness requirement needed to obtain a conviction, the Judge found that "there is no evidence that the defendant knew that sales to Cuba through Purolite International, the United Kingdom entity, violated the CACRs. The evidence is to the contrary."

As a result, "knowledge of the sales through Purolite International . . . is not evidence of the defendant's knowing and willful membership in the conspiracy." The judge found that there was insufficient evidence of Stefan Brodie's knowing and willful participa-

tion in the charged conspiracy, and she granted the motion for acquittal.

### New Trials Ordered

Following the jury's guilty verdicts, the attorneys for Bro-Tech, James Sabzali and Donald Brodie argued to Judge McLaughlin that there was no legal basis for the convictions and that they should be reversed. They also submitted motions arguing that prosecutorial misconduct during the closing arguments required the court to grant a new trial.

The judge rejected the motions for acquittal. She held that the defendants

did not dispute that the sales to Cuba took place. Therefore, the central issue relating to the convictions was whether the defendants knowingly and willfully violated the TWEA and the CACRs.

After reviewing the evidence presented at trial, Judge McLaughlin rejected the motions to dismiss and noted that "the Court is convinced that there is sufficient evidence to uphold the jury verdict against the three defendants on all counts of which they have been convicted."

To support their motion for a new trial, the defendants raised several instances of alleged prosecutorial misconduct during their closing arguments. In her decision, Judge McLaughlin held that the Assistant U.S. Attorney's closing-argument story of defendants engaging in "deception, concealment and obstruction" -- not to mention shredding and withholding documents -- was "not supported by the evidence."

### Closing Was Inflammatory

In addition, she held that the prosecutor stirred up the jury with inflammatory language, including repeated accusations that the defendants had lied.

In reaching her decision, Judge McLaughlin said that "it is the Court's view that it is never proper to throw around such inflammatory language in a criminal trial, especially when it is used to describe a defendant.

But even if it were proper to use that language about pretrial conduct when a defendant does not take the stand, there is no way to separate pretrial conduct from trial testimony in this case."

The improper arguments were made even worse when a second prosecutor vouched for the prosecutor's character during the rebuttal arguments.

"When an extremely personable and able prosecutor," ruled McLaughlin, "tells a jury that the defendants have

been shredding documents and lying to government agents and calls the defendants liars, and when a second prosecutor then tells the jury that the first prosecutor is committed, extremely fair and tries to do what is right, it would have to be a very special jury that is not influenced by such argument."

Judge McLaughlin, who is a former assistant U.S. attorney, held that the actions during the closing and rebuttal arguments had "no place in the argument of an assistant U.S. attorney."

In her opinion she pointed out that "the prosecutor in this case conducted himself throughout the complex pre-trial proceedings and the trial as a skilled advocate and a person of integrity. Somehow, at the last minute, perhaps in the heat of a long and complicated trial, he got carried away.

The Court can certainly understand that from a human point of view. But the Court cannot ignore conduct that may have prejudiced criminal defendants."

As a result, Judge McLaughlin ruled that "it is with great reluctance that the Court grants the motion for a new trial."

### What's Next?

While the U.S. Attorney that prosecuted this case has stated that the judge's decision to grant a new trial is "appealable," the U.S. Attorney's office has not yet stated whether they will appeal the judge's decisions or ask the judge to schedule a new trial as soon as possible.

The evidence cited in the judge's opinion certainly indicates that the defendants may face an uphill battle to gain an acquittal in a second trial. While rumors have been circulating that negotiated settlement of this case may in the offing, the U.S. Attorney's Office and for the Justice Department must

determine whether their limited trial resources could be better utilized in other cases.

By bringing this case, the Justice Department has already sent the message that it will prosecute those persons and companies that attempt to circumvent the Cuba embargo. A second trial, which will be costly to the government and the defendants, may be viewed as redundant and unnecessary, particularly if a plea bargain can be negotiated that results in jail time for the defendants.

In the meantime, Donald Brodie and James Sabzali remain employed by Bro-Tech and the company continues to engage in international sales and marketing -- albeit with a slightly different perspective than it did before.

*Douglas N. Jacobson is the founder of the Law Offices of Douglas N. Jacobson LLC, a Rockville, Maryland law firm concentrating in international trade-related matters, including sanctions and export controls. He can be reached by e-mail at [djacobson@djacobson-law.com](mailto:djacobson@djacobson-law.com).*

## THE

## EXPORT

## PRACTITIONER