

FORBIDDEN TRADE

The U.S. Hard Line on Exports to Cuba

by DOUGLAS N. JACOBSON, ESQ.

A Canadian citizen living and working for a company in the United States is convicted of violating the Trading With the Enemy Act (TWEA) for selling water purification supplies to Cuba. The Canadian citizen faces a maximum sentence of life in prison and millions of dollars in fines. Sounds like a story from the height of the Cold War, doesn't it? However, this is an actual case that occurred in early 2002 when two U.S. executives of Pennsylvania-based Bro-Tech Corporation and their sales manager, a Canadian citizen, were convicted of violating the U.S. trade embargo against Cuba. The case generated a great deal of controversy in Canada, but went virtually unnoticed in the United States.

Caught Between the Laws

On April 5, 2002, James Sabzali, a Canadian citizen, was convicted by a jury in the U.S. District Court for the Eastern District of Pennsylvania of 20 counts of violating TWEA, and one count of conspiracy. The same jury also convicted Stefan and Donald Brodie, the American owners of Bro-Tech Corp., of similar violations. The convictions came after the U.S. Attorney for the Eastern District of Pennsylvania indicted Sabzali and the Americans on 76 counts of violating, and conspiracy to violate the TWEA.

Their crimes?

From 1992 through 1996 Sabzali worked as a sales representative in Canada selling U.S.-made water purification supplies to Cuba. During that time he made more than 20 trips from Canada to Cuba on behalf of U.S. and Canadian chemical companies.

Sabzali was promoted to marketing director of Bro-Tech and in 1996 moved with his family to Philadelphia. Although he did not travel to Cuba after becoming a U.S. resident, Sabzali continued to be involved in Bro-Tech's sales to Cuba, which were made through the company's foreign subsidiaries and he personally approved travel expenses for another Canadian citizen to do business in Cuba.

During the trial, both the prosecution and defense focused on whether Sabzali and the other Bro-Tech defendants had "knowingly" and "willingly" violated U.S. law. The defense raised Canada's blocking legislation, the Foreign Extraterritorial Measures Act (FEMA), which forbids Canadian citizens from complying with the U.S. embargo against Cuba, as a defense. The defense also argued that the sales to Cuba were legal since they were made through subsidiaries located in Canada, Britain, and Italy - all countries in which trade to Cuba is legal. Moreover, Bro-Tech claimed that the company never intended to expose itself to criminal action, since Cuban sales netted less than US\$48,000 in profits and made up less than 1% of the company's business.

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

The jury agreed and convicted Bro-Tech of 45 counts of violating the Trading with the Enemy Act, Sabzali of 21 counts, Donald Brodie of 34 counts and Stefan Brodie of one count of conspiracy. Sabzali's convictions were on counts relating to Sabzali's approval of reimbursements to a Canadian salesman for travel expenses to, from, and within Cuba. While the jury convicted Sabzali for sales made from Canada to Cuba, it found him not guilty on all charges up to March 1995, when he traveled to Cuba on behalf of a non-U.S. company.

Sabzali now faces a maximum sentence of life in prison and more than \$5 million in fines. However, federal prosecutors have indicated they will settle for a prison term of 37 to 41 months without parole. His two American co-defendants, Donald and Stefan Brodie, also face prison sentences and millions of dollars in fines.

Not surprisingly, this verdict generated a major uproar in Canada. A spokesman for Canada's Department of International Affairs and Foreign Trade reiterated shortly after the verdict that "in Canada, commerce with Cuba is

lawful, and we've always, always objected to U.S. attempts at prohibiting Canadians from trading with Cuba."

Controversy over the verdict was not limited to Canada. Cuba's Foreign Minister declared before an anti-U.S. embargo rally in Havana "that the Cuban people and government express their support and solidarity with Sabzali, his family and friends. We support his right to trade with Cuba without being condemned by another country's laws, even if that country is the most powerful on the planet."

This case illustrates the difficulty that Canadians and Americans face by having to deal with competing U.S. and Canadian laws. Sabzali was caught in a classic Catch 22. Sabzali would have been breaking Canadian law if he had refused to do business with Cuba (at least while he was living in Canada), but was subject to prosecution for violating the U.S. embargo on Cuba as soon as he set foot in the United States.

Island Isolation

Since the early 1960s, U.S. policy toward Cuba has consisted largely of isolating the nation through economic sanctions. The U.S. sanctions regime governing transac-

Title IV To Date:

The State Department has banned from the United States executives and their families from three companies because of their investment in confiscated U.S. property in Cuba:

- Grupos Domos, a Mexican telecommunications company (In 1997, the company disinvested from U.S.-claimed property in Cuba, and as a result its executives are again eligible to enter the United States);
- Sherritt International, a Canadian mining company; and
- B.M. Group, an Israeli-owned citrus company.

Other Title IV Proceedings:

- STET, an Italian telecommunications company, actions against the company's executives was averted when the company agreed to pay U.S.-based IIT Corporation \$25 million for the use of IIT-claimed property in Cuba for 10 years.
- Sol Melia, a Spanish hotel company, under investigation by the State Department for several years for allegedly investing in property that was confiscated from U.S. citizens in 1961. Press reports have indicated that a settlement between Sol Melia and the original owners of the property is likely.

tions with Cuba remain broad in scope and must be closely reviewed by U.S. and non-U.S. companies involved in transactions with Cuba.

The principal tool of U.S. policy remains the comprehensive sanctions set forth in the Cuban Assets Control Regulations (CACR). The CACR were issued by the U.S. Government on July 8, 1963 pursuant to the authority granted in the Trading With the Enemy Act. Under TWEA, the Secretary of the Treasury has the authority to promulgate regulations prohibiting unlicensed transactions between U.S. nationals and certain designated foreign countries and their nationals.

The CACR prohibits virtually all U.S. goods, technology and services from being exported from the United States to Cuba, either directly or through third countries, such as Canada or Mexico. This prohibition includes dealing in or assisting the sale of goods or commodities to or from Cuba, even if done entirely offshore. Criminal penalties for each violation of the Cuban sanctions can bring a penalty of up to 10 years in prison, \$1,000,000 in corporate fines and \$250,000 in individual fines.

The Cuban embargo was strengthened by the Cuban Democracy Act (CDA) of 1992 and by the Cuban Liberty and Democratic Solidarity Act of 1996, often referred to as the Helms-Burton law. The CDA prohibits foreign-based U.S. subsidiaries from engaging in trade with Cuba and prohibits entry into the United States of any vessel if it has engaged in trade with Cuba within the past 180 days. The CDA, along with the Trade Sanctions and Export Enhancement Act of 2000 (TSRA), modified the Cuban embargo to permit the sale of U.S. origin medicine and medical supplies, food and agricultural commodities to Cuba. (*See* EXPRAC, July/Aug. 02)

Helms-Burton

The Helms-Burton law was enacted in the aftermath of the shooting down of two U.S. civilian planes in February 1996. Helms-Burton law contains several measures to increase pressure on Cuba, the most controversial of which are Titles III and IV.

Title III allows U.S. nationals to seek financial compensation from persons that traffic in property confiscated in Cuba. The provision extends the right to sue to Cuban Americans who became U.S. citizens after their properties

were confiscated. The legislation gave the President the authority to delay implementation for 6 months at a time, if he determines that such a delay would be in the national interest and would expedite a transition to democracy in Cuba. Since its passage, delaying the passage of Title III has become a biannual tradition.

Title IV provides for the denial of visa to and exclusion from the United States to foreign nationals who the Secretary of State determines is a person who, after March 12, 1996, confiscates or traffics in confiscated property in Cuba, a claim to which is owned by a U.S. national (see text box, p. 5). This provision also applies to the corporate officers, principals and controlling shareholders of an entity which has been involved in confiscation or trafficking in confiscated U.S. property. It also includes the spouse, minor child, or agent of aliens who would be excludable under the provision. This provision is mandatory, and only waiveable on a case-by-case basis for humanitarian medical reasons or for individuals to defend themselves in legal actions regarding confiscated property.

Many U.S. allies, including Canada, Mexico and the European Union (EU) criticized the enactment of the Helms-Burton law as an extraterritorial application of U.S. law. The EU even challenged the Helms-Burton legislation at the World Trade Organization, however, the matter was later settled and the Helms-Burton law remains on the books.

Anti-Embargo

By contrast, Canada has long maintained a policy of engagement with Cuba, and Cuba is Canada's largest trading partner in the Caribbean. Indeed, Canadians are forbidden by Canada's Foreign Extraterritorial Measures Act from complying with the U.S. embargo against Cuba. Canada's Foreign Extraterritorial Measures Act, was originally enacted by in 1985 in response to several cases of extraterritorial jurisdiction that Canada found objectionable. The legislation was based on similar blocking laws that had previously been enacted by the United Kingdom. FEMA was amended in the 1990s in direct response to the U.S. enactment of the CDA and Helms-Burton.

FEMA contains several blocking provisions. For example, FEMA authorizes the Attorney General of Canada, with the concurrence of the Minister of Foreign Affairs, to issue orders to block compliance in Canada with an

extraterritorial measure of a foreign state. The extraterritorial measures must adversely affect significant Canadian trading interests or infringe Canadian sovereignty.

As a result of the enactment of Helms-Burton, FEMA was amended to permit the Attorney General of Canada to block any attempt by a foreign claimant to enforce a judgment under a law such as Helms-Burton in Canada. FEMA was amended to give Canadian companies recourse in if awards are made against them in U.S. courts under the Helms-Burton Act.

Significantly, FEMA not only is intended to prevent Canadian companies from complying with U.S. government mandates but also requires Canadian companies to ignore "directive, instruction, intimation of policy or other communication" from U.S. corporate parents to their Canadian subsidiaries to the effect that the subsidiaries should comply with the U.S. embargo of Cuba.

Under FEMA, the penalties for compliance with objectionable foreign laws and other violations include fines of up to C\$1,500,000 for corporations and C\$150,000 for individuals along with imprisonment of individuals for up to five years. Yet FEMA appears to have more bark than bite. To date, there have been no reported prosecutions in Canada for violations of FEMA.

Enforcing the Embargo

U.S. companies should not overlook the plight of Bro-Tech and Sebzali. By prosecuting this case to the full extent of the law, the United States Government clearly indicated that it would not tolerate activities that violate U.S. trade embargoes. The U.S. will continue to prosecute such violations, perceived or real, vigorously. Conflicting laws are not an affirmative defense to alleged violations of U.S. sanctions law.

Moreover, foreign nationals involved in sales of U.S. origin goods to Cuba will be subject to U.S. jurisdiction. As such, this verdict will give pause to Canadian executives engaged in sales of U.S. products to Cuba who are considering moving or traveling to the United States.

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