



Bribery of foreign officials

by David Selley

Bribery of foreign government officials is not just unethical—it could land you in jail. New federal legislation makes it a criminal offence.

The federal government passed the *Corruption of Foreign Public Officials Act* in December 1998, which makes it a criminal offence punishable by up to five years in jail to pay a bribe to a foreign public official to gain a business advantage. The media either didn't notice or chose to remain silent.

The act in the making

By most estimates, Canadian companies are not aware of this legislation and the effect it may have on the way they do business. In late 1997, the 28 Organization for Economic Cooperation and Development (OECD) member countries approved a convention to outlaw major bribery of government officials. According to Milos Barutciski, a lawyer with Toronto law firm Davies Ward & Beck, the Canadian legislation has done a good job of implementing the requirements of the convention. Barutciski chaired the Canadian Bar Association's Task Force on International Corruption, which provided input to, and support for, the Canadian implementation of the convention.

So what previously was a business and an ethical issue for Canadian companies has also become a legal issue for them. In fact, it has always been a legal issue in the countries in which a bribe has been paid. There is no country in the world where bribery of public officials is legal. One has only to look at the travails of the International Olympic Committee (IOC) and the Bre-X scandal in Indonesia. What is new is that bribing a foreign government official is now illegal in Canada broadly in the same way it would be illegal to pay a bribe to a Canadian government official.

The act covers loans, awards and advantages of any other kind made directly or indirectly to a government official to obtain a business advantage, by inducing that official to act or refrain from acting in some way. Under the act, "government officials" are defined as elected officials and others, and "governments" are defined as including political subdivisions of countries, government agencies and international organizations formed by governments. The act also makes it an offence to deal in the proceeds of bribery.

Facilitating payments

The legislation does not prohibit "facilitating payments" to junior officials that are demanded in order to perform tasks of a

routine nature, such as issuing vehicle or business licences, or import and export documentation common in many countries. Although such practices are generally harmful to the countries concerned, they are not easy to eliminate in the short term. From the point of view of the OECD convention and the act, it can be argued that they don't confer a business advantage, because all businesses pay facilitating payments as a matter of course.

There's no absolute cure

Paying bribes to obtain or retain business has been a major impediment to the smooth operation of markets and flow of trade. Bribery can seriously distort outcomes, to the detriment of everyone involved, except the recipients of the bribes and their Swiss or other offshore bankers. Proponents of the act recognize that legislation in the 28 OECD countries and the handful of other countries that have signed on voluntarily to the convention cannot stop the practice. But because the signatories account for approximately 80 per cent of world trade, a significant reduction in bribery is anticipated.

Some Canadian businesspeople and their advisors have been somewhat cynical about this issue, taking the approach that they would, of course, rather not pay a bribe, but that's the only way business can be done in some countries. In most cases, they will now think twice (at least) before doing something that could send them to jail for five years. For many, the mere fact that it is now illegal will dissuade them from making bribes. Most companies' codes of ethics start with the requirement that they will comply with the law.

Michael Davies, vice-president and general counsel for GE Canada, is a strong proponent of the OECD convention and was heavily involved in its development. He notes that many large Canadian companies have recently developed codes of conduct that include prohibitions against paying major bribes. Many companies, including GE, walk away from deals because they are unwilling to pay bribes. Such companies may simply need to reinforce their current codes by stressing the illegality of what, before, had merely been contrary to their codes of conduct.

However, Davies believes an educational effort may be necessary for other companies that operate in this environment, so that they are aware of the act and are helped to understand the issues involved.

A level playing field?

Why would big business be so much in favour of this initiative? After all, large companies are not associated in the public's mind with asking for more rules. In addition to ethical considerations, though, big business is looking for a level playing field. Because the United States has had legislation banning foreign bribery for many years, U.S. companies said they were being put at a competitive disadvantage when bidding on major contracts against competitors from Germany, France, Britain and other home bases for multinational business, including Canada.

Now, it appears that the playing field will be level for most of the world that exports capital investment and business. Or will it? Legislation is one thing; enforcement is another. The OECD convention requires signatories to establish a monitoring and reporting process on enforcement. The Canadian act requires the ministers of Foreign Affairs, International Trade and Justice to report annually to parliament on implementation of the convention—an unusual provision that should be interesting to watch. If some major countries do not live up to their commitment, the overall effect of the convention will be drastically reduced, not only because companies from those countries may continue to pay bribes, but also because companies from other countries will lose competitiveness if they do not follow suit.

Checks beyond the act

Compliance within companies is not guaranteed either. For example, nobody pretends that the U.S. Foreign Corrupt Practices Act has stopped all bribery by U.S. companies, nor that codes of conduct that prohibit bribes are always effective. There are, however, other mechanisms that may discourage the kinds of bribes covered by this act.

Senior management and boards of directors will likely become more conscious of situations in which they, or their subsidiaries in other countries, may be asked for a bribe. They may become more sensitive about unusually large agency fees. Companies that do business in high-risk areas will consider the potential for illegal bribes in their risk management processes, if they did not before.

Auditors of public companies with major business transactions in high-risk countries will have to be alert for evidence that

illegal bribes may have been paid. Now that they are illegal, they are covered by the requirements of generally accepted auditing standards that relate to illegal acts. Auditors must understand their client's business sufficiently to be able to assess the risk of breaches of laws and regulations that might materially affect the financial statements.

An important first step

In short, the OECD convention and the Canadian act are important steps that can have only positive effects. Strict enforcement by OECD countries would likely see large-scale bribery of foreign public officials diminish significantly and provide a strong incentive for companies to resist pressure to pay bribes.

It must be recognized, however, that there are a few major players that have not signed on—Hong Kong and Singapore, for example—and if individual companies, or entire industries, continue to believe they must pay bribes to get the business they need to stay alive, they will probably find ways to hide the bribes and will probably also find loopholes in the law. Only time will tell whether these circumstances will seriously detract from the effectiveness of the convention and act.

Getting informed

Engineers involved in international business in any way should be aware of two key pieces of information about this issue. The first is the act itself (also known as Bill S-21), which consists of only six short paragraphs, the related amendment to the Income Tax Act, and a few other amendments that only lawyers need to worry about.

Transparency International (TI), a non-profit organization working to eliminate bribery, has a second vital piece of information—a so-called “Corruption Perception Index,” based on the perception by business executives of which countries are the most susceptible to bribery. This index is widely publicized, and is available from TI Canada's website, www.bus.yorku.ca/program/TranIntl/index.htm, or from TI's main site at www.transparency.de. ♦

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