



management *ethics*

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Bribing foreign government officials now illegal

By David Selley

In December the federal government passed the "*Corruption of Foreign Public Officials Act*" (the Act) which, effective in mid February, 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. By most estimates Canadian companies are not aware of this Act and the effect it may have on the way they do business. In late 1997, the 28 OECD member countries had approved a Convention that would outlaw major bribery of government officials and, according to Milos Barutciski, a lawyer with Toronto law firm Davies Ward & Beck, the Canadian legislation has done a good job in implementing the requirements of that convention. Barutciski chaired a Canadian Bar Association Task Force on International Corruption that provided input to, and support for, the Canadian implementation of the Convention. So what previously has been a business and an ethical issue, now also becomes a legal issue for Canadian companies and their officers and directors. 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, or publicly acceptable. One has only to look at the current travails of the International Olympic Committee (IOC), and the developing revelations in Indonesia. What is new with this Act 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. Government officials include elected officials and others. Governments include political subdivisions of countries, government agencies and also international organizations formed by governments.

A typical case might be paying an agent to assist in obtaining a government contract to, say, build a dam, and instructing the agent to use some of the funds to bribe a government official to award the contract to their principal, rather than to another bidder. Of course, if the other bidders bribe too, this will become a mug's game for all bidders. The Act also makes it an offence to deal in the proceeds of bribery and clarifies that any payment that falls within the ambit of this Act is not deductible for income tax purposes. Finally, the Act exempts "facilitating payments" to junior public 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 which are common in many countries. While 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 they can be argued to not confer a business advantage because all businesses pay these amounts as a matter of course. Like all legislation, there will be opportunities for differing interpretations and room for loopholing, but the wording is strong and unequivocal in its primary thrust -- elimination of major bribery and corruption by Canadians of foreign officials for business advantage.

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The Centre at Ten Years Old

"The whole objective of the Centre has been to shake our society of its complacency, to question a status quo that too often accepts as inevitable those activities which are bad not only for our moral character, but for the bottom line as well."

The Centre held its 10th anniversary celebration on December 2, 1998 at the Royal Bank of Canada where special recognition was given to the Centre's founding directors. David Olive, a founding director himself and senior writer with *The National Post*, gave a tribute to the achievements of the past ten years to about 70 of the Centre's past and present corporate and individual supporters, as well as many former and current directors. He lauded the progress that the Centre has made over the past decade in bringing issues to light. "We've made the forceful point that ethics isn't an arcane set of rules. It is merely an appreciation of the consequences of behaviour that may bring regret and injury to ourselves and others." He described the Centre as "part of the vanguard" that has raised the level of moral tolerance and sounded a call to action. David also reminded us that much needs to be done. He challenged the Centre "to be more aggressive in identifying soul-destroying ethical lapses, and the chronic ethical abuses that still characterise too many aspects of business life." He concluded by saying he was excited by the prospect of the Centre's growing role as a forum for ideas and solutions in a world far more attuned to ethical values than ten years ago. Sincere thanks are due to The Royal Bank for use of their outstanding premises for our celebration.

(continued from page 1) The OECD Convention, and the Canadian Act, resulted from the strenuous efforts of many multi-national businesses, governments and NGOs, particularly Transparency International (TI), a non-profit international organization based in Berlin whose mission is to get rid of major bribery in international business transactions. TI has fought for this legislation for many years in many countries. Professor Wes Cragg of the Schulich School of Business at York University is president of the Canadian Chapter of TI. He is proud of TI's pivotal role internationally, and in Canada in persuading the government to push the legislation through before the December 31 deadline. This was critical to the success of the entire OECD initiative because the Convention was required to be ratified by five major countries in order to become effective, and Canada was the last of the five to sign on. The Bill was passed quickly by the Senate and then zipped through all three readings in the House of Commons in one day.

Cragg and other proponents of the Act recognize that legislation, even in the 28 OECD countries and the handful of others that have signed on voluntarily, cannot stop the practice, but because these signatories account for approximately 80% of world trade a significant reduction in bribery is anticipated. Previously, some Canadian businesspersons and their advisors have been somewhat cynical about this issue; they have taken 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, hopefully most, the mere fact that it is illegal will dissuade them from participating. 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, a strong proponent of the OECD Convention and heavily involved in its development, believes that many large Canadian companies have in recent years developed codes of conduct that include prohibitions against paying major bribes. Many companies, he said,

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 code. 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. The lack of media coverage to date has not helped. The Financial Post finally published an editorial on the Act on January 20th. It was not entirely favourably inclined to the legislation. On the other hand, The Economist (January 16th) devoted a strongly supportive editorial and a three page article to the coming into force of the Convention. This is consistent with the Economist's editorial stance in favour, except in exceptional circumstances, of unfettered free markets and trade. Paying bribes to obtain or retain business has been a major impediment to the smooth operation of markets and flow of trade and can seriously distort outcomes, to the detriment of everyone except the recipients of the bribes and their Swiss or other off-shore bankers.

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. The United States has had legislation banning foreign bribery for many years. US companies said they were put at a competitive disadvantage when bidding on major contracts against competitors from Germany, France, Britain and other home bases for multi-national business, including Canada. Now 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. Cragg points out that TI is strongly urging the OECD to develop its own effective monitoring mechanisms to ensure member countries enforce the Act. 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 because then companies from other countries will lose competitiveness if they do not follow suit -- the level playing field will have been ploughed up.

Compliance within companies is not guaranteed either. For example, nobody pretends that the US Foreign Corrupt Practices Act has stopped all bribery by US 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. For public companies, their auditors have to change the way they look at evidence that bribes covered by this Act 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. According to Diana Hillier, Director of Assurance Standards for the Canadian Institute of Chartered Accountants (CICA), this would require an auditor of a company with major business transactions in high risk countries to be alert for evidence that illegal bribes may have been paid. Auditors are not required to design procedures to investigate whether any have been paid, however, unless they find evidence that makes them suspicious, such as an unusually large agency fee. If auditors find evidence that an illegal bribe has been, or might have been paid, they must first assess whether the consequences may be material to the financial statements. Often they would not be, but even in this case CICA standards require the auditors to report the matter to senior management and the board, and if they are not satisfied that appropriate action has been taken the standards suggest seeking legal advice on their options. Large public accounting firms will no doubt be informing their audit personnel about the Act, and building awareness into their audit processes.

In short, the OECD Convention, and the Canadian Act are an important first step that can have only positive effects. With strict enforcement by the OECD countries, large scale bribery of foreign public officials will significantly diminish 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

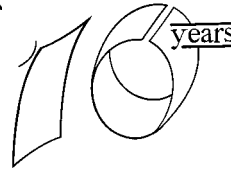
individual companies, or entire industries, continue to believe they must pay bribes to get the business they need to stay alive, they will probably be able to find ways of hiding the bribes and loopholing the law. Only time will tell whether this seriously detracts from the effectiveness of the Convention and Act. For now, though, we can rejoice that a major step has been taken that might eventually rid the world of this scourge on international business and on domestic economies.

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If you are involved in any way in international business, it is relatively easy to arm yourself with 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. The second vital piece of information is TI's 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 web site, www.bus.yorku.ca/program/TranIntl/index.htm, or from TI's main site at www.transparency.de. If you are doing business with government officials or their agents in countries at or near the bottom of TI's list, you ought to take special steps to ensure that your company is not breaking Canadian law.

Beneficiaries of the OECD convention, if it works, will include: companies in Canada and other OECD nations whose codes of ethics and values have prevented them from paying bribes and who have walked away from deals that other less scrupulous companies have won; companies and their owners, who will no longer have to bear the cost of paying the bribes, or inflated agency fees; the ordinary people in countries low on the TI index whose economies have been distorted and rendered less efficient because of misallocation of resources; employees on the front line of international business transactions who will be under less pressure, or will have added support to resist; and international organizations such as the World Bank and IMF whose efforts to deal with financial problems of the developing world will be less distorted by diversion into off-shore bank accounts of moneys that should have gone to development. A few, though, will lose a great deal. We should not shed any tears for them.

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The Canadian Centre for Ethics & Corporate Policy would like to thank everyone who helped make 1998, our tenth year, a success. In particular we would like to welcome new 1998 corporate supporters as well as give recognition to those corporations that have renewed their support over the past year.

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