Bribery and the Rule of Law

by

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Attorney General (and Minister of Justice) Jody Wilson-Raybould's resignation following the government's SNC-Lavalin debacle highlights how the "rule of law" applies to public prosecutions under inconvenient laws enacted by Parliament, and adds nuances to common words, such as "interference", "pressure" and "directed".

SNC-Lavalin is facing allegations (unproven to date) of corrupting foreign officials and paying bribes to secure contracts in Libya and elsewhere. Section 3 of the *Corruption of Foreign Public Officials Act* (CFPOA) makes it an offence to bribe foreign public officials at any level of government, whether international, national or local. A successful conviction would have dire economic consequences for SNC-Lavalin (it would be barred from bidding for federal contracts for 10 years) and, potentially, even worse political consequences in Quebec in an election year, from the loss of the loss of thousands of jobs. Hence, SNC- Lavilin would prefer to enter into a Remediation Agreement whereby it would promise to behave itself in the future in exchange for "deferred prosecution" if it did not behave.

Transparency International's *Corruption Perceptions Index*, which measures the perceived levels of public sector corruption in about 180 countries, reveals that Canada ranks 8th in the world as being amongst the least corrupt countries. Good news? Well, partially, but Canada also needs to do business in the other 172 countries. The law effectively rules out Canadian corporations from doing business in Libya (ranked 171), Nigeria (ranked 148), India (ranked 81) and China (ranked 77), to name but a few of the more significant economies in the world.

The essence of the offence is the corruption of public officials to get them to act or refrain from acting in the performance of their public duties. For example, Griffiths Energy International Inc. of Calgary paid $2 million for energy contracts to a company controlled by the spouse of the ambassador of Chad, which resulted in a fine and surcharges of $10.35 million in 2013. Niko

Resources Ltd. of Calgary paid benefits of nearly $200,000 by providing a luxury vehicle to an official of the Bangladesh government. The company was fined $ 9.5 million in 2011.

A "bribe" – in German, "Schmiergeld" or lubrication money – is an offer or promise, either explicitly or implicitly, to give undue pecuniary or other advantage, directly or through intermediaries, in order to obtain or retain business or other improper advantage. The offence extends to all businesses, professions and trades, regardless of where they are situated or practiced.

There is no bright line test for determining a payment or gift as a bribe. Each business must make its own decisions based on their judgment in the context of the particular circumstances and local culture. Unlike the United States IRS, the CRA does not provide guidelines for what constitutes a "reasonable payment" and businesses must exercise judgment. For example, a dinner gift of a bottle of single malt Scotch whiskey costing $300 may be entirely appropriate for a senior government official. However, a collector bottle valued at $128,000 (as released in China in 2013) may spark prosecutorial interest.

Business must go on according to the local culture where it operates. In certain societies "grease", "commissions", "facilitation fees", "agency fees" and "baksheesh" are essential to doing business. For example, many governments control the issuance of licenses to produce, manufacture or distribute products that, sometimes, assure the recipient of a monopoly or protected market. Typically, public officials supervise the grant of such licenses and, in the process, may supplement their income with bribes. Canadian companies that participate, directly or indirectly, in such bidding processes are open to criminal prosecution and civil sanctions. To be sure, the local culture may be "No bribe, no licence" but Canadian law does even not tolerate "facilitation payments".

In addition to SNC's inability to bid for government contracts following conviction under the CFPOA, there would also be severe economic consequences for employees (loss of jobs), shareholders (loss of share value), and the government (loss of tax revenues in the long run). In tax law, taxpayers may generally deduct reasonable amounts that they incur for the purpose of earning income from a business. Corruption of government officials is a routine cost of doing business in many countries, including Canada. However, even though bribes are a necessary and

essential cost of doing business in some countries, the *Income Tax Act* weighs in with its own "economic morality" by prohibiting the deduction of bribes in computing net income and undermining the very foundation of income tax law, the accurate computation of *net* income. In the short run, the CRA would collect more because of the denied deductions. In the long run, the CRA might not collect anything if SNC becomes bankrupt.

The CFPOA has other important consequences for businesses. The potential sanctions are severe. Bribery of foreign officials is a criminal act and carries a maximum term of imprisonment of fourteen years. Further, the offence carries a fine that is entirely in the discretion of the judge and the Act does not stipulate any maximum amount!
Also, there is no limitation period and the tax authorities can reassess the taxpayer at any time in the future. That is the law that Parliament has written and which the Attorney General of Canada alone is obliged to enforce under the "Shawcross principle" (named after Lord Shawcross, a prosecutor in the Nuremburg trials) without interference, pressure or directions from anyone. She could have gone the remediation route but chose not to do so. That is the end of the matter in law but not in politics.

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