

# General Corporate — Commentary — Articles — English — Vern Krishna —, 2011-01-12 -- Britain Steps Up War on Bribery

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## Britain Steps Up War on Bribery

Date: January 12, 2011

*Vern Krishna*

Canadian companies have traditionally enjoyed home cooking in their trading relationships with the United States and Britain. However, as global trade opens new opportunities beyond Pax Americana and Pax Britannia, Canadian companies will need to adapt to new political cultures that rely on bribes to government officials and politicians. At the same time, they cannot ignore new British anti-corruption legislation, with extended territorial jurisdiction, that may sideswipe them.

When it comes to bribery and corruption, Canada ranks as “very clean” (an 8.9 score out of 10) in rankings of the 2010 corruption perceptions index (CPI). Bribing Canadian public officials has always been a *Criminal Code* offence. It is also an offence under the *Corruption of Foreign Public Officials Act* (CFPOA) to bribe foreign officials. Thus, on paper at least, Canadian laws seem a strong deterrent against public corruption in most provinces.

But there are two escape hatches in the CFPOA that temper its bite. First, the bribe must have a “real and substantial” link with Canada. Canadian courts will not offend international comity and extend territorial jurisdiction to foreign countries. Thus, companies easily circumvent the rules by routing their bribes through foreign intermediaries in less stringent countries.

Second, the law exempts facilitation and “grease” payments to minor officials to smooth the processes of official actions. The rationale of the exemptions is an acknowledgement that it is impossible to do business in certain countries (think India that ranks below 4 and the Congo that ranks at 2 on the 2010 CPI) without greasing the palms of public officials. Thus, the CFPOA’s bite is about as painful as a lick from a golden retriever.

The United States (at a 7.1 CPI) gets around the jurisdiction issue in its *Foreign Corrupt Practices Act* (FCPA). It is an offence for any company that trades on a U.S. exchange to bribe foreign government officials to gain a business advantage. So, for example, the Securities & Exchange Commission just settled charges against Alcatel-Lucent that it bribed Latin American and Asian officials for telecommunications contracts. The firm agreed to pay US\$137-million—US\$45-million in disgorged profit and a US\$92-million criminal fine—without admitting any wrongdoing.

Britain, with a 7.6 CPI rating, jumped on the anti-corruption bandwagon in April with a new *Bribery Act*, which some describe as the American FCPA on steroids. The *Bribery Act* targets foreign companies and multinationals that bribe to secure contracts anywhere in the world if the company has even a minimal British connection.

The new *Bribery Act* includes a separate offence of bribery of a foreign public official, which authorizes the Serious Fraud Office to prosecute foreign companies and their executives for illicit payments anywhere in the world if they have any U.K. business presence.

Bribery becomes a strict liability offence with serious financial consequences. Firms can be compelled to disgorge all profit made from contracts obtained through bribery and pay unlimited fines. Individuals can face up to 10 years in jail. Thus, all involved in the offence—companies, third parties and their associated staff—can be liable under the statute.

The only corporate defence is that the company put into place “adequate procedures” to prevent corruption. However, there is no prescribed list of guidelines as to what constitutes “adequate procedures.” Full details of the procedures have not yet been released, which leaves companies scrambling to review their procedures without clear guidance.

The most radical part of the British legislation is that it applies extra-territorially to non-British companies that carry on a business, or any part of a business, in the U.K. Unlike its Canadian counterpart, the British statute does not have any exception for small or routine grease payments expected by local business culture.

To be sure, new global trade opportunities will benefit Canadian firms. But companies must walk a fine line between foreign business cultures—many of which consider bribes to petty officials and senior government personnel an intrinsic part of local cuisine—and the prosecutorial zeal of U.S. and U.K. authorities eager to extend their territorial empires.

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