BANKING ON CORPORATE

BY NEILL MAY

Corruption law coming of age

There has been a lot of attention paid recently to the enactment and enforcement by various countries of anti-bribery statutes that prohibit payments made to foreign officials by businesses for the purpose of obtaining some commercial advantage (some of these countries might have been paying better attention to the bribery of officials at home, as reported *ad nauseam* in every paper with the possible exception of the *News of the World*). Recent developments include a surge in prosecutions under the United States' Foreign Corrupt Practices Act and the coming into force this past summer of the United Kingdom's Bribery Act, as well as some signs of life in Canada's Corruption of Foreign Public Officials Act.

Regulatory initiatives focused on international bribery tend to generate lawyerly debates about extraterritorial overreach, not to mention paranoid hand-wringing for the potential disadvantage wrought on first-world companies handcuffed by this newly mandated morality.

Focusing first on the practical, it is worth noting that mandated morality does not appear to affect competitiveness, on a large scale. An article for the American Bar Association's global anti-corruption task force by Juliet Sorensen cites a 2000 study by Columbia Business School's Shang-Jin Wei. Wei's study found "corruption deters all foreign investment, regardless of the source, and that U.S. firms were no less likely to suffer from a lack of business overseas than firms based in countries lacking anti-bribery criminal statutes."

This is slightly more subtle than saying that anti-bribery statutes do not disadvantage companies. A bribe here or there might still help any given company or entrepreneur get its way, on a small scale and in the short term. In the aggregate, however, it appears anti-bribery laws do not affect a country's companies from competing abroad. If the effect on foreign investment is indeed a wash, and since corruption where it occurs is doubtless bad for business, bad for governance, and bad for those local people who bear the externalities, anti-bribery statutes seem like an eminently good idea.

Which brings us to our own anti-bribery act in Canada, which came into force in a prior millennium but only recently started to flex its muscles. The first significant bicep curl happened in June, when the CFPOA squeezed $9.5 million out of Niko Resources Ltd. for providing a $190,000 vehicle, along with trips to Calgary and New York, to the energy minister of Bangladesh. To better illustrate the point, the RCMP is reportedly currently investigating more than 20 other potential breaches.

The question is, if the CFPOA has been around for more than a decade, why has the rate of Canadian prosecutions of international bribery been so low, and why are there signs now that enthusiasm for more vigorous enforcement is growing dramatically?

The timing of two recent reports from international organizations chastising Canada's record in enforcing the act may have been a motivating factor, roughly coinciding with the charges against Niko and the revelation of other investigations. Last March, the Organisation for Economic Co-operation and Development's working group on bribery in international business transactions issued a report that found that "Canada's legislative and institutional framework remains problematic." Then, in May of this year, Transparency International issued its annual progress report on the enforcement of the OECD's Anti-Bribery Convention, noting a "lack of progress in Canada" and that "the Canadian legal system and courts do not handle complex white-collar criminal cases well."

This leads to the further question of whether we're simply late catching up with the international zeitgeist on white-collar crime in general and anti-bribery in particular, or whether there's something uniquely Canadian, something cultural, that creates an aversion to enforcing it.

Part of the issue, and the answer, may lie in a key difference between the CFPOA and its international counterparts. Where the Canadian act only applies when the bribery has a "real and substantial" connection to Canada (i.e., presence, action, or effect in Canada), most OECD countries will prosecute based on the nationality of the accused (even where there is little or no connection between the bribery and the jurisdiction). The OECD and Transparency International have criticized the CFPOA's reliance on the "real and substantial connection" principle, as opposed to the automatic application of the act to Canadian nationals. Nonetheless, the scope of the act's application is not necessarily out of character.

It could be, just speculating, that comfort with extraterritorial enforcement of laws comes more naturally to states with a history of global influence. Basing extraterritoriality in the CFPOA on the "real and substantial connection" principle may make more sense for a middling power with no imperial past or pretensions for a past or present superpower. That same "actor in a supporting role" world status may also tend to, still speculating, lead Canadians to assume others will effectively police corruption in their own backyards.

But speculation aside, the reasons Canada has lagged in anti-bribery prosecutions are unclear. The lesson, though, is not. The CFPOA seems to be coming of age, and quickly. When conducting business abroad, keep your hands in your own pockets; and if looking to purchase a business with foreign operations, make sure your target does, too. CL

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