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Vern Krishna: Beware the double whammy of a bribe



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Griffiths Energy International president and CEO Gary Guidry talks to the media in front of the Calgary court, Friday Jan. 25, 2013

Photo: Jen Gerson/National Post

The double whammy of bribes

Bribing government officials is often a cost of doing business in certain industries or locations. Necessary or not, however, it's a criminal offence with severe consequences.

The latest version of Transparency International's Corruption Perceptions Index, which measures the perceived levels of public sector corruption in 176 countries, reveals that 70% of all countries are sufficiently corrupt to receive a failing grade.

Canadian law enforcement is stepping up interest in bribery and corruption. A recent court settlement highlights the dangers. Griffiths Energy International Inc. was fined \$10-million for paying \$2-million to the wife of Chad's ambassador. Chad is a small central African country that ranks 165 out of 176 countries listed for corruption.

The \$12-million and the legal fees expended to reach the settlement are not deductible for tax purposes and must be paid with after-tax dollars together with any interest and penalties that the Canada Revenue Agency may impose.

Under the Corruption of Foreign Public Officials Act, a bribe is a payment of value to a foreign official to obtain, directly or indirectly (such as payment to the spouse of a foreign official), a business advantage by inducing the official to use his or her position to render a favourable decision. Items of value include cash, computer equipment, medical supplies and vehicles.

A "foreign public official" is a person who holds a legislative, administrative or judicial position of a foreign state or who performs public duties or functions for the state. Thus, for example, foreign officials include foreign military officers in charge of procurement

and defense contracts.

The U.S. equivalent, the U.S. Foreign Corrupt Practices Act, requires publically traded companies to maintain proper books and records and have a system of internal controls that provide a reasonable assurance that transactions are properly executed and recorded in accordance with generally accepted accounting principles.

Bribery may be illegal, but not all grease payments are bribes. Public servants in many Third World countries control the issuance of licenses to produce, manufacture or distribute products that can confer substantial economic benefits. Civil servants and their political masters who supervise the granting of such licenses often top up their income with payments for their favours.

Reasonable payments to foreign officials for promoting products or facilitating the performance of contracts between the payer and the foreign government are not illegal.

Similarly, facilitation payments that get officials to perform acts of a “routine nature” within the scope of their public duties are also not bribes under the statute. (At least, not at the moment — earlier this month the government [introduced amendments](#) that might make them illegal in the future).

Thus, as the law currently stands, one can pay foreign officials to perform routine functions that they are supposed to be performing anyway as part of their job. For example, one can bribe a foreign official to obtain a visa or work permit or pay a harbour master to offload a ship’s cargo in a port since that is what he is supposed to do. Which is why captains of cargo vessels carry a tin box with lots of small bills in various currencies.

Bribery is expensive since such payments must be made with after-tax dollars. Bribes are not deductible as expenses even if they are necessary and essential for the purposes of conducting business and there is no alternative but to pay if one is to secure the contract. A recipient must also declare the bribe as income and pay tax thereon. There is no limitation period and the Canada Revenue Agency can assess both the payer and the payee at any time.

There is no bright-line test as to what is a bribe. Each business must make its own decisions based on its judgment in the context of the particular circumstances and local culture. For example, a dinner gift of a bottle of single malt Scotch whiskey costing \$300 may be entirely appropriate for a senior official; a collector bottle with a value of \$128,000 may raise eyebrows and prosecutorial interest. The CRA does not provide guidelines for what constitutes a “reasonable payment” and businesses must exercise judgment, preferably with the benefit of legal counsel.

In contrast, and in the finest of U.S. regulatory traditions, U.S. authorities provide 120 pages of guidelines that define proper gifts, travel and entertainment expenses, and facilitation payments.

For example, the guidelines say that entertaining a foreign official at dinner might be entirely acceptable, whereas, spending \$10,000 on dinners, drinks and entertainment would probably not pass the test. Similarly, a trip to Paris for a foreign government official and his spouse might cross the line if the trip consisted primarily of touring and social activities in a chauffeur-driven vehicle.

To be sure, there are many countries in the world where it is impossible to do business without paying a bribe. However, necessity does not whitewash the offence. Nor is it a defence to criminal prosecution and the severe tax sanctions that attach.