CORRUPTION IN THE PUBLIC SECTOR - THE CONTEMPORARY CANADIAN EXPERIENCE

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INTRODUCTION[1]

On a yearly basis, the relative corruptness of countries is measured in a world corruption index. Canadians understandably take pride in the fact that their country routinely ranks near the bottom on that index.[2] Nevertheless, the scourge of corruption is such that even nations with a good record cannot rest on their laurels or ignore the realities of the marketplace.

Despite being relatively young countries, having only been 'discovered' by European explorers a few hundred years ago,[3] Canada and the United States have developed elaborate governmental and business structures, which now place them both in the role of international leaders - as members of the G-8, as peacekeepers on the world stage and as safe harbours in times of international strife.

The rapid growth from pubescent nationhood to international leadership did not occur overnight, nor was it devoid of many bumps and turns. The process by which North America was populated after the European discovery tended to be from east to west. As cities grew along the Atlantic seaboard, new settlers ventured westward, always pushing back the frontier.

A by-product of the opening of the frontier was the development of many part-time and sometimes ineffective local governments and the emergence of grassroots entrepreneurs who did business their way, devoid of government oversight and somewhat disdainful of authority. This often resulted in the development of gambling, prostitution[4] and other vices commonly associated to fledgling societies.

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[1]The opinions expressed in this paper are those of the writer and do not necessarily reflect the views of the Royal Canadian Mounted Police or the Government of Canada. An earlier form of this paper was presented to the Sixteenth International Symposium on Economic Crime, Cambridge, England, Sept. 15, 1998.

[2]Canada ranked 50th out of 54 countries in the 1996 rankings of Transparency International The United States ranked 40th, followed by Britain at 43rd (Jack Nelson, *The Global Explosion of Corruption* in The White Paper, Vol. 2, No. 3, May/June 1997 at p. 25.).

[3]One must not ignore the fact that aboriginal peoples lived in North America long before the European discovery.

[4]Prostitution continues not to be a crime in Canada, although public solicitation is, as is the keeping or being an inmate in a common bawdy house.

Gradually, in the larger cities of central and eastern Canada and the United States, government became more settled and involved in most aspects of daily life. The vice industries stabilized and took root and formed an outer ring of activity, which was either ignored or tacitly condoned by government.

Regardless of whether it was on the western frontier or in the eastern cities, where the vice industries, or non-regulated economic activity, crossed paths with local government, politicians and the police, corruption often resulted. Fortunately, the level of corruption in Canada seems never to have been very great. More often than not, it was restricted to turning a blind eye to activity, which was officially shunned, as immoral, and privately accepted as inevitable.

In Canada, it would also appear that corrupt activity did not cross into otherwise legitimate governmental and business activities. Bribes and secret commissions are not and never have been commonplace in business affairs. The explanation for this absence of cross-over is likely explained by the growth of strong, democratic systems, including opposition parties and the division of power between the legislative and judicial branches; a strong and vocal media; police who are functionally independent from their political masters; and modified, merit-based systems for appointing judges and for hiring prosecutors and police.[5]

It has been suggested that the absence of an open policy making process invites interest groups to exert their influence at the output or implementation stage, including by way of bribery.[6] In Canada, where policy making is generally an open process, the thought

[5]One political scientist, He Zengke, opines that the absence of these factors has prevented Communist China from stopping the spread of public corruption within its borders (Susan V. Lawrence, *Excising the Cancer*, Far Eastern Economic Review, Vol. 161, No. 34, August 20, 1998, p. 10 at 11).

[6]*Ibid.*

of giving or receiving a bribe in order to do business is quite foreign to domestic business activity, so much so that Canadians often refuse to accept that there is any corruption in their country. That, however, would be naive.

Public corruption can take many forms. Canada's *Criminal Code*[7] categorizes them as Bribery of Judicial Officers and Legislators,[8] Bribery of Officers,[9] Frauds on the Government,[10] Breach of Trust by a Public Officer,[11] Municipal Corruption,[12] Selling or Purchasing Office[13] and Influencing or Negotiating Appointments or Dealing in Offices.[14]

As noted above, the overt forms of public corruption rarely surface in Canada. It is most unusual to discover that a cop accepted a bribe in order to drop a charge or in some way, give favour to a suspect. Similarly, customs and immigration officers who work on Canada's borders, are seldom compromised by the desperate persons they encounter on a daily basis.

Although Canadians must always remain on guard to prevent such blatant attempts to corrupt front-line officials, our systems are hopefully of sufficient strength to ensure that overt, corrupt practices will always constitute a minuscule proportion of our aggregate economic and governmental activity. Law enforcement agencies concentrate instead on the less obvious forms of corruption, those involving unauthorized benefits offered to government officials and secret commissions in connection with contract awards.

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[7]R.S.C. 1985, c. C-46.

[8]S. 119.

[9]S. 120.

[10]S. 121.

[11]S. 122.

[12]S. 123.

[13]S. 124.

[14]S. 125.

THE COGGER CASE[15]

In 1997, the Supreme Court considered the case of a Canadian lawyer, Michel Cogger, who had been appointed to Canada's Senate in 1986. In Canada, similar to Great Britain, Canada's lower House of Parliament, the Commons, is an elected body, whereas the higher chamber, the Senate, is appointed. The Senate does not take an active role in governance on the level of the United States Senate, but rather acts in a somewhat passive manner as a chamber of sober, second thought. Its committees review governmental activities and it considers legislation which emanates from the Commons. Seldom does the Senate block legislation and its public profile is relatively low.

Senators have traditionally been appointed from the ranks of former politicians or political party supporters and are oriented along party lines. The governing party in the Commons tends to ensure that over time, through appointments, it also dominates the Senate, ensuring safe passage for its legislation and a minimum of disruption. Senators are well paid, but not necessarily in comparison to what they can garner in private business.

One concession made through the years has been to allow Senators to retain other forms of income outside their public office. In other words, they are permitted to maintain professional or business careers, which do not impinge on their Senatorial duties. Such was the case of Senator Cogger.

Prior to becoming a Senator, Cogger had been a well-known lawyer and political insider. Among his legal clients were a group of companies, for which he had made representations to various levels of government in the hope of obtaining grants. After his appointment to the Senate, he continued to make those representations. Although his efforts were unsuccessful, he had been able to arrange meetings with ministers and senior officials in order to "advance" the interests of his client companies. Cogger received $162,000 in fees during the period, as well as a $50,000 loan from the

[15]*R. v. Cogger* [1997] 2 S.C.R. 845. A new trial was ordered by the Supreme Court of Canada, which resulted in Cogger being convicted and sentenced. An appeal is pending.

principal of the companies.

Senator Cogger was charged with having accepted a benefit or advantage in consideration for co-operating, assisting, or exercising influence in connection with a matter of business relating to the government, a long and involved section of Canada's *Criminal Code* which is often referred to as its influence peddling provision.[16]

The question to be decided by Canada's highest court was, whether the crime required a "corrupt" state of mind, or whether the normal *mens rea* requirement of a subjective knowledge of all relevant circumstances and an intention to commit the constituent elements of the offence was sufficient. In other words, if Senator Cogger intentionally committed the acts, was it necessary that he also realize that they were corrupt acts.

The Supreme Court of Canada was clear in its assessment of Parliament's intention when it created s. 121(1)(a)(ii).[17] It's object "is to prevent government officials from taking benefits from a third party in exchange for conducting some form of business on that party's behalf with government."[18] The Court viewed this as "both a clear and an honourable goal."[19]

The Court restated its long held position[20] that the official need not be acting in his

[16]S. 121(1)(a)(ii) and (iii).

[17]L'Heureux-Dube, J, delivered the unanimous judgment of the 7 person coram.

[18]*Ibid.* at p. 857-8.

[19]*Ibid.* at p. 855.

[20]See *Martineau v. La Reine*, [1966] S.C.R. 103.

official capacity, as a Senator in this case, when conducting the act which gives rise to the charge. The benefit need not be conferred because of the person's position and the official need not know that it was given for this reason. It is also not necessary for the official to believe that his or her integrity has been compromised. The fact that the person is an official is sufficient to satisfy the section and lead people "to presume that he has something to sell, namely influence."[21]

[21] *Supra, Cogger*, at p. 856.

The court concluded that corruption was not a required element of the offence. To be guilty, the accused must know that he or she is an official, must intentionally demand or accept a loan, reward, advantage or benefit of any kind and must know that the reward is in consideration for assistance or the exercise of influence in connection with the transaction of business with or relating to the government.[22]

According to the court, the fact that Senator Cogger's activities would likely not be considered criminal were he not a public office holder, his possible ignorance of the law or his status therein, and the fact that his dealings were neither hidden nor concealed, were all irrelevant to a determination of guilt.[23]

The Cogger case echoed a 1996 case, in which the Supreme Court made similar, strong statements in support of the present *Code* provisions dealing with corruption, this time in the case of an alleged benefit received by a government employee. In *Hinchey v. The Queen*[24], the wife of a district engineer in a provincial transportation department appeared on the payroll of a road construction company with which the government did business. She was paid for a period of 20 weeks, sufficient for her to qualify for unemployment insurance benefits, although at no time did she actually work. The Court found that government employees could legitimately be held to a higher code of conduct than persons could in private industry, in order to preserve the integrity and the appearance of integrity of government.[25] The receipt of benefits, despite the absence of an ill motive, can damage that integrity.[26] All that is required in order to satisfy the

[22]*Ibid.* at p. 858.

[23]*Ibid.* at pp. 859-60.

[24][1996] 3 S.C.R. 1128, per L'Heureux-Dube for the plurality.

[25]*Ibid.* at p. 1139.

[26]*Ibid.* at p. 1141.

mental requirement of the crime is that the employee knew of the conduct and had knowledge of the circumstances in which it occurred.

INTERNATIONAL CORRUPTION

Although Canada's highest court appears clear in its resolve to give credence to the *Criminal Code* provisions dealing with public corruption, Canadians cannot ignore the reality that the world is becoming increasingly small and, despite a strong domestic record on corruption, Canada must strive for similar standards in its dealings on the international stage. It has been suggested that the globalization of the economy, the rapid flow of money across international borders, the flight of capital to offshore havens and the weakness and instability of many nations contribute to the increase in corruption around the world.[27] Although Canadians fortunately do not suffer from a weak or unstable society, the globalization of markets, technological advances and the international movement of money profoundly affect Canada. Dealing with these factors remains a challenge.

Until recently, Canada had not enacted legislation similar to the United States' *Foreign Corrupt Practices Act*.[28] In so doing, Canada restricted its criminal laws relating to corruption to its physical borders.[29] It did, however, participate in international efforts to eradicate corruption and forbade the tax deduction of foreign bribes paid by Canadians, something which remains possible in many countries. Now, however, Canada has lent its support to the OECD Convention on Bribery. A necessary corollary to that support is the implementation of domestic legislation aimed at preventing the corruption of foreign public officials. Bill S-21 is designed to do just that, outlawing such activity and interfacing the legislation with Canada's proceeds of crime and money laundering laws.

As with any new law, enactment is but a first step. Corruption cases are never easy to

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[27]Jack Nelson, *The Global Explosion of Corruption* in The White Paper, Vol. 11, No. 3, May/June 1997, p. 23 at pp. 23-4.

[28]15 U.S.C.A. 78(b), 78dd-1, 78dd-2.

[29]For an excellent overview, see James M. Klotz, *Bribery of Foreign Officials - A Call for Change in the Law of Canada* (1994) 73 C.B.A. 467.

investigate or prosecute. By their very nature, they involve paper trails, persons in high places, and are both resource and time intensive. They tend not to be favourites of prosecutors, because they are not perceived to be priorities for the criminal justice system, which increasingly targets its resources against violent crime and other crimes against persons. Effective enforcement and prosecution of Canada's new anti-corruption legislation will therefore depend on political will, largely demonstrated through the application of resources to the agencies within the criminal justice system which are charged with giving life to its provisions.

The fundamental importance of political will in the fight against corruption was demonstrated by the international accounting firm of Deloitte Touche Tohmatsu International. In a study for the European Commission, it concluded that nations must harmonize their laws to a common standard, increase the intensity and speed of international co-operation, employ confiscation as a tool of deterrence and prevention and develop a "zero tolerance" anti-fraud culture in business and government. Such goals are not only desirable, but necessary. Only by working in partnership with nations around the world, as well as with domestic industry and government, can society hope to curb the expansion of corruption and ensure the sanctity of those institutions which we all hold precious.