

Is a Major Bribery Prosecution Coming in Canada Under the CFPOA?

“What did the President know and when did he know it?” That is the iconic question from the Watergate Hearings asked by Senator Howard Baker of various witnesses. In the case of the Canadian engineering company SNC-Lavalin Group Inc. (SNC), it appears that its chief executive knew something was amiss and had known so for quite some time.

In an article in the March 27, 2012 edition of the Wall Street Journal (WSJ), entitled “*Big Builder’s Chief Resigns*”, reporters Caroline Van Hasselt and Satish Sarangarajan detailed the ongoing turmoil at SNC. In an article in the New York Times (NYT), entitled “*Chief of Canadian Firm Steps Down After the Inquiry*”, reporter Ian Austen reported that the chief executive of the firm, Pierre Dunhaimie, resigned on Monday, March 26, after the “release of a report indicating that he had authorized that \$56 million in improperly documented payments to unidentified agents.” The WSJ reported that the company “still had unanswered questions about the payments and had referred the matter to the Royal Canadian Mounted Police [RCMP]...”

Both newspaper articles reported on the release Monday of a copy of the company’s internal investigation, although the NYT article stated that it “appeared to raise more questions than it answered.” It appeared from the WSJ articles that Dunhamie had personally approved these payments to unknown agents to secure work for SNC projects. Apparently these agents were hired without any formal vetting process. Further the company reported that it was taking a charge to earnings for separate amounts of \$33.5 million and \$22.5 million, which had been incorrectly recorded on the company’s books and records. These payments had been made from 2009 until 2011.

Interestingly the company’s Chief Financial Officer (CFO) had objected to these payments because, as reported by the WSJ, “the agents identities weren’t properly disclosed and their fees would be charged to other projects.” The NYT reported that the payments to “agents who broker and manage contracts with foreign governments.”

So what does all this mean under relevant Canadian law? It could mean quite a bit. Canada has its own law prohibiting bribery and corruption of foreign governmental officials, the Canadian *Corruption of Foreign Public Officials Act* (CFPOA) which was enacted in 1999. The criminal provisions of the CFPOA are almost identical to those found in the US Foreign Corrupt Practices Act (FCPA) but it has no equivalent to the books and records component and there is no civil component which is enforced by the US Securities and Exchange Commission (SEC). The CFPOA only contains a criminal component, similar to that which is enforced by the US Department of Justice (DOJ). The FCPA has a longer jurisdictional reach than the CFPOA, where the test for jurisdiction requires that the cases involved have a “real and substantial” link to Canada. This means that a portion of the illegal activities must have been committed in Canada or have a real impact on Canadians.

Under CFPOA, there are clearly questions raised that would be similar to those raised under a FCPA analysis. What due diligence, if any, was done on the agents? What services, once again if any, were performed by the agents? The fact that the agents are still not known to the company or what the \$56 million payment was for, or where it went, are problematic as well? Why did the company executive approve these payments over the objections of the CFO? While there is no books and records equivalent under CFPOA, mis-characterizing payments and expenses would seem to indicate a desire to hide the true nature of the payments.

SNC had strong relationships with members of the former ruling family in Libya, the Qaddafi's, and had done ongoing work for the country before the regime fell. A consultant for the company was reported by the NYT to have traveled to Libya during the allied forces bombing and "produced a five-page report that was critical of the NATO-led bombing campaign in support of Libyan rebels." In view of these relationships, could some of this CAD56 million have been paid as bribes in Libya?

As noted, the matter has been turned over to the RCMP for further action. In a guest post on this blog, entitled "*Why Does It Appear Anti-Bribery Enforcement Is Lacking in Canada?*" our colleague Cyndee Todgham Cherniak wrote that Canada's criminal justice system does not include grand juries. As a result, the job of the RCMP is to gather sufficient information to cause the Crown to lay charges. Canada does not use grand juries as an investigatory tool. When there is a Canadian investigation, the RCMP is not inclined to talk about it. Appropriately, they declined comment for both articles.

Many questions are left unanswered by the company report. But as we might say down here south of the border, it is time for several people to "lawyer up".

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