
FOREIGN CORRUPTION ISSUES FOR CHARITIES OPERATING OUTSIDE OF CANADA

*By Terrance S. Carter**

A. INTRODUCTION

This *Charity Law Bulletin*¹ provides a brief overview of some of the foreign corruption issues involving bribery that Canadian charities operating outside of Canada need to be aware of. “Bribery” is generally understood to mean “offering, promising or giving someone a financial or other advantage to encourage them to perform their functions or activities improperly”.² The *United Nations Convention Against Corruption* denounces bribery of national public officials, foreign public officials and officials of public international organizations, as well as bribery in the private sector.³ It is unlikely, although not impossible, that charities might encounter this type of corruption domestically. However, in some areas of the world, bribery may be so prevalent that the employees and agents of a charity operating in those areas may be put under pressure to provide bribes of one sort or another in order to accomplish their intended charitable programmes.⁴

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¹ This bulletin consists of an excerpt from the book titled *Corporate and Practice Manual for Charities and Not-for-Profit Corporations*, by Jane Burke-Robertson, Terrance S. Carter, and Theresa L.M. Man, publication forthcoming in 2013.

² Charity Commission for England and Wales, *Compliance Toolkit: Protecting Charities from Harm*, April 2011 (Revised June 2012), Chapter 3, M1, available online at: <http://www.charity-commission.gov.uk/Our_regulatory_activity/Counter_terrorism_work/compliance_toolkit_3.aspx#m>.

³ United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, 2004, New York, articles 15, 16 and 21.

⁴ *Supra* note 2.

Charities, of course, are prohibited from engaging in bribery,⁵ since to do so would constitute giving an unacceptable private benefit in violation of the charity's charitable purpose.⁶ Any charity involved in such activities could face loss of charitable status, as well as allegations of breach of trust through the misapplication of charitable property. This in turn could leave the directors and officers of the charity open to personal liability for the misapplication of charitable funds or property that had been paid out as a bribe.⁷

B. CANADA'S CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT

Charities also need to be aware of the possible application of Canada's *Corruption of Foreign Public Officials Act*⁸ to their operations. In this regard, section 3(1) of the Act prohibits bribery of foreign public officials when the bribe is intended "to obtain or retain an advantage in the course of business". In section 2, "business" is defined as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere". This definition, and in particular the reference to "undertaking of any kind", could impact charities carrying on activities outside of Canada where their programs in a foreign jurisdiction include a "related business"⁹ activity permitted under the ITA, or a charitable program that involves an inherently commercial element like microfinance, or simply constructing a hospital or a school. The seriousness of the *Corruption of Foreign Public Officials Act* is found in section 3(2), which states that every person who contravenes section 3(1) is "guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years". As well, there is a similar indictable offence under section 4(2) of the *Corruption of Foreign Public Officials Act* for falsifying books and records for the purpose of bribing a foreign government official or for hiding such bribery in contravention of section 4(1) of the Act.

⁵ However, see discussion below about "facilitation payments" that raises a perplexing question of if and when such payments might be justified as a necessary means to a charitable end.

⁶ The courts have held that an activity that would otherwise serve a charity's purpose is not charitable if it results in a private benefit that is more than incidental to the resulting public benefit. See, for example, *Powell v Compton, (Compton, Re)* [1945] Ch. 123 (Eng. C.A); *Hadaway v Hadaway* (1954), [1955] 1 WLR 16; *Inland Revenue Commissioners v Oldham Training Enterprise Council*, [1996] BTC 539 (Eng. Ch. Div.). In addition to the common law principles relating to private benefit, the ITA includes penalties for charities that confer an undue benefit [Income Tax Act, subsections 188.1 (4) and (5)].

⁷ For a discussion of breach of trust and personal liability, see Donovan W.M. Waters, Mark Gillen, & Lionel Smith, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Carswell, 2005) at 1208.

⁸ S.C. 1998, c. 34, as amended by Bill S-14, *An Act to amend the Corruption of Foreign Public Officials Act* (short title: *Fighting Foreign Corruption Act*), 1st Sess, 41st Parl, 2013 (Royal Assent 19 June 2013) ["Bill S-14"].

⁹ A related business is one which is run substantially by volunteers or linked to a charity's purpose and subordinate to that purpose. For more information on related business, see: Canada Revenue Agency, CPS-019, *What is a Related Business?*, (31 March 2003), available online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-019-eng.html>>.

Bill S-14, *An Act to amend the Corruption of Foreign Public Officials Act*,¹⁰ that received Royal Assent on June 19, 2013, introduced two important amendments to the *Corruption of Foreign Public Officials Act* with regard to charities operating outside of Canada. One of the amendments removed the words “for profit” from the definition of “business”, referenced above, resulting in the prohibitions on bribery applying to organizations involved in any business or undertaking in a foreign country, regardless of whether that undertaking was conducted for profit.¹¹

The second amendment repeals the “facilitation payment” exemption provision of the *Corruption of Foreign Public Officials Act* on a date to be fixed by order of the Governor in Council. Currently, subsection 3(4) of the Act permits “facilitation payments” to be undertaken “to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions...” by excluding these situations listed therein from the prohibition on bribery. However, the amendments introduced by Bill S-14 will repeal this exemption on a date to be fixed by order of the Governor in Council, which means that in the future charities could be exposed to possible criminal liability for activities which, up to now, would have been permitted under the “facilitation payment” exemption. This could leave charities operating in foreign jurisdictions where “facilitation payments” might be considered necessary under limited certain conditions that, if ignored, could impede humanitarian aid, in an untenable predicament.¹²

C. OTHER SOURCES OF LIABILITY CONCERNS

The laws of the jurisdiction in which a charity operates may also serve as a source of criminal liability for a charity’s employees and agents who engage in bribery. Many countries dealing with bribery have far-reaching anti-bribery legislation¹³ and in this regard the CRA Guidance reminds charities that “being registered in Canada does not exempt a charity from the laws in the jurisdiction where they operate”.¹⁴ Also,

¹⁰ Bill S-14, *supra* note 8.

¹¹ For more on the discussion of the application of these amendments to charities operating outside of Canada, see Samuel E. Schwisberg, *When Doing Good Becomes Wrongdoing: Humanitarian Aid and Corruption*, (Paper presented at the Canadian Bar Association 2013 National Charity Law Symposium, May 10, 2013).

¹² For a fuller discussion of this issue, see Schwisberg, *ibid.*

¹³ For example, Russia is considered one of the most corrupt nations in the world (Transparency Institute, *2010 Corruption Perceptions Index*), yet it’s Criminal Code, Code of Administrative Offences, Law on Anti-Corruption, Law on Public Procurement and Law on State Civil Service combine to prohibit numerous corrupt activities including giving and receiving a bribe (*Anti-Bribery and Corruption Laws – An International Guide* (August, 2011), CMS Legal Services EEIG).

¹⁴ Canada Revenue Agency, CG -002, *Canadian Registered Charities Carrying Out Activities Outside Canada*, (8 July 2010 – last modified 14 June 2012) available online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html>> [“CRA Guidance”] at para 4.1.

sections 465(1) and 465(3) of Canada's *Criminal Code* make it illegal to conspire to commit an indictable offence and state that if an individual conspires, while in Canada, to commit an act outside of Canada that is an offence both inside Canada and where the individual plans to commit that act, the individual will be deemed to have conspired to commit that act in Canada.¹⁵

A Canadian charity might also fall under the jurisdiction of the U.S. *Foreign Corrupt Practices Act*¹⁶ if it makes payments through the U.S. banking system or sells goods of U.S. origin or with U.S. content.¹⁷ In this regard, it is possible that a Canadian charity that has any of these affiliations to the U.S. and is engaging in bribery could be subject to the anti-bribery provisions in the U.S. *Foreign Corrupt Practices Act*.

Charities should also note that the Department of Foreign Affairs, Trade, and Development (DFATD), formerly the Canadian International Development Agency (CIDA), now includes anti-corruption clauses in its requests for proposals, contract documents, and loan or contribution agreements.¹⁸ As a result, charities that collaborate with the DFATD on foreign activities are contractually bound to refrain from engaging in bribery.

D. SIX PRINCIPLES FOR PREVENTING BRIBERY

Canadian charities wanting to prevent their organization from becoming involved with bribery may wish to consult some of the resources generated by the United Kingdom ("UK") Ministry of Justice. After the UK adopted the *Bribery Act 2010*,¹⁹ the Ministry of Justice recommended six principles for preventing bribery,²⁰ which the Charity Commission for England and Wales has since reiterated.²¹ These principles are paraphrased below for ease of reference:

1. Proportionate procedures:

Organizations should adopt bribery prevention procedures that are proportionate to the bribery risks they face and to the nature, scale and complexity of their activities.

¹⁵ Samuel Schwisberg, "A Bouquet of Roses: Agents, Distributors and Other intermediaries in Foreign Government Procurements" (2008) 7:3 Canadian International Lawyer 131 at 134.

¹⁶ 1977 (FCPA) (15 U.S.C. §78dd-1, et seq.)

¹⁷ *Supra* note 15 at 132.

¹⁸ Bruce M. Bailey, "Anti Corruption Programming Strategies and Solutions" (2000) Canadian International Development Agency.

¹⁹ Bribery Act, 2010 (UK), c.23.

²⁰ Ministry of Justice, UK, *Bribery Act 2010 – Guidance*.

²¹ *Supra* note 2 at M3.

2. Top-level commitment:

Leaders of organizations should be committed to preventing bribery and foster a culture in which bribery is unacceptable.

3. Risk assessment:

Organizations should periodically assess the nature and extent of its exposure to risks of bribery and document these assessments.

4. Due diligence:

Organizations should apply due diligence procedures, using a proportionate and risk based approach, to mitigate identified bribery risks.

5. Communication (including training)

Organizations should use communication and training to ensure their bribery prevention policies and procedures are embedded and understood throughout their organization

6. Monitoring and review

Organizations should monitor and review their bribery prevention policies and make improvements where necessary.²²

E. CONCLUSION

The violation of anti-corruption laws carries severe consequences, including criminal liability, the possible loss of charitable status, and the potential for personal liability on behalf of directors. In this regard, charities should use their best efforts to ensure that they are not involved in activities prohibited by anti-corruption laws, including bribery, domestically or abroad. This includes, for example, understanding the six principles outlined by the UK Ministry of Justice. Charities also need to be mindful of Canadian laws, including the *Corruption of Foreign Public Officials Act* and its amendments, together with the *Criminal Code*, among others, as well as the laws of any foreign jurisdictions in which they operate. Charities making payments through the U.S. banking system or selling goods of U.S. origin or content will need to be particularly wary

²² Organisations considering adopting these principles should consult the Ministry of Justice's Guidance, supra note 20, to read the full text of the principles.

not to be caught under the U.S. *Foreign Corrupt Practices Act*. Finally, charities need to consider the implications that may result from the repeal of the “facilitation payment” exemption under the *Corruption of Foreign Public Officials Act* as of the date to be fixed by order of the Governor in Council.



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