

# Corruption and the Private Sector

## A Concise Action Plan

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## 1. Introduction<sup>1</sup>

The pace of life, and crime, have accelerated exponentially in recent years. As technology races ahead, enabling globalization of both trade and transportation, so does the threat environment and the need to mitigate those threats to the greatest extent possible.<sup>2</sup> The intent of this guide is to provide Canadians engaged in commerce at home and abroad with a one-stop source of information regarding corruption and its impact on business.<sup>3</sup>

Despite the moral imperative that every business should practice ethics and integrity in its operations, the reality is that free enterprise, dominated by the profit-motive, often overlooks the dividend provided by a strong, anti-corruption program, and how such a program can benefit the bottom line.

This guide outlines the pitfalls of corrupt behaviour, examines the increased domestic and international focus which the topic has acquired, and provides a concise roadmap that businesses can use in the current threat environment. It is for companies to reach their own conclusions on the importance of dealing with corrupt behaviour. Their motivation can be altruistic, it can be profit-oriented, or it can be driven by regulation.

The recommendations provided at the end of this guide are intended to be both operational and actionable.

## 2. Corruption

Corruption is a multi-faceted concept, which can be defined broadly or narrowly. Businesses encounter corruption when dealing with governments, but also when dealing with other businesses. In the public sector, corruption is the abuse of government office for private gain. It involves a transaction

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<sup>1</sup> Thanks are due to Professors Fen Osler Hampson of Carleton University, and Allan Rock, OC, of the University of Ottawa for the inspiration that gave rise to this guide and for shepherding its development. Thanks also to the World Refugee & Migration Council for its support of the Vancouver Anti-Corruption Institute.

<sup>2</sup> In this guide, we refer to businesses, corporations, and companies interchangeably. Similarly, the words, countries, nations, and states are used interchangeably.

<sup>3</sup> Closely allied to the private sector are universities and non-profit and charitable societies, which often rely upon grants and donations from domestic and foreign benefactors. They buy and sell property, develop large projects, engage in procurement contracts, and compete for students.

between two parties, for their mutual benefit or advantage.<sup>4</sup> Corruption is an affront to the rule of law, which democracies view as the cornerstone of good government.

Corruption is allied to the concept of secret commissions paid by corporate entities, to obtain a competitive advantage. It can also include industrial espionage and dirty tricks of various kinds. This guide acknowledges the broad nature of corruption, but concentrates, as do domestic and international law, on corruption involving the public sector.

Invariably, corruption will take hold in a nation where the Rule of Law is either weak or non-existent. Although no state is immune from corrupt practices, where checks and balances do not exist or are not enforced, people in positions of power are free to benefit personally from their office.

Corruption is a top-down and a bottom-up crime. It spreads throughout a society until it captures everyone and everything. Corrupt practices can quickly overtake a government bureaucracy, in which public servants, police, and the military may exact tribute in return for undertaking tasks that they are already paid to perform. Eventually, this culture of corruption becomes a way of life, accepted by the public as unavoidable to obtain basic services.

A ripple effect is found in private industry which, in its attempt to satisfy the demands of public officials, will develop its own corrupt practices with respect to contracts and tenders. We saw this with the Enron and World Com scandals in the first decade of the millennium. Bad behaviour, once accepted, becomes expected.

The proceeds of corruption tend to flow from the Global South to the Global North, creating large-scale economic distortion. States which are the recipients of a windfall of tainted money, often describe the influx of wealth as foreign investment. In fact, it is wealth squandered from those who need it most.

The malaise that surrounded corruption for so long permeates both the advantaged and the disadvantaged countries of the world. Prior to the turn of the century, corruption was so commonplace, that in many nations, the giving of bribes to secure overseas contracts was viewed as a legitimate business practice. In 1996, only one third of the countries belonging to the

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<sup>4</sup> Susan Rose-Ackerman, *Corruption and Government* (Cambridge: University Press, 1999), p. 13.

Organisation for Economic Co-operation and Development (OECD)<sup>5</sup> forbade tax deductions for foreign bribes.

Corruption affects that critical interface between public and private sectors, where bribes may influence the award of procurement and development contracts. Corrupt states degenerate into countries ruled by kleptocrats, whose grand corruption can place an entire nation on the precipice of disaster. From there, nations devolve into criminal states, where bribery and corruption replace normal market forces. The winners are the kleptocrats and government insiders who amass riches and typically move their assets abroad. This wealth often serves as a lucrative pension fund for their future.

In recent decades, private industry has realized that, by complying with demands for bribes, it becomes part of the problem. The reputational risk associated with giving bribes is huge. Corruption distorts competition and the rules of a market economy, impacts the quality of goods and services, weakens investment opportunities, and undermines business ethics. Corruption can impact a corporation's finances, its reputation, its profitability, and its competitive advantage.<sup>6</sup> The consequent loss of value, economic impact, and goodwill can lead to a corporation being shunned by governments, and even threaten its survival.

### 3. Canada

It would be easy for Canadians to dismiss corruption as somebody else's problem. That would be a grave error. Despite Canada being described as less corrupt than most nations,<sup>7</sup> organized crime has a strong foothold across the country. Although trafficking in illegal drugs was the preferred activity for most organized crime groups in past decades, this has evolved to include laundering dirty money, producing drugs in super labs, stealing and transporting stolen vehicles overseas, internet-enabled financial crime,

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<sup>5</sup> Founded in 1961 and headquartered in Paris, the OECD consists of thirty-eight member nations, including the U.K., Canada, and the U.S. It is committed to democracy, the market economy, growth in trade, and upgrading living standards in the world. It is found online at <http://www.oecd.org>.

<sup>6</sup> UN Secretariat, "Corruption: threats and trends in the twenty-first century," Working Paper, A/Conf.203/6, *Eleventh UN Congress on Crime Prevention and Criminal Justice*, Bangkok, April 2005, paras.17-18.

<sup>7</sup> Transparency International issues its yearly Corruptions Perception Index, at <https://www.transparency.org/en/cpi/>. Canada is always seen as less corrupt than most countries. However, the index does not consider the overseas behaviour of domestic companies.

product counterfeiting, labour trafficking, and environmental crime, to name but a few.

Canada has seen many Royal Commissions and public enquiries through the years on topics ranging from organized crime to corruption and money laundering.<sup>8</sup> What is apparent from recent research is that organized crime in Canada is transnational in nature, with global linkages to Africa, Asia, Australia, Europe and, of course, the Americas. As a moniker, “act local, think global,” reflects this new reality.

Fortunately, Canada and Canadians excel at many legal endeavours, thanks in large part to our strong financial system, markets, and laws. Prime examples are the extractive industries of oil, gas, and mining; those producing military equipment; and project management companies. However, these are also prime examples of industries which are quite vulnerable to corruption, especially overseas. Why? Because they are reliant on politicians and bureaucrats for funding, permits, access, and virtually all other aspects of their work.

Canadian business routinely exports its expertise to the world. More than once however, Canadian companies have caused environmental degradation, toxic spills, and other calamities, as the result of a disregard for regulations, or worse yet, corruption. Similarly, some Canadian banks and financial institutions, which are among the world’s largest and possess a footprint in many nations, have been sanctioned for their financial activities abroad. We cannot forget Canada’s sovereign wealth and investment funds, and asset management and equity capital firms. The dollar value which these organizations manage makes them attractive to criminal actors.

## 4. Domestic tools

In Canada, the *Competition Act*<sup>9</sup> is intended to do what its title implies, ensure competition in business. Competition allows for economic growth, equality among businesses, and a healthy marketplace for consumers. The *Act* is both lengthy and powerful. It covers a diverse range of topics, from deceptive practices to mergers, and from telemarketing to bid rigging. It incorporates both criminal offences and civil sanctions, as well as immunity

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<sup>8</sup> For example, the Cliché Commission (Quebec, 1976), the Charbonneau Commission (Quebec, 2015), and the Cullen Commission (BC, 2022).

<sup>9</sup> RSC 1985, c. C-34.

and whistle-blower provisions. Competition law provides significant tools with which to combat specific forms of bribery and corruption.

In addition, Canada's *Criminal Code* contains a general fraud offence<sup>10</sup> and specific offences relating to bribery and corruption. They include bribery of judicial and political office holders, bribery of officers, frauds on the government and influence peddling, breach of trust by a public officer, and municipal corruption.<sup>11</sup>

The *Criminal Code* addresses corruption within private entities through the secret commission offence in section 426. That provision acknowledges the importance of preserving the integrity of agency relationships and protecting principals from unscrupulous agents or third parties. On a macro level, secret commissions, because of their corrosive effect on corporations, can have the same negative impact on society as can the bribery of a public official.

## 5. International initiatives

In the early 1970s, the United States Congress passed the *Foreign Corrupt Practices Act (FCPA)*,<sup>12</sup> the purpose of which was to prevent American corporations from paying bribes overseas to obtain business. The *FCPA* applies broadly to public companies listed on U.S. stock exchanges, all public and private companies organized under U.S. law, and their employees, subsidiaries, sub-contractors, agents, and consultants, wherever located.

It is illegal for the entities and individuals captured by the *FCPA* to offer incentives to foreign officials, to retain or obtain business. The 'books and records' provisions of the *FCPA* require that public companies record transactions and maintain a system of internal controls, which aim to prevent bribes. Transparency in accounting practices is crucial.

The reach of the *FCPA* is far broader than the shores of the United States. Any foreign company which has an American subsidiary or which trades on a market regulated by the Securities and Exchange Commission (SEC) is

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<sup>10</sup> RSC 1985, c. C-46, section 380.

<sup>11</sup> *Ibid.*, sections 119 to 126.

<sup>12</sup> 15 USC ss 78dd-1, et seq.

caught in its web. This includes Canadian companies, in which dual listings, on both a Canadian and a U.S. exchange, are common.

The early successes of the *FCPA* were marred by the failure of other nations to enact similar legislation, giving rise to an American belief, likely well founded, that its corporations were at a comparative economic disadvantage when conducting business overseas. The United States urged international institutions to engage on the issue and develop similar rules of fair play.

Initially through the vehicle of the OECD *Anti-Bribery Convention* of 1997, legislation has now been enacted in many countries to deal with foreign corruption.<sup>13</sup> Ratification of the *UN Convention Against Corruption (UNCAC)*<sup>14</sup> propelled corruption onto the world stage. *UNCAC* attempts to deal with the demands of both advantaged and disadvantaged nations. It includes a framework to combat public and private corruption, with emphasis on the former. The Convention is built on the four pillars of prevention, criminalization, international co-operation, and asset recovery.

Chapter III of *UNCAC* is particularly important as it requires all nations to criminalize corruption offences. Among the mandatory offences are bribery of domestic public officials; bribery of foreign public officials and officials of private international organizations; embezzlement, misappropriation, or other diversion of property by a public official; laundering the proceeds of crime; and obstruction of justice.

## 6. Current and future global initiatives

In 2015, the United Nations General Assembly adopted its 2030 Agenda, containing seventeen Sustainable Development Goals (SDG), including the elimination of poverty and hunger, ensuring good health and education, gender equality, clean water, affordable energy, and many others. SDG 16 calls for peace, justice, and strong governmental institutions. Virtually none of the SDG goals are attainable in a corrupt environment. As a result, dealing with the scourge of corruption is a necessary pre-condition to fulfilling the 2030 Agenda.

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<sup>13</sup> Implemented in Canada by the *Corruption of Foreign Public Officials Act*, S.C.1998, c. 34.

<sup>14</sup> Adopted by UN General Assembly Resolution 58/4 of October 31, 2003, i/f December 14, 2005. Canada ratified *UNCAC* on Nov. 1, 2007, with certain reservations.

In addition to the development of international norms through the OECD, the United Nations, and other bodies; in recent years, a movement in support of an International Anti-Corruption Court (IACC) has gained traction with several countries. Many NGOs, spearheaded by Integrity Initiatives International,<sup>15</sup> support the creation of such a court as a supplement, addition, or parallel court to the existing International Criminal Court.

One proposal envisions a Civil Chamber attached to the IACC, designed to manage contested issues relating to the return of assets to nations from which they were stolen.<sup>16</sup> Other proposals envisage an expansion of the mandate of the United Nations Office on Drugs and Crime (UNODC) and of the Permanent Court of Arbitration, to better manage the process of asset recovery.<sup>17</sup>

## 7. What can / must private industry do?

In the world of financial regulation, there has been a global shift away from a rules-based compliance model, to one which is increasingly risk-based. Institutions are left to their own devices to identify and monitor suspicious behaviour. Risk is passed from government to the private sector, placing a much greater burden, and obligation, on private industry than was previously expected or accepted. Today, a company ignores this issue at its peril. Not only can corruption impact the bottom line, but it has the potential to destroy companies.<sup>18</sup> Fortunately, there is much that the private sector can do, to fight corruption.

Clearly one size does not fit all. The challenges faced by a mainstream bank may differ greatly from those faced by an investment management fund, or a company working overseas in an extractive industry. There are, however, certain overarching best practices that companies can practice regardless of their product or geographic focus. This is due in part to all companies, public and private, having common governance structures, such as a board of directors, a financial audit requirement, and a regulatory structure.

Below are seven recommendations aimed at domestic business operations and five which target foreign operations. There is clearly overlap between some of these recommendations, all of which can help form the basis for a

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<sup>15</sup> Integrity Initiatives International, “Declaration in Support of the Creation of an International Anti-Corruption Court,” online at <http://integrityinitiatives.org/declaration>.

<sup>16</sup> Allan Rock, “Proposal for a Civil Chamber in the International Anti-Corruption Court,” unpub. paper, Oct. 23, 2023.

<sup>17</sup> Sabine E. Nolke, “Strengthening Existing International Anti-Corruption Frameworks and Institutions,” unpub. paper, 2023.

<sup>18</sup> Corporations such as Siemens and SNC Lavalin were fundamentally impacted by bribery and corruption scandals.

robust and meaningful response to the risks created by bribery and corruption, money laundering, and other criminal activity.

## 7.1. Recommendations – Domestic

### 1) Education

Awareness and prevention come with education. Scenario-based training for business is just as important when fighting corruption, as it is when fighting forest fires. Understanding your enemy and the tools at your disposal are critical.<sup>19</sup>

### 2) Know Your Customer and Client (KYC)

Know your customer is a basic premise of all compliance models. It is incumbent on companies to identify with whom they are dealing, and ensure that, within reason, the client and third parties, including consultants, key entities in the supply chain, and customers, are not engaged in illegal activity.

### 3) Practicing Due Diligence

Due diligence is also a basic ingredient in all compliance programs. Not only is it necessary to identify a client, but it is also important in many situations to identify the source of a client's wealth. As with KYC, parties acting on behalf of a client must also undergo an appropriate due diligence enquiry. Depending on the degree of risk presented by the client's business operations, enhanced checks may be required of both the client and third parties. Risk increases appreciably when dealing with political-exposed persons, their families, and associates.<sup>20</sup>

### 4) Know the 'Red Flags' of your Industry

Every industry, be it real estate, auto sales, banks, casinos, sports betting, money transfer, cryptocurrency, or luxury goods, must be aware of red flags, denoting suspicious activities which can exist in their industry. It is important to act on those red flags by insisting on

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<sup>19</sup> Robert I. Rotberg and Fen Osler Hampson (edits.), *Grand Corruption: Curbing Kleptocracy Globally* (New York: Routledge, 2024) is a recent publication which provides both a conceptual and a policy-oriented approach to the problem of corruption.

<sup>20</sup> A politically exposed person is defined in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 at subsection 9.3(3).

greater due diligence to satisfy oneself of potential risks with a transaction. This is particularly important in cash-based businesses.

#### 5) Understand the Importance of Compliance

Corporate entities require compliance programs which monitor internal and external activity by the company and its agents. Compliance cannot be a simple checklist or checkoff sheet, but requires the application of thought and deliberation, and is dependent on employees being properly trained for their work.

#### 6) Enhancing Audit Capacity

Internal and external audits cannot be checklist processes. These work when ensuring that all systems are working on equipment, but in the world of corporate finance, an auditor must be encouraged to look beyond the obvious for indicators and red flags, and to alert management of anomalies.

#### 7) Board and Director Accountability

Not all boards are alike. Some oversee the activities of a company from a distance, often referred to as governance boards, while others engage in decision-making that might otherwise be left to senior executives. These are often referred to as managerial boards. Regardless, all directors must be alive to the risks which their corporation faces. This applies equally to non-profit and university boards.

The only way to be aware of risks is to be informed of circumstances which give rise to concern. Oftentimes this means having a compliance officer with a direct reporting relationship to the board of directors or to the chief executive officer. Boards are not fulfilling their responsibility to shareholders if they do not pay attention to potential illegality or wrongdoing.

## 7.2. Recommendations - International

### 1) Respect Human Rights

Human rights are sacrificed when corruption is prevalent in a nation. Increasingly, the international community is drawing a nexus between these concepts. With the advent of social media and instant

communications, any suggestion that a corporation or other entity is involved in corrupt activity will also be viewed as a violation of human rights.

Regardless of whether such conduct is actionable, it will impact a corporation's brand and may affect its ability to contract with domestic or foreign governments, and international organizations. It may also impact the corporation's ability to access government grants and tax incentives. The importance of corporate social responsibility cannot be overemphasized.

## 2) Know the Source of Funds and Wealth

Understanding a client's source of funds and wealth is critical to most business pursuits. The importance of this requirement increases exponentially when business is conducted in a foreign country, particularly if the country is not aligned with international legal and business norms.

## 3) Respect Foreign Laws and Regulations

The law must be respected, both at home and abroad. This, however, can be a daunting process in some foreign countries. A lax legal environment can prove just as difficult for business as one which is restrictive. Where there are gaps in the written law, or more likely, gaps in the enforcement of laws, businesses are well advised to impose a greater than normal standard or expectation on their foreign operations. The role of compliance specialists is critical. It is also important to note that certain Canadian laws apply to conduct committed abroad, most notably the *Corruption of Foreign Public Officials Act*.<sup>21</sup>

## 4) Compliance with Economic Sanctions

The international community increasingly uses sanctions to prevent trade and commerce with rogue states and terrorist organizations. The impact of sanctions inevitably has a secondary impact on legitimate business, which must source goods elsewhere and develop alternate markets. The importance, however, of adhering to

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<sup>21</sup> S.C. 1998, c. 34.

sanctions is fundamental to their success and an expectation of every corporation.

Canadian sanctions regimes govern Canadians and Canadian companies, working within Canada and abroad. U.S. sanctions can apply to foreign subsidiaries of American companies. It is often difficult to maintain a running log of sanctions, due to their sheer number. Once again, a robust compliance program is key to being properly informed.

#### 5) Support Global Mechanisms to Eliminate Corruption

Reducing corruption, helps create a level playing field for business. A byproduct of eliminating or reducing corruption is to improve the lives of all people. Working to meet and exceed the U.N.'s Sustainable Development Goals is a worthwhile exercise for all nations, as are supporting the aims of the U.N. *Convention Against Corruption*.

## 8. Summary

Corruption will not be eliminated by governments alone. Private enterprise has a critical role to play in developing a fair playing field and a safe and prosperous environment. Without sustained, unified, and global action, we will only witness more of what we have for so many decades and centuries. The expectations placed on private industry are modest by comparison to the benefits to be gained. The steps outlined above are common sense measures, designed to assist in the goal of reducing and eliminating corruption, while at the same time allowing private entities to prosper from the increased attention which they pay to issues of risk in the new and evolving corporate environment. There is no better time than now for corporate Canada to engage in outreach and collective action to eliminate corruption and create a fair environment for all.<sup>22</sup>

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<sup>22</sup> For more on this topic, see generally the Basel Institute on Governance, and specifically, <https://baselgovernance.org/private-sector>.

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