FEAR NOT

Securities laws back whistleblower programs, some even with rewards. Yet a lot of company leaders still think of whistleblowers as "rats." The longer those executives and directors take to buy in, the more they put themselves, their employees and shareholders at risk

BY PAUL MCLAUGHLIN

In late 2011 someone blew the whistle at SNC-Lavalin Group Inc., the Montreal-based engineering giant, and what a loud and piercing sound it made.

Senior executives and board members received an anonymous tip that serious criminal activities had taken place at the global firm. The allegations included the payment of kickbacks to obtain contracts and the improper diversion of funds to Libya. The board voluntarily initiated an independent review, under the direction and oversight of the audit committee, and released its findings in March 2012.

The review found that SNC-Lavalin (TSX:SNC) had indeed made improper payments, in 2010 and 2011, to the tune of $56 million. This revelation was accompanied by the resignation of its long-time CEO, Pierre Duhaime.

What happened next has been sending icy shivers down the backs of directors of listed Canadian companies in the months since.

In April 2012, Riadh Ben Aïssa, the former SNC head of global construction who had resigned earlier in the year along with the company's financial comptroller, was arrested in Switzerland in relation to an ongoing investigation involving allegations of corruption, fraud and money laundering. Although the reason has not been confirmed, his detention in Switzerland is likely connected to allegations by the RCMP that Ben Aïssa masterminded an elaborate scheme to pay Saadi Gadhafi more than $160 million in bribes to secure construction contracts in Libya, when Saadi's father, Moammar, was still in power.

In November, Pierre Duhaime, was arrested and perp-walked by Quebec's anti-corruption police unit, which charged him with three counts of fraud. They stemmed from the $56 million in questionable payments, which were related to the awarding of a contract to build the McGill University Health Centre. Three months later, Duhaime was slapped with additional charges of fraud, conspiracy and paying bribes. Ben Aïssa, who was still in Switzerland (the RCMP was trying to get him deported to Canada), was likewise charged.

The business fallout: SNC-Lavalin's share price fell 6% immediately after the fraud charges in 2012 and its financial forecast for 2013 was subdued. It's hard to quantify exactly how much of this is due to these and other scandalous details. Yet once it released the findings of the independent review, SNC announced it was enhancing its ethics and compliance measures. This included amending its codes of ethics and business conduct and upgrading its previously existing whistleblower program by implementing a worldwide training and certification plan, the establishment of an ethics and compliance committee and the outsourcing of a 24/7, multilanguage ethics and compliance hotline to a third party.

If these new and stronger policies had been in place at SNC years earlier would the various misconducts have been prevented or mitigated? It's impossible to say. But there's no question in the minds of compliance and governance specialists that all public companies should have an effective whistleblowing process in place. "I definitely think they have to do this," says Ray Harris, the former chair of Deloitte Canada and the Canadian Institute of Chartered

Accountants. He currently is chair of the audit committee on boards of three Canadian public companies, all of which have a whistleblowing program. "And they have to pay it as much attention as possible. They must highlight it."

David Malamed, a partner in the Toronto office of Grant Thornton LLP's Forensic Accounting and Investigative Services practice, which operates independent hotlines for companies, strongly reinforces the need to have an effective whistleblowing process. "With a duty to review, evaluate and examine, an audit committee member who does not subscribe to a whistleblower program or promote it within their company would be the same as getting into a speeding Ferrari without a helmet, airbag or seatbelt. There's no guarantee that you're not going to crash and burn, but I sure as hell would want to have some protection," he says.

HAVING A WHISTLEBLOWING program in place is not an option for Canadian public companies. In 2002, the U.S. passed the Sarbanes-Oxley Act, also known as the *Public Company Accounting Reform* and *Investor Protection Act*, as a response to the collapse of Enron Corp. and other egregious accounting scandals. About two years later, Canada brought in *Multilateral Instrument 52-110*, a bill that requires the audit committees of public companies to implement a "whistleblower instrument." All Canadian securities administrators, other than British Columbia, adopted the new legislation.

Under 52-110, it is mandatory for an audit committee to "establish procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."

Many companies, however, still don't comply. "I don't know the stats but I would say at least 50-to-75% of Canadian public companies don't have a [whistleblower] process in place," says Shannon Walker, founder and president of Whistleblower Security Inc., a Vancouver-based company established about seven years ago. She'd like to see regulators do more enforcing. "There's no teeth in Canada. It's a gummy bear. If you're going to spend all this time and effort to roll out these regulations but there's absolutely no standard, no enforcement, no consequence...this is the one frustration."

Threat of enforcement notwithstanding, the creation of a whistleblower program is not a complicated or expensive undertaking, says Richard Leblanc, an associate professor of governance, law and ethics at York University and a member of the governance faculty at Harvard University this summer. "It's an urban myth that a whistleblower procedure requires extensive expenditures," he says. "It just requires common sense. You need a code of conduct. You need a program of procedure that could be two pages, and it needs to be practiced. There needs to be regular compliance. There needs to be signoff on the code every year and there needs to be the right culture [in the company] from the top down."

Grant Thornton's Malamed agrees that cost should not be a deterrent. "Setting up an external hotline, for example, is a no-brain-

By the time someone blew the whistle at SNC-Lavalin and former CEO Pierre Duhaime was ousted and charged (here, in a Quebec anti-corruption unit perp walk), trouble was extensive

er," he says. "This is very inexpensive for most companies, about the cost of a Starbucks latte a day."

An effective whistleblowing program must have three major elements," he adds. One is absolute anonymity. "They say you can lose a whistleblower in 60 seconds or less. If whoever answers the call puts the person on hold, for example, that can lose the caller as they could get afraid they're being tracked or taped."

A second element is accessibility. "A potential whistleblower needs to be able to call by phone, have secure web access, be able to e-mail or send in a written letter," he says.

The third element is accountability by the receivers of the complaints. "If the hotline is run by an external company, it can come in maybe quarterly or yearly and ask what kind of follow-up has been done," he says. "It's easy to shuffle complaints away but harder to do that if the company knows they're going to be held accountable for their actions."

Even when a whistleblower program is in place not all potential whistleblowers will use it, says Leblanc. "There's evidence to suggest that many whistleblowers don't perceive the program as being effective. It could be because of a lack of anonymity, or a lack of confidence that there will be a proper investigation and impartiality."

He says companies must install what he calls a protective mechanism to encourage people to feel safe about coming forward. "If your whistleblower program has the general counsel or the compliance officer or external counsel [as the contact person], this likely won't work. People are smart. They wonder if their phone call or e-mail is going to be traced." Canada needs to adopt a procedure now in place in the U.S., he says, that allows a whistleblower or lawyer to contact the Securities and Exchange Commission directly, bypassing the company they want to inform on. "Your lawyer is covered by solicitor-client privilege and can say to the SEC that you're never going to learn the identity of this person until he consents." The Ontario Securities Commission is currently exploring whether to have this option in Canada.

Leblanc notes that some people don't come forward because their work environment is so toxic. "If every time someone raises their hand it gets chopped off then employees, who are rational people, are going to say, well, I'm just not going to raise it."

In truth, this is probably the No. 1 obstacle to more effective whistleblower deterrence. While there have been protections in place for whistleblowers in the Criminal Code since 2004 that make it a criminal offence for an employer to retaliate against anyone who reports unlawful conduct, for instance, the truth is that most whistleblowers can still expect to find their lives upended, and often destroyed, if they inform on their place of employment. A great many managers, owners and organizations still see whistleblowing as squealing and whistleblowers as rats and will go out of their way to discredit them.

"If anyone says to me we have all these systems, and they work, I say, well show me a success story and they can't," says David Hutton, executive director of FAIR (Federal Accountability Initiative for Reform: Protecting Whistleblowers Who Protect the Public Interest), which was established in 1998. "It's very rare to see a case where a whistleblower actually prevails in any meaningful sense."

While FAIR deals with the treatment of public servants who blow the whistle, the lot of those who inform on public companies is no better and perhaps even worse. "Whistleblowers do take a great risk and most of them suffer greater consequences than the rewards they receive [in the U.S.]," says Marc Raspanti, a partner in the Philadelphia office of Pietragallo Gordon Alfano Bosick & Raspanti LLP. "The great majority lose their careers, lose their jobs. The pro-

Photograph: Christinne Muschi/Reuters

tections are retrospective. They usually happen after the screwing has occurred. It's very hard to stop an action before it has occurred."

The Washington law firm Constantine Cannon LLP, which publishes the *Whistleblower Insider* blog, writes that new U.S. laws protecting whistleblowers "have vastly improved...and the horror stories...have dropped off considerably." Yet all is not for the best. "It can still be a very rough ride. The risk of retaliation or some form of estrangement, alienation or even blacklisting remains very real. At the very least, the target company will do everything in its power to discredit the whistleblower as a mere snitch, opportunist or disgruntled employee. Work, or how you practice your profession, may never be the same again."

Hutton says this is often true in Canada. "Does a whistleblower in Canada have a lot to worry about in terms of retaliation? Absolutely."

WHILE THE AVERAGE CANADIAN public company might never deal with a serious whistleblowing matter, they need to be aware that potential trouble does exist, especially if they do business outside of Canada or with entities that have a U.S. component.

"It's absolutely essential that companies operating in foreign markets, particularly those in emerging countries where there's a high risk of contravention of [that country's] anti-corruption legislation, that they have in place a very robust compliance program," says Riyaz Dattu, a partner who specializes in international trade and investment at the Toronto law firm Osler Hoskin & Harcourt LLP.

It's not just that it's the right thing to do; it's prudent and fiduciarily responsible. If serious wrongdoing is uncovered at a company, whether by a whistleblower coming forth or by any other means, the existence of a strong compliance program, properly implemented, "will almost certainly be taken into consideration [by the authorities]," says whistleblower security consultant Walker. "It can be an important mitigating factor."

Philadelphia lawyer Marc Raspanti emphasizes that Canadian firms must understand how vulnerable they are to the various U.S. anti-corruption statutes.

"I would make them aware of three significant whistleblowing-type statutes," he says. "One is the *False Claims Act* and a subcategory, which could impact Canadians but is something they probably don't hear a lot about, which is the *New York False Claims Act*. Then I would tell them about the SEC whistleblower program and the IRS [one]." Raspanti, who heads up his firm's national Affirmative Qui Tam practice group and its White Collar Criminal Defense practice group, adds that 30 U.S. states have false claims acts but New York is the only one "that has a significant tax provision."

Considering the amount of business traffic between New York and parts of Canada, he cautions Canadian companies to understand how easily they could become ensnared in a foreign-driven investigation into fraud or corruption. "As soon as you have any connections to the United States or you're reporting to the United States or you're providing lenders with information or maintaining books or audit records, any of those things, to the extent they're not maintained properly, [that] could expose you."

Most companies, Raspanti says, think they're only vulnerable to possible corruption charges under existing U.S. legislation such as the *Foreign Corrupt Practices Act*. However, "the lesser-known provisions of the FCPA deal with books and records," he says. "They want to make sure there is no monkey business going on...especially because of the accounting differences in the way American companies keep their books compared to how Canadian books are being kept."

The U.K. also has stringent anti-corruption legislation. "The long arm of the U.K. *Bribery Act*, for example, can go anywhere," says Walker. "If you're a Canadian mining company doing business in Africa and you happen to have an outsource company that's British and something goes amiss with that supplier, you can be prosecuted under the *Bribery Act* even though you're not British or doing business in the U.K."

There is an enticing incentive in the U.S. to blow the whistle: the chance for the whistleblower to share in any money recovered by a successful investigation the whistleblower initiated. A prime example was the $104-million payout from the U.S. Internal Revenue Service to 47-year-old Bradley Birkenfeld, a former banker at UBS AG, the global financial services firm in September 2012. It came some five years after he'd told IRS authorities about schemes his employer had undertaken to help wealthy clients evade taxes.

You'd think boards and management would rather have damaging financial or reputational truths reported internally than first hear about them in a phone call from the regulator.

Under the SEC's whistleblower program, meanwhile, which targets securities violations, tipsters are eligible to receive 10% to 30% of sanctions ultimately collected from a reported company. The hotline's high profile and the prospect of big payouts seem to be working: in 2012, its first year of operation, the SEC whistleblower's office logged 3,001 tips.

The OSC does not allow payouts to whistleblowers at the time but a change may be coming. "You will note from the OSC's enforcement initiative notice that staff have only committed to examining the merits of an incentives-based whistleblower program, including the important questions raised as to the funding and possible need for legislative amendments necessary for operating such a program," an OSC spokesperson said in an e-mail message.

If there's a lesson here, it's a reminder that truth will out. And if that truth were something that could expose a company to serious financial and reputational problems, you'd think boards and management would rather have it reported internally than first hear about it in a phone call from the regulator.

Osler's Riyaz Dattu says despite increasing publicity about companies that run afoul of anti-fraud and anti-corruption statutes, it could be some time before the remainder of companies buy in. The risk "hasn't quite sunk in at the board level," he says, pointing to a lack of knowledge and understanding, not just with management but also with some of the lawyers who conduct due diligence.

That's why his presentations to clients these days include references to the Griffiths Energy International Inc. case that cost the company a $10.35-million penalty under Canada's *Corruption of Foreign Public Officials Act*. The aim of such a large fine, says Dattu, was not just punitive. "It wasn't to put the company out of business. It was to send a loud message to the business community." The question that remains, of course, is whether it's been heard.