Canada Strengthens Its Laws Against Bribery of Foreign Public Officials

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I. Introduction and Background

The Corruption of Foreign Public Officials Act (CFPOA)[1] was enacted in 1999 and made it an offence in Canada to bribe a foreign public official in order to obtain or retain an advantage in the course of business. To date, three companies have pleaded guilty and been convicted of offences under the CFPOA, the latter two resulting in fines of approximately $10 million each.

On August 15, 2013, the first trial was conducted under the CFPOA, which resulted in the first individual, Nazir Karigar, being convicted by the Ontario Superior Court of bribing a foreign public official. Mr. Karigar has not yet been sentenced.

On June 19, 2013, the CFPOA was amended (2013 Amendments) to expand the offences and increase the punishments under the Act, broaden the extra-territorial reach of the Act, and extend the ambit of the Act to include not only for-profit businesses but also charities and other non-profit organizations.[2]

The United States was the first country to enact legislation against bribery of foreign officials with the implementation of the Foreign Corrupt Practices Act of 1977 (FCPA).[3] However, on implementing the FCPA, many argued that the United States was placed at a competitive disadvantage compared to other international trading states in bidding for third-party business, and American businesses complained that complying with the FCPA's strict provisions resulted in lost business opportunities.[4] As a result, the United States encouraged other states through the United Nations and other international bodies to also institute anti-corruption

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[1] S.C. 1998, c. 34 (Can.).

[2] Fighting Foreign Corruption Act, S.C. 2013, c. 26 (Can.).

[3] 15 U.S.C. §§ 78dd-1 to 78dd-3.

[4] Lori Ann Wanlin, "The Gap Between Promise and Practice in the Global Fight Against Corruption," *Asper Rev. of Int'l Bus. & Trade L.* 209 (2006).

initiatives so that American businesses would no longer be at a disadvantage.

The impetus for the CFPOA in Canada was the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) adopted by the negotiating conference of the Organization for Economic Co-operation and Development (OECD) in 1997 and brought into force in February 1999.[5] Signatories to the Convention now include the 34 OECD members (including Canada, the United States, and the United Kingdom[6]), as well as Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa, which are not members of the OECD.

The preamble to the Convention noted that it was addressing bribery because it "is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions."

The Convention appears to have recognized the United States' experience that companies who refuse to bribe or to respond to solicitations of bribes when dealing with foreign public officials could be at a competitive disadvantage if competitors from other countries are willing to engage in such behaviour. As a result, it is ideal if industrialized nations can all implement similar laws prohibiting bribery in foreign nations. It is also understood that perhaps the most effective way to combat bribery is not within the nations themselves that permit, acquiesce to, or encourage acts of bribery, but rather to prohibit organizations based in industrialized nations from bribing public officials in such developing nations.

Recently, the 2013 Amendments strengthened the CFPOA in the following respects:

- the offence of bribing a foreign public official was expanded beyond business carried on "for a profit" to include business activities not carried on for profit, such as charities and other non-profit organizations;
- the maximum period of imprisonment for bribing a foreign public official has been increased from 5 years to 14 years;

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[5] *See* OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents* (2011); 37 I.L.M. 1 (1998).

[6] The members of the OECD are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

- instead of requiring a "real and substantial connection" between Canada and the location where acts of bribery occur, the CFPOA now applies to acts of bribery anywhere in the world where such acts are conducted by Canadian citizens, permanent residents present in Canada, Canadian corporations, or other entities created under the laws of Canada or a province;
- "facilitation payments" (generally, payments to a public official to expedite a routine governmental act that is part of the official's duties, and not to obtain or retain business or any other undue advantage), which are currently an exception to the offence of bribing a foreign public official, will become illegal at a future date to be set by the Governor in Council;
- a new offence of manipulation or falsification of accounting records to conceal bribery has been created (the "books and records" offence), which attracts a maximum sentence of 14 years in prison; and
- whereas previously many different categories of peace officers that exist in Canada were empowered to enforce the CFPOA, the Royal Canadian Mounted Police (RCMP) have been given exclusive jurisdiction to charge persons for offences under the CFPOA.

The CFPOA is most relevant to individuals and companies that conduct business in developing nations where bribery is typically more prevalent. In many developing nations, which are often poor, bribery is not criminalized but rather is accepted, or at least ignored. Lower-level government functionaries may routinely require "facilitation payments" to supplement their meagre salaries.

The extractive industries tend to be highly regulated, requiring frequent interactions with governments in order to obtain necessary concessions, licences, permits, and other authorizations to explore and exploit natural resources. Such frequent interactions with public officials increase the opportunities for bribery in such countries. As a result of the CFPOA and recent high-profile convictions under it, many resource companies in Canada that operate in developing nations have been implementing anti-bribery and anti-corruption policies and procedures.

II. Corruption of Foreign Public Officials Act (Canada)

The CFPOA entered into force on February 14, 1999, and was amended in 2001 and in 2013. The CFPOA makes it an offence in Canada to bribe a foreign public official in order to obtain or retain an advantage in the course of business.

Section 3 of the CFPOA sets out the offence of bribery of a foreign public official as follows:

> (1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
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> (*a*) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (*b*) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.
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> (2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

"Every person" who is capable of committing the offence under subsection 3(1) includes not only individuals but also public bodies, corporations, firms, partnerships, trade unions, municipalities, or other associations of persons.

A "foreign public official" is defined as:

> (*a*) a person who holds a legislative, administrative or judicial position of a foreign state;
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> (*b*) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
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> (*c*) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.[7]

A "foreign public official" would include, for example, an elected representative or a government official of a foreign state, as well as an official or agent of a public international organization, such as the United Nations. The official may work at any level of government, from national to local. This prohibition applies not only to conduct internationally, but also to the bribing of foreign public officials who are situate within Canada (for example, bribing a foreign public official while such official is in Canada in order to obtain a construction contract to build an embassy in Canada).

To constitute an offence, a person must have given, offered, or agreed to give or offer a benefit to a foreign public official "in order to obtain or retain an advantage in the course of business."[8] The CFPOA defines "business" as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere."[9]

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[7] CFPOA s. 2.

[8] *Id*. s. 3(1).

[9] *Id*. s. 2. Prior to the amendments introduced in the 2013 Amendments, the definition of "business" included a requirement that such business be conducted "for profit." By removing "for profit," non-profit organizations and charities, which were formerly outside the ambit of the CFPOA, are now subject to the CFPOA.

As a result of the 2013 Amendments, the prohibition against bribery applies not only to for-profit companies but also to charities, non-governmental organizations and other not-for-profit organizations, provided that they are conducting "business" at the relevant time. The courts have not yet considered what constitutes activities "in the course of business" under the CFPOA. It is likely that selling products, such as medicine or homes, in a foreign country for a price that does not exceed the cost of such products (i.e., generating revenue but not profit) would be conducting "business," but it is less clear whether the provision of products or services for free, such as the provision of humanitarian aid, will be considered conducting "business." For example, we do not yet know if the prohibition against bribery would apply to an international relief organization that may be asked, in the course of delivering food during a famine, to pay a bribe to a government official in order to obtain permission to import, transport or deliver the food in the country.

The CFPOA criminalizes the act of one that "directly or indirectly gives, offers or agrees to give or offer . . . [an] advantage or benefit of any kind . . . ."[10] The use of the term "agrees" is not limited to an agreement between the party who pays a bribe and the party who receives it; rather the term "agrees" criminalizes all parties who may be involved in a conspiracy to bribe a foreign public official.[11] The inclusion of the word "indirectly" criminalizes bribes made to foreign public officials through others, such as agents, on behalf of a person or organization.

No particular mental element (mens rea) is expressly set out in the offence, since it is intended that the offence will be interpreted in accordance with common law principles of criminal culpability and the courts will be expected to read in the mens rea of intention and knowledge.[12] Under Canadian law, when a true crime, such as the bribery offence under the CFPOA, is silent as to the requisite mens rea, the courts will presume that subjective mens rea was intended by Parliament. Subjective mens rea is normally satisfied by proving the prohibited act was committed "intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them."[13]

There is no requirement that the evidence support a finding that a bribe was in fact paid to a foreign public official. It is sufficient for a conviction under section 3 of the CFPOA for the evidence to support a finding of the

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[10] *Id*. s. 3(1).

[11] *See* R. v. Karigar, 2013 ONSC 5199, para. 28.

[12] Dep't of Justice Can., "The Corruption of Foreign Public Officials Act—A Guide," at 3 (May 1999) (Canadian Guide).

[13] R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 1309.

existence of a conspiracy or an agreement to bribe a foreign public official. As stated in *R. v. Karigar*,

> it is not necessary to establish a violation of s. 3 of the CFPOA, that a bribe [is] actually paid to a foreign official with the power to offer a business advantage. Rather, it is sufficient if the party alleged to have paid the bribe to such an official believes that a bribe is being paid to such an official . . . .[14]

Until the CFPOA was amended by the 2013 Amendments, the CFPOA did not specifically apply to Canadian nationals operating abroad, and a "real and substantial link" was required to be found between Canada and the activities constituting the offence. However, recent changes to the CFPOA resulting from the 2013 Amendments extend its reach to activities conducted outside of Canada by Canadian citizens; permanent residents of Canada; or a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.

The 2013 Amendments also introduced a new "books and records" offence, which is similar to laws that have existed for some time in the United States. This offence prohibits the manipulation or falsification of accounting records to conceal bribery. The new section 4 was added to the CFPOA, which reads as follows:

> (1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,
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> (*a*) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
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> (*b*) makes transactions that are not recorded in those books and records or that are inadequately identified in them;
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> (*c*) records non-existent expenditures in those books and records;
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> (*d*) enters liabilities with incorrect identification of their object in those books and records;
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> (*e*) knowingly uses false documents; or
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> (*f*) intentionally destroys accounting books and records earlier than permitted by law.
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> (2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

A. Exceptions

There are currently three exceptions to the bribery prohibitions under the CFPOA: (1) that the payment was technically lawful (as opposed to merely customary) under the laws of the foreign country for which the public official works, (2) that the payment constituted a reasonable promotional expense, or (3) that the payment was a facilitation payment.

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[14] 2013 ONSC 5199, para. 33.

As discussed further below, the facilitation payments exception will be repealed at a future date to be set by the Governor in Council.

[1] Lawful Under Local Law

Section 3(3)(*a*) sets out a lawful exception that a person accused of bribing a foreign official could use as a defence, namely, that the payment was lawful in the foreign state or public international organization for which the foreign public official performs duties or functions. In Canada, the defence applies when the payment was either "permitted or required under the laws of the foreign state or public international organization for which the public official performs duties or functions."[15] Such payments must be strictly legal and not merely tolerated or customary. In other words, even though small bribes are routinely requested, paid, and tolerated by local law enforcement, they would not qualify for the local law exemption if they are technically unlawful. In practice, it is likely that the local law defence will arise infrequently, as the written laws and regulations of countries rarely, if ever, permit corrupt payments.

[2] Reasonable Promotional Expenses

The defence contained in paragraph 3(3)(*b*) of the CFPOA allows for reasonable expenditures to be made in order to develop a business relationship. To use this defence, the accused must show that the loan, reward, advantage, or benefit was:

- a reasonable expense,
- incurred in good faith,
- made by or on behalf of the foreign public official, and
- *directly related* to the promotion, demonstration or explanation of the person's products and services or to the execution or performance of a contract between the person and the foreign State for which the official performs duties or functions.[16]

This means that, for example, a Canadian company can pay the expenses of a foreign public official to visit Canada so that the company can promote its products and services. Likewise, a Canadian company can pay the expenses of a foreign public official to visit Canada for the purpose of signing a contract.

[3] Facilitation Payments

Subsections 3(4) and 3(5) of the CFPOA currently allow certain facilitation payments, sometimes referred to as "grease payments," to be made which are exempt from the bribery prohibitions. Such facilitation payments are not considered bribes if they are made to expedite or secure

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[15] CFPOA s. 3(3)(*a*).

[16] Canadian Guide, *supra* note 12, at 8.

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, including:

> (*a*) the issuance of a permit, license or other document to quality a person to do business;
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> (*b*) the processing of official documents, such as visas and work permits;
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> (*c*) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and
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> (*d*) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.[17]

Subsection 3(5) of the CFPOA provides that "[f]or greater certainty, an 'act of a routine nature' does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision."

Facilitation payments have been criticized by many who believe that they are essentially bribes, encouraging corruption and illicit enrichment of public officials.[18] In addition, it can be very difficult to differentiate between an illegal bribe and a legal facilitation payment, at least in part because there has been no judicial consideration of facilitation payments in Canada. For these reasons, it has been suggested that facilitation payments be avoided as a matter of "best practice."

The existence of an exception for facilitation payments in the CFPOA was criticized by the OECD in its annual reviews of Canada's anti-bribery legislation. Largely as a result of such criticism, the 2013 Amendments provided for the removal of the facilitation payments exception, but the proposed criminalization of facilitation payments was resisted by certain commentators.[19] Rather than providing for an immediate repeal of the exception for facilitation payments, the 2013 Amendments provide that subsections 3(4) and 3(5) of the CFPOA will be repealed on a day to be fixed by order of the Governor in Council. This will enable the government to educate its internal staff responsible for enforcing the CFPOA about the change, to give companies and other organizations time to adjust their own practices and internal policies to ban the use of facilitation payments, and

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[17] CFPOA s. 3(4).

[18] *See, e.g.*, Australia Attorney-General's Department, Public Consultation Paper, "Assessing the 'facilitation payments' defence to the Foreign Bribery offence and other measures" (Nov. 15, 2011) (Consultation Paper), http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx.

[19] *See, e.g.*, "Proceedings of the Standing Senate Committee on Foreign Affairs and International Trade," Issue 23, meeting of March 6, 2013 (Senate Proceedings).

perhaps to attempt to encourage other governments, such as the United States, to also prohibit facilitation payments in their anti-bribery legislation so that Canadians and Canadian companies are not at a competitive disadvantage.[20]

B. Penalties

Pursuant to subsections 3(2) and 4(2) of the CFPOA, a person found guilty of contravening subsection 3(1) of the CFPOA is guilty of an indictable offence and liable for imprisonment for a term not exceeding 14 years.[21] The penalty may also include a fine. A fine will be levied in the event a corporation or other non-natural person that cannot be imprisoned has been convicted of the offence. The amount of the fine is at the discretion of the judge, and there is no maximum. Note that no limitation period applies to indictable offences in Canada, and that offences in Canada that contain a maximum sentence of 14 years are not eligible for discharges, either absolute or conditional, or for conditional sentences (sentences served in the community). However, there is prosecutorial discretion to not charge a person for what may be considered a minor crime (e.g., paying $20 to a border officer to speed access to a visa to leave a country) and, if charged, defences such as "necessity" may exist to avoid a conviction.[22] The defence of necessity may apply, for example, when a payment was made by a person who thought his or her life was in danger if the payment was not made.

The penalties prescribed under the CFPOA may be only part of the potentially negative consequences that could impact a company or the individuals involved resulting from a conviction, or even a charge, of bribing a foreign public official under the CFPOA. Charges and convictions under the CFPOA are widely reported in the press and are likely to damage a company's reputation. If the company charged or convicted is a public company, the company may suffer a reduction in its share price and the potential for action by disaffected shareholders. Finally, dealing with a CFPOA investigation or charge can consume a great deal of management's time and attention and distract it from other business matters.

In addition, a charge of bribery may have reputational consequences for the individuals involved. In *R. v. Watts* (discussed below), Hydro Kleen Systems Inc. (Hydro Kleen) was convicted of bribing a foreign public

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[20] The United States' FCPA provides an exemption for facilitation payments, as does the anti-bribery legislation of Australia and New Zealand. Australia is considering removing the facilitation payment exception from the anti-bribery provisions of its Criminal Code. *See* Consultation Paper, *supra* note 18.

[21] Prior to the 2013 Amendments, the punishment was no more than five years.

[22] *See* Senate Proceedings, *supra* note 19.

official. In a Victim Impact Statement, a competitor of Hydro Kleen, through its president, Mr. Sullivan, made a statement to the effect that, as a result of the bribery by Hydro Kleen, "our own employees questioned the point of maintaining our own ethical values. What's the use, was the most asked question."[23] To this statement Mr. Justice Sirrs responded as follows:

> Mr. Sullivan, you have indicated in your statement that your employees have asked themselves, What is the use of being honest, being proper, in your business, activities? All I can say to you is, as a citizen, you have to appreciate there are many more important things than profit. Maybe there is no financial value, but I think our society still places a large value on the loss of one's soul, loss of one's integrity, a loss of one's good reputation, all for the sake of more profit.
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> I do not think your employees want to be seen as slippery, slimy snakes that slither on their bellies in order to win business advantage. That is, in my opinion, most people will conduct themselves in their business affairs in a high ethical standard because they want to be thought well of. And in many ways, that is the more important deterrent when people conduct their business practices.[24]

C. Convictions under the CFPOA

To date, there have been four convictions under the CFPOA. The first three convictions involved the conviction of companies, and in all cases the companies pleaded guilty and paid a fine. The fourth and most recent prosecution under the CFPOA resulted in the first trial under the CFPOA and the conviction of an individual, who has yet to be sentenced. In addition, there are currently over 35 active investigations by the RCMP International Anti-Corruption Unit.

[1] *R. v. Watts (Hydro Kleen)*

R. v. Watts[25] concerned bribes paid by a Canadian company to an American official. Hydro Kleen is an oil and gas refinery services company operating in Canada and the United States from its office in Red Deer, Alberta. A U.S. immigration officer who worked at the Calgary International Airport pleaded guilty under the Criminal Code[26] in July 2002 to accepting secret commissions from Hydro Kleen. Hydro Kleen had bribed the Immigration Officer to facilitate the entry of its employees into the United States. Furthermore, the Immigration Officer took it upon himself to enter information on a computer system used by U.S. border officers that resulted in delaying or denying entry into the United States of employees of Hydro Kleen's competitors. The Immigration Officer was paid $2,000 per month for providing these "immigration consulting services." The company, its President and Majority Shareholder (Robert C.

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[23] R. v. Watts, [2005] A.J. No. 568, para. 129 (Alta. Q.B.).

[24] *Id*. paras. 186–87.

[25] [2005] A.J. No. 568 (Alta. Q.B.).

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

Watts), and its Operations Coordinator were charged under section 3(1)(a) of the CFPOA. Hydro Kleen pleaded guilty and was ordered to pay a fine of $25,000, an amount recommended to the court by the prosecution and defence lawyers. Charges against Hydro Kleen's President and Majority Shareholder and its Operations Coordinator were stayed. The Immigration Officer received a six-month sentence and was subsequently deported to the United States.

[2] *R. v. Niko Resources Ltd.*

In *R. v. Niko Resources Ltd.*,[27] Niko Resources Ltd. (Niko) was charged under the CFPOA for having bribed a foreign public official in Bangladesh. Niko is a TSX listed oil and natural gas exploration company with a head office in Calgary and business operations in several countries.

Niko had a subsidiary in Bangladesh that had entered into a joint venture with the Bangladesh Petroleum Exploration & Production Company Limited (BAPEX), which is a gas exploration and production company indirectly wholly owned by the Government of Bangladesh. The purpose of the joint venture was to develop two gas fields in Bangladesh. Such development was to be initially funded by Niko, and Niko was to recoup its investment from production of the gas fields once they were developed. However, Niko's Bangladeshi subsidiary had not yet finalized a gas purchase and sale agreement with the Bangladesh government, which subjected the company to significant risk. In addition, in January 2005 an explosion occurred on one of the joint venture's properties while an independent drilling contractor was drilling for gas, which damaged an adjacent village. In June 2005, a second explosion occurred while drilling a relief well to seal off the gas leak caused by the January blowout.

In May 2005, Niko's Bangladeshi subsidiary provided the use of a vehicle costing $190,984 (and funded by Niko) to the Bangladeshi State Minister of Energy and Mineral Resources, and in June 2005, Niko paid the Minister's travel and accommodation expenses of approximately $5,000 to Calgary to attend the Gas & Oil Expo and onward to New York and Chicago to visit his family who lived there. It was alleged that the vehicle and payment of travel expenses were made to persuade the Minister to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement acceptable to Niko and to ensure that Niko was dealt with fairly in relation to claims for compensation related to the blowouts, which represented potentially very large amounts of money.

The Bangladeshi press had become increasingly critical of Niko as a result of the two gas explosions, and on June 15, 2005, a Bangladeshi

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[27] *See* Transcript of Proceedings Taken in the Court of Queen's Bench of Alberta, Judicial Dist. of Calgary, R. v. Niko Res. Ltd. (June 24, 2011).

newspaper, *The Daily Star*, published an article entitled "Niko gifts minister luxurious car."[28] As a result of the scandal, the Bangladeshi State Minister of Energy and Mineral Resources resigned and the Canadian government commenced an investigation of corruption against Niko.

On June 24, 2011, Niko pleaded guilty and agreed upon a fine of $8,260,000 plus a 15% Victim Fine Surcharge, totalling $9,499,000. In addition, Niko agreed to comply with a Probation Order for a period of three years and to pay all costs associated with complying with the Probation Order. The Probation Order was aimed at reducing the likelihood of Niko committing a subsequent related offence.

Niko was ordered to strengthen its compliance, record keeping, and internal control standards and procedures in accordance with the directions set out in the Probation Order. In addition, Niko was ordered to report periodically, at no less than 12-month intervals, to the court, the RCMP, and the RCMP International Anti-Corruption Unit regarding remediation and implementation of the compliance program and internal controls, policies, and procedures.

The Niko Probation Order was authored after consultation with the U.S. Department of Justice (DOJ) Fraud Section and reflects what the Crown Prosecutor referred to as "a Canadianized version of similar enforcement actions in the United States."[29] The Crown suggested that its intention is to use the Probation Order as a template for future prosecutions under the CFPOA.

Both the Crown and the defence agreed that a fine of almost $10 million was reasonable, given several aggravating and mitigating factors, which included the following:

- The fine should be large enough to send a message to Canadian business that the penalty for violating the CFPOA will be severe, so that bribery would be considered unjustifiable from a business decision-making perspective.
- Niko is a large company (relative to Hydro Kleen), with a market capitalization of approximately $3.3 billion and a nine-month net profit of approximately $118 million at the time of sentencing, so that the fine would be significant to Niko but would not cause it financial distress.
- There were two incidents of bribery admitted by Niko.
- The bribes were made to a high-level minister rather than to a less senior government official.

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[28] *See* Agreed Statement of Facts, *R. v. Niko Res. Ltd*. (June 23, 2011).

[29] *See* Transcript of Proceedings, *supra* note 27.

- Significant expenses were incurred in the RCMP investigation in an amount of almost $870,000 and the investigation involved the efforts of law enforcement agencies of several countries.
- The amount of the bribes totalled approximately $200,000 (considerably less than the amount of the fine) and there was no evidence that Niko benefitted from the bribes.

In addition, Niko had cooperated with the RCMP once Niko became aware of the investigation and once the company was charged Niko pleaded guilty without the need for a trial. The Crown suggested that it would have sought a more severe penalty had Niko not cooperated with the investigation or if it decided to plead guilty only after a trial was conducted.

[3] *R. v. Griffiths Energy International Inc.*

In *R. v. Griffiths Energy International Inc.*,[30] Griffiths Energy International Inc. (Griffiths) pleaded guilty to bribery charges under the CFPOA and agreed to pay a $10.35 million penalty. Griffiths is a privately held Calgary-based international exploration and development company solely focused on oil and gas activities in the Republic of Chad, Africa.

In January 2011, a Griffiths subsidiary, Griffiths Energy (Chad) Limited, entered into a production sharing contract with the Republic of Chad. The contract provided Griffiths with the exclusive right to explore and develop oil and gas reserves and resources in the Borogop and Doseo blocks in Chad.

In July 2011, an entirely new management team was hired and several new independent directors were appointed. As a result of due diligence being conducted in connection with Griffiths' proposed initial public offering, it was discovered that the founders of Griffiths had caused the company to enter into a consulting agreement dated September 15, 2009, with a Nevada company named Chad Oil Consulting LLC (COCL), which was owned by Nouracham Niam, the wife of Chad's Ambassador to Canada (who was also Ambassador to Argentina, Brazil, Cuba, and the United States). The services to be provided by the Consultant under the consulting agreement were generally described as providing advisory, logistics, operational, and other assistance with respect to implementing Griffiths' oil and gas projects in Chad. The consulting agreement provided for a US$2 million payment if Griffiths was awarded the Doseo and Borogop blocks prior to December 31, 2009. Also on September 15, 2009, Ms. Niam was issued 1,600,000 founders shares of Griffiths at $0.001 per share and two other individuals nominated by Ms. Niam were given the

[30] Agreed Statement of Facts, R. v. Griffiths Energy Int'l Inc. (Jan. 14, 2013) (Alta. Q.B.).

opportunity to purchase a total of 2,400,000 founders shares at $0.001 per share. Ikra Saleh, the wife of the Deputy Chief of the Chadian Embassy in Washington, D.C., acquired 800,000 shares and an individual named Adoum Hassan purchased 1,600,000 shares, which were ultimately transferred to Ms. Niam.

On October 26, 2009, a memorandum of understanding (MOU) was signed between Griffiths and the Minister of Petroleum and Energy on behalf of the Government of Chad, and Griffiths engaged in due diligence of the Doseo and Borogop blocks. On September 30, 2010, Chad changed its long-held tax/royalty regime for oil concessions to a new legal regime which required companies to enter into a production sharing contract (PSC) with predetermined economic terms for royalties and production sharing with the State. The new process was subject to a transparent three-step process in which no one individual would have the authority to grant a PSC. A new MOU was negotiated on December 23, 2010, which provided for a US$40 million signing bonus to be payable to the Government of Chad.

On January 4, 2011, Griffiths instructed its new external legal counsel to either extend or redo the original consulting agreement with COCL, under which the $2 million payment obligation had expired. A new consulting agreement, dated effective January 1, 2011, was entered into in mid-January 2011 between Griffiths and COCL (with Ms. Niam signing on behalf of COCL), providing for the same $2 million payment in the event the PSC was signed.

The PSC was signed by Griffiths Energy (Chad) Limited and the Ministry of Petroleum and Energy on January 19, 2011, which included a US$40 million signature bonus payable to the Government of Chad. In early February 2011, the $2 million fee owing under the consulting agreement was paid to COCL.

Once Griffiths' new management team and independent directors became aware of the consulting agreements, the board of directors created a special committee of independent directors, which engaged special legal counsel to conduct an internal investigation of the matter. Special legal counsel engaged forensic accountants from KPMG LLP and other consultants to assist in the investigation. As early as November 15, 2011, Griffiths disclosed the existence of the consulting contracts and its internal investigation to the Public Prosecution Service of Canada and Alberta Justice, followed by the RCMP and law enforcement authorities in the United States. Documents, including emails and even legally privileged communications, were shared with authorities. The hard costs of the investigation were approximately $5 million and Griffiths decided to withdraw its IPO, causing Griffiths to write off $1.8 million in sunken pre-IPO expenses. As part of the sentencing agreement, Griffiths agreed to a fine of $9 million plus the 15% victim fine surcharge, for a total amount of

$10.35 million. Among other things, the sentence reflected the steps already taken by Griffiths to reduce the likelihood of committing a subsequent related offence (including the adoption of a robust anti-corruption compliance program and the strengthening of internal controls), and the full and extensive cooperation by Griffiths in bringing the matter to the attention of authorities.

[4] *R. v. Karigar*

R. v. Karigar[31] was the first prosecution under the CFPOA that proceeded to trial and resulted in the first conviction of an individual under the statute.

On August 15, 2013, Nazir Karigar was found guilty of conspiring to offer bribes to foreign public officials contrary to section 3(1)(*b*) of the CFPOA. Karigar has yet to be sentenced.

During the trial, the court found that between June 2005 and January 1, 2008, Karigar conspired with two senior officers of Cryptometrics Canada Inc. of Ottawa, Ontario and its U.S. parent corporation, Cryptometrics Corporation (collectively, Cryptometrics), and certain of Karigar's Mumbai-based colleagues, to bribe certain officials of Air India and the then-Indian Minister of Civil Aviation for the purpose of securing a major contract for Cryptometrics to provide facial recognition software and related equipment to Air India. Air India is a corporation owned and controlled by the Government of India. Karigar and his colleague Mehul Shah agreed to act as agent of Cryptometrics in exchange for 30% of the expected revenue stream resulting from the contract with Air India.

The evidence indicated that Karigar had represented to Cryptometrics that he and his contacts had the necessary connections to secure the contract with Air India, and that he drafted an initial list of public officials to be bribed, along with the suggested bribes of cash or shares that each would be offered.

In June 2006, US$200,000 was transferred from Cryptometrics' bank account in New York to Karigar's bank account in India at the request of Karigar. The money was intended to bribe Air India's Deputy Director of Security, Captain Mascarenhas, who was co-chair of the selection committee for the Air India project. In April 2007, a further US$250,000 was similarly transferred to Karigar's bank account in Mumbai, which was to be returned if the contract with Air India was not obtained by Cryptometrics. It appears the US$250,000 was paid, or was intended to be paid, to the then-Minister of Civil Aviation. The court found that there was no evidence that the funds were actually transferred to either of the foreign

[31] 2013 ONSC 5199.

public officials, but that such evidence was not required to establish a violation of section 3 of the CFPOA.

In May 2007, Karigar and the Chief Operating Officer of Cryptometrics met with the Canadian Assistant Trade Minister in Mumbai, during which Karigar stated that Cryptometrics, through an agent, had paid a bribe to the Indian Minister of Civil Aviation in order to clear the process and obtain the Air India contract. The Assistant Minister testified that she was shocked and expressed that they could be prosecuted or sued.

Shortly thereafter, the two senior officers of Cryptometrics began to lose trust in Karigar for failing to win the Air India bid and seemed to cut off communications with him. In August 2007, Karigar anonymously contacted the DOJ Fraud Section and inquired about reporting an incident of bribery involving U.S. citizens of which he was aware, but without naming the parties involved. In November 2007, the two senior officers of Cryptometrics hired another agent to attempt to have the contract awarded through further monetary bribes to Indian public officials. During this period, Cryptometrics began a civil claim against Karigar in U.S. courts to recover the second bribery advance of US$250,000. For his part, in January 2008, Karigar sent two emails to the DOJ and inquired about immunity from prosecution. In these emails, Karigar identified Cryptometrics and the two senior officers involved in the bribery scheme, indicating that they were U.S. citizens, and described the two bribery payments. Perhaps ironically for Karigar but not surprisingly, the information provided by Karigar to the DOJ was then shared with the RCMP and formed part of the evidence against Karigar in the prosecution. Ultimately, Air India did not enter into such contract with Cryptometrics.

The Crown's case against Karigar was largely based on documentary evidence (particularly email communications) and the testimony of Robert Bell, who is an engineer and was the Vice-President, Business Development of Cryptometics Canada during the period in which the bribery was conducted, and who was an unindicted co-conspirator in the bribery scheme. Bell testified on the promise of immunity from prosecution. As noted above, evidence also included the emails written by Karigar to the DOJ and evidence from the Canadian Assistant Trade Minister in Mumbai.

D. Corporate Responses

Companies that conduct business abroad, especially in developing nations and in heavily regulated industries such as the extractive industries, would be well advised to consider implementing anti-bribery policies and compliance programs to avoid violating applicable anti-bribery legislation. Although the CFPOA does not explicitly offer defences against bribery

charges to companies that institute adequate policies and procedures for preventing its employees, agents and other representatives from engaging in bribery, the United Kingdom's Bribery Act[32] does offer such a defence.

In the author's opinion, it is likely that courts in Canada would favourably consider such policies and procedures when sentencing a company that is convicted under the CFPOA, provided that the policies and procedures are supported by upper management and generally followed. Such policies and procedures offer tangible evidence that a company has taken steps to prohibit bribery in its dealings with international foreign officials. The extent of such policies and procedures will depend on a risk assessment addressing the individual circumstances of the company, in particular the risks of bribery in the particular foreign countries in which the company operates.

A company's anti-bribery policies and procedures may include the following:[33]

- Written policies against bribery, whether contained in a self-contained policy or within other policies, such as a Code of Ethics, which make it clear that bribes will not be tolerated by the company.
- Clear guidelines for employees on how to handle gifts and expenses. A company may decide to prohibit the giving of gifts or the payment of expenses altogether. Alternatively, the organization may adopt a policy permitting gifts and/or payment of expenses, provided such gifts or payments are made in good faith and are "reasonable." It is important for each individual company to determine what it thinks is "reasonable," and provide guidance to employees and others that must comply with the policy.
- Whether the company will allow facilitation payments. Many companies make it a policy to do without facilitation payments altogether, even if applicable anti-bribery laws permit such payments. For companies subject to the CFPOA, the company's anti-bribery policies and procedures should prohibit facilitation payments once the exception is repealed by the Governor in Council under the provisions resulting from the 2013 Amendments.
- Contractors and agents should be contractually bound to apply the same anti-bribery policies used by the company.
- The company should have a clear process to recruit, retain, and manage agents. Due diligence should be performed on such agents

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[32] 2010, c. 23 (U.K.).

[33] Additional suggestions relating to internal controls, ethics, and compliance programs relating to preventing and detecting bribery of foreign public officials can be found in "Good Practice Guidance on Internal Controls, Ethics, and Compliance," adopted February 18, 2010 by the OECD Council. *See* http://www.oecd.org/dataoecd/5/51/44884389.pdf.

by independent and qualified individuals or organizations. The hiring process should be documented in writing.

- Any charitable grants or donations and political contributions should be approved at a senior level within the company.
- Establish a compliance program for the company, which may include:
  - educating relevant employees about bribery and the company's policies and procedures for avoiding it, and having employees certify in writing that they have been advised of the company's policies regarding corruption and that they will abide by those policies;
  - requiring due diligence (and establishing due diligence checklists) before entering into a relationship with a foreign representative or a foreign business partner, such as a potential joint venture partner, or making charitable grants or donations or political contributions to ensure such payments are not, in effect, bribes;
  - provide a mechanism to provide guidance and advice on complying with the company's compliance program, which is able to handle urgent requests;
  - establishing internal accounting controls and procedures to ensure accurate financial record-keeping and making sure facilitation payments, gifts, and expenses, when they are permitted, are properly recorded;
  - assigning responsibility to one or more senior executives for the implementation and oversight of the company's anti-corruption policies and procedures;
  - instituting appropriate disciplinary procedures to address violations of the company's anti-corruption policies and procedures;
  - providing a mechanism for employees to report violations;
  - monitoring high risk activity; and
  - periodically monitoring the effectiveness of the compliance program and making changes when necessary.