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This newsletter is designed to highlight new issues of importance in international trade and business related law. We hope you will find it interesting and welcome your comments.

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"Prior to the implementation of the CFPOA, the Canadian Criminal Code... did not address the corruption or bribery of foreign public officials."

AN OVERVIEW OF FOREIGN ANTI-CORRUPTION LAWS IN CANADA

Henry J. Chang

Introduction

As a member of the Organization for Economic Co-operation and Development ("OECD"), Canada signed the *Convention on Combating Bribery of Foreign Public Officials* in International Business Transactions (the "OECD Convention") on December 17, 1997. To satisfy its obligations under the OECD convention, the Government of Canada implemented the *Corruption of Foreign Public Officials Act* [1] ("CFPOA"), which came into force on February 14, 1999. A discussion of anti-corruption offenses that resulted from the CFPOA is provided below.

Significance of the CFPOA and Subsequent Amendments

Prior to the implementation of the CFPOA, the *Canadian Criminal Code* [2] already contained provisions that addressed the corruption and bribery of public officials in Canada. [3] However, these provisions did not address the corruption or bribery of foreign public officials; the CFPOA was intended to specifically prohibit this conduct.

When initially implemented, the CFPOA contained three new offenses: (a) bribery of public officials (Section 3), (b) possession of property or proceeds derived from the bribery of public officials (Section 4), and (c) laundering of property or proceeds derived from the bribery of public officials (Section 5). However, the Government of Canada later implemented *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts* [4] (the "2001 Act"), which amended the CFPOA; the relevant sections came into force on January 7, 2002.

As a result of the 2001 Act, the existing possession and money laundering offenses contained in the *Criminal Code* were expanded to address the conduct described in Sections 4 and 5 of the COFPA; the COFPA offences were then repealed. In other words, the prohibition on possession and laundering of property or proceeds from the bribery of foreign public officials is now covered by the *Criminal Code*. [5]

Bribery of Foreign Public Officials

The Offence

According to Subsection 3(1) of the CFPOA, 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

[1] S.C. 1998, c. 34.
[2] R.S.C. 1985, c. C-46.
[3] *Criminal Code*, ss. 118-125.
[4] S.C. 2001, c. 32.
[5] *Criminal Code*, ss. 354, 355.2, 355.4 and 462.31.

"...a corporation that is convicted of an indictable offense is liable, in lieu of imprisonment, to a fine in an amount that is in the discretion of the courts. As a result, the maximum fine that may be imposed on a corporation is essentially unlimited."

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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:

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.

According to Subsection 3(2), every person who contravenes Subsection 3(1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

The CFPOA does not provide any specific fines for a violation of this offence. However, pursuant to Subsection 735(1) of the *Criminal Code*, a corporation that is convicted of an indictable offense is liable, in lieu of imprisonment, to a fine in an amount that is in the discretion of the courts. As a result, the maximum fine that may be imposed on a corporation is essentially unlimited.

Pursuant to Subsection 732.1(3.1) of the *Criminal Code*, the Court may also prescribe probation in respect of an organization, requiring that the offender do one or more of the following:

1) Make restitution to a person for any loss or damage caused by the offence;

2) Establish policies, standards and procedures to prevent subsequent offences;

3) Communicate those policies, standards and procedures to its representatives;

4) Report to the court on the implementation of these policies, standards and procedures;

5) Identify the senior officer who is responsible for compliance with those policies, standards and procedures; and

6) Make a public announcement regarding the conviction, sentence, and any measures being taken to prevent further offences.

Meaning of "Person"

According to Section 2 of the CFPOA, the term "person" means a person as defined in Section 2 of the *Criminal Code*. According to the *Criminal Code*, "person" includes the Federal and Provincial Governments of Canada, public bodies, corporations, societies, companies and inhabitants of counties, parishes, municipalities, or other districts in Canada. This clearly includes the Canadian Government, corporations, agencies and individuals in Canada (both Canadians and non-Canadians). However, the definition does not specifically apply to Canadian citizens residing abroad or to foreign nationals working abroad on behalf of Canadian companies.

In Order to Obtain or Retain an Advantage in the Course of Business

This language is virtually identical to the language in Article 1.1 of the OECD Convention. However, the CFPOA uses the term "business" rather than "international business."

According to the guide published by the Canadian Department of Justice [6] (the "CFPOA Guide"), this difference in language makes the

[6] "The Corruption of Foreign Public Officials Act, A Guide," published by the Department of Justice, Canada (May (1999).

"...the CFPOA targets the bribery of a foreign public official where the payment is made in furtherance of profit. Canada is the only party to the OECD Convention that includes such a requirement in its anti-bribery legislation."

CFPOA offence broader than the OECD Convention since it need not in every instance involve crossing borders. As an example, it states that it would be illegal to bribe a foreign public official in Canada to obtain a business contract to build a new wing on a foreign embassy in Canada.

The term "business" is also defined in Section 2 of the CFPOA as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit." In other words, the CFPOA targets the bribery of a foreign public official where the payment is made in furtherance of profit. Canada is the only party to the OECD Convention that includes such a requirement in its anti-bribery legislation.

It is not entirely clear whether the CFPOA would apply if a profit was not obtained as a result of the foreign bribery transaction in question or if a non-profit or government controlled entity was responsible for the bribe. However, the most logical interpretation of this limitation is that it is not intended to apply to a bribe made by a charitable or similar non-profit entity in furtherance of its humanitarian objectives.

Directly or Indirectly

Section 2 of the CFPOA makes it clear that the offense includes bribes made indirectly through third parties. This is consistent with the language contained in Article 1.1 of the OECD Convention.

Meaning of "Foreign Public Official" and "Foreign State"

The term "foreign public official" is defined in the CFPOA to mean:

a) A person who holds a legislative, administrative or judicial position of a foreign state;

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

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.

The definition includes an elected representative, government official, or judge in a foreign state as well as a representative of a public international organization, such as the United Nations. This is consistent with the definition of "foreign public official" in Article 1.4 of the OECD Convention.

The CFPOA also defines the term "foreign state" as a country other than Canada, and includes:

a) Any political subdivision of that country;

b) The government, and any department or branch, of that country or of a political subdivision of that country; and

c) Any agency of that country or of a political subdivision of that country.

This definition includes a public official working at all levels of government, from national to local. This is consistent with the definition of "foreign country" in Article 1.4 of the OECD Convention.

"...a corporation could be held criminally liable if one or more of the directing minds of that corporation acted intentionally, recklessly, or with willful blindness."

To any Person for the Benefit of a Foreign Public Official

The offence makes clear that the foreign public official need not receive the benefit personally. For example, the official might arrange for the direct benefit to be given to a family member, to a political party, or to any other person, thereby indirectly benefiting that official. This is consistent with Article 1.1 of the OECD Convention.

Requirement of Knowledge

As no particular mental element (i.e. *mens rea*) is specifically stated in Subsection 3(1) of the CFPOA, Canadian courts are required to consider common law principles of criminal culpability. In *R. v. Sault Ste. Marie* [7], the Supreme Court of Canada stated the following:

> Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

Based on the above, a bribe made by an overseas agent without the knowledge of the company or individual on whose behalf the agent has acted would not necessarily result in criminal liability for that company or individual, unless they were wilfully blind to the true facts. However, the agent could be found criminally liable because he or she would clearly have the requisite *mens rea*.

With regard to corporate liability, the courts in Canada have adopted an approach known as the Identification Theory, which was addressed in the Supreme Court of Canada case of *Canadian Dredge and Dock Co. v. The Queen*. [8] According to this theory, liability may be attributed to a corporation when an offence is committed by a "directing mind" of that corporation.

Therefore, a corporation could be held criminally liable if one or more of the directing minds of that corporation acted intentionally, recklessly, or with willful blindness. However, other senior officers or board members of the company who had no knowledge of the bribe would not be criminally liable, provided that they were not acting with willful blindness.

Permitted Payments and Affirmative Defenses

Required under the Laws of the Foreign State

Subsection 3(3)(a) of the CFPOA provides for an affirmative defense if the loan, reward, advantage or benefit is permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions. This appears to have been modeled after the United States' *Foreign Corrupt Practices Act of 1977* [9] ("FCPA"), which contains a virtually identical affirmative defence.

In practice, the above defense will be of limited applicability. This is because most countries have laws that prohibit the payment of bribes made to

[7] [1978] 2 S.C.R. 1299.

[8] [1985] 1 S.C.R. 662.

[9] 15 U.S.C. §§78dd-1, et seq.

"...facilitation payments would only include payments made to expedite or guarantee the performance of activities that the foreign public official is already required to perform and not to improperly influence his or her decisions in connection with those activities."

their foreign public officials, although the enforcement of those laws may be a low priority.

Reasonable Expenses

Subsection 3(3)(b) of the CFPOA provides an affirmative defense if the loan, reward, advantage or benefit was made to pay the *reasonable expenses incurred in good faith* by or on behalf of the foreign public official that were directly related to:

a) The promotion, demonstration, or explanation of the person's products and services, or

b) The execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.

This appears to have been modeled after the FCPA, which contains a virtually identical affirmative defence.

Facilitation Payments

According to Subsection 3(4) of the CFPOA, a facilitation payment is permitted if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including:

a) The Issuance of a permit, licence, or other document to qualify a person to do business;

b) The processing of official documents, such as visas and work permits;

c) The provision of services normally offered to the public, such as mail pick-up and delivery, telecommunications services, and power and water supply; and

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.

According to the CFPOA Guide, this list of examples is not intended to be all-inclusive.

According to Subsection 3(5), 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. The CFPOA Guide adds that a payment to obtain or retain an improper advantage could not be characterized as a facilitation payment. This is because such a payment would not relate to an act of a routine nature that is part of the foreign public official's duties or functions.

The above provision appears to have been modeled after the FCPA. The U.S. statute contains virtually identical language relating to permissible facilitation payments.

Based on the above, it would appear that facilitation payments would only include payments made to expedite or guarantee the performance of activities that the foreign public official is already required to perform and not to improperly influence his or her decisions in connection with those activities. For example, a fee paid to expedite the issuance of a work permit that would have been approved anyway might be considered a facilitation payment. However, a fee made to improp-

"...the existing money-laundering offences contained in the Criminal Code were expanded by the 2001 Act to include any act or omission that occurs outside Canada that would be considered an indictable offence if it occurred in Canada."

erly influence the decision whether or not to approve the work permit would not be considered a facilitation payment.

Money Laundering and Related Offences

As mentioned above, the existing money-laundering offences contained in the *Criminal Code* were expanded by the 2001 Act to include any act or omission that occurs outside Canada that would be considered an indictable offence if it occurred in Canada. This complies with Article 7 of the OECD Convention, which addresses money laundering activities. These *Criminal Code* offences are briefly described below.

Money Laundering

According to Subsection 462.31(1) of the *Criminal Code*, every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of:

a) The commission in Canada of a designated offence; or

b) An act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

According to Subsection 462.3(1) of the *Criminal Code*, the term "designated offence" means:

a) Any offence that may be prosecuted as an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation; or

b) A conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a);

According to Subsection 461.31(2) of the *Criminal Code*, everyone who commits an offence under Subsection 461.31(1):

a) Is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

b) Is guilty of an offence punishable on summary conviction.

Possession of Property or Proceeds from Crime

According to Subsection 354(1) of the *Criminal Code*, everyone commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from:

a) The commission in Canada of an offence punishable by indictment; or

b) An act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

According to Subsection 355 of the *Criminal Code*, everyone who commits an offence under Section 354:

a) Is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the value of the subject-

"The Extradition Act is based on the concept of dual criminality; in other words, the conduct must be a criminal offence both in Canada and in the requesting country."

matter of the offence exceeds five thousand dollars; or

b) Is guilty of:
   i) An indictable offence and is liable to imprisonment for a term not exceeding two years; or
   ii) An offence punishable on summary conviction;

where the value of the subject-matter of the offence does not exceed five thousand dollars.

Trafficking in Property or Proceeds from Crime

According to Section 355.2 of the *Criminal Code*, everyone commits an offence who traffics in any property or thing or any proceeds of any property or thing knowing that all or part of the property, thing or proceeds was obtained by or derived directly or indirectly from:

a) The commission in Canada of an offence punishable by indictment; or

b) An act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

According to Section 355.4 of the *Criminal Code*, everyone commits an offence who has in their possession, for the purpose of trafficking, any property or thing or any proceeds of any property or thing knowing that all or part of the property, thing or proceeds was obtained by or derived directly or indirectly from:

a) The commission in Canada of an offence punishable by indictment; or

b) An act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

For the purposes of Sections 355.2 and 355.4, the term "traffic" means to sell, give, transfer, transport, export from Canada, import into Canada, send, deliver or deal with in any other way, or to offer to do any of those acts.

According to Section 355.5 of the *Criminal Code*, everyone who commits an offence under section 355.2 or 355.4:

a) Is, if the value of the subject matter of the offence is more than $5,000, guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years; or

b) Is, if the value of the subject matter of the offence is not more than $5,000;
   i) Guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or
   ii) Guilty of an offence punishable on summary conviction.

Extradition

According to Article 10 of the OECD Convention, the bribery of a foreign public official shall be deemed to be an extraditable offence under the laws of each country and the extradition treaties between them. However, the CFPOA does not specifically address extradition. In order to determine whether an offence under Subsection 3(1) of the CFPOA is extraditable, it must be considered in light of the *Extradition Act* [10].

The *Extradition Act* is based on the concept of dual criminality; in other words, the conduct must be a criminal offence both in Canada and in the

[10] S.C. 1999, c. 18.

"The Canadian legal system applies a territory-based principle when determining whether it will extend criminal jurisdiction to offences that take place outside of Canada."

requesting country. According to Subsection 3(1)(b) of the *Extradition Act*, a person may be extradited from Canada on the request of an extradition partner if:

a) There is an extradition agreement in place between Canada and the extradition partner;

b) The offence is punishable, by the extradition partner, with a maximum term of imprisonment of two years or more; and

c) The conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada by imprisonment for a maximum term of two years or more.

In other words, extradition from Canada requires the existence of an extradition treaty and maximum term of imprisonment (both in Canada and the foreign country) of two years or more.

A violation of Subsection 3(1) of the CFPOA should be considered an extraditable offence for the following reasons:

a) According to Article 10.2 of the OECD Convention, if a country makes extradition conditional upon the existence of an extradition treaty, it may consider the OECD Convention to be the legal basis for extradition. In other words, extradition for the bribery of a foreign public official should be possible even for countries that do not have a formal extradition treaty with Canada.

b) Section 3(1) of the CFPOA is punishable by a maximum term of imprisonment of five years.

c) According to Article 10.4 of the OECD Convention, in countries where extradition is conditional upon dual criminality, that condition shall be deemed fulfilled if the offence is within the scope of the Convention. Therefore, the dual criminality requirement would be considered fulfilled in the case of a CFPOA offence.

Jurisdiction

The Canadian legal system applies a territory-based principle when determining whether it will extend criminal jurisdiction to offences that take place outside of Canada. As a result, jurisdiction in Canada is much narrower than for most other OECD Convention parties, which also provide nationality-based jurisdiction over foreign bribery offences.

The leading case on this territory-based principle, in the context of criminal offences, is *R. v. Libman*.[11] In the *Libman* case, the Appellant was charged with fraud and conspiracy to commit fraud arising out of the operation of a telephone sales operation based in Toronto, Canada. The sales personnel telephoned U.S. residents and attempted to induce them to buy shares in two Central American mining companies. Promotional material was mailed from Central America. As a result of fraudulent statements made by the sales personnel, a large number of U.S. residents purchased shares in these mining companies. The funds were sent to Central America and the appellant received his share back in Toronto.

The Supreme Court of Canada stated that, for an offence to be subject to the jurisdiction of Canada, the court must consider:

[11] [1985] 2 S.C.R. 178.

"In the context of the CFPOA, it is necessary to demonstrate a real and substantial link between Canada and the act of bribing a foreign public official abroad..."

a) All relevant facts that took place in Canada, which might give this country an interest in prosecuting the offence; and

b) Whether or not anything in those facts offended against international comity.

Speaking on behalf of the court, Justice LaForest stated the following:

> As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting the offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between the offence and this country, a test well known in public and private international law…

The court concluded that the preparatory activities to perpetrate the fraudulent scheme were in themselves sufficient to warrant a holding that the offence took place in Canada. The scheme was devised in Canada. The whole operation that made the scheme function, the directing minds, and the boiler room were also all in Canada.

In finding that prosecuting the offence in Canada did not offend international comity, Justice LaForest adopted the following words of Lord Diplock in *Treacy v. Director of Public Prosecutions* [12]:

> There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other state.

In the context of the CFPOA, it is necessary to demonstrate a real and substantial link between Canada and the act of bribing a foreign public official abroad; this requirement can make prosecutions under the CFPOA difficult. It may be possible to establish a real and substantial link in the case of Canadian citizens in Canada, foreign nationals in Canada, Canadian incorporated companies, or foreign-based subsidiaries of Canadian companies. However, it may be more difficult to establish such a link in the case of foreign joint ventures, Canadian citizens residing abroad, and foreign nationals residing abroad.

Of course, there should be little concern that prosecutions under the CFPOA would offend against international comity, in particular among the parties to the OECD Convention. Even where the offence occurs in a country that is not party to the OECD Convention, considerations of international comity are unlikely to prevent Canadian courts from prosecuting an offence under the CFPOA, provided that a "real and substantial link" to Canada can be established.

In 2009, the Minister of Justice introduced Bill C-31, which would have amended the CFPOA to also apply nationality-based jurisdiction in foreign bribery offences. Unfortunately, it died on the order paper with the prorogation of Parliament

[12] [1971] A.C. 537.

"...despite the complexity and cost of what are often multi-country investigations over several years, more vigorous enforcement of anti-corruption legislation may soon be the norm in Canada."

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in December 2009. Whether it will be reintroduced in the future is unknown.

Recent Enforcement Efforts

Until recently, Canada's track record of enforcing the CFPOA was less than impressive. However, recent enforcement efforts by the RCMP International Anti-Corruption Unit, which was established in 2008, have demonstrated that Canada is taking the bribery of foreign public officials much more seriously.

In 2005, Hydro Kleen Group Inc (a company based in Red Deer, Alberta), its president and an employee, were charged under the CFPOA for two counts of bribing a United States Customs & Border Protection officer who worked at Calgary International Airport. The company pled guilty on January 10, 2005, but was only ordered to pay a fine of $25,000 CAD; this was actually less than the bribe itself, which was closer to $30,000 CAD.

On March 18, 2011, the OECD Working Group on Bribery completed a report on Canada's enforcement of the OECD Convention.[13] Although it praised Canada's recent enforcement effort, the report expressed concerned that there had only been one successful prosecution since it enacted the CFPOA in 1999.

Then on June 24, 2011, Calgary-based Niko Resources Ltd. ("Niko") pled guilty to a single charge of bribery under the CFPOA. [14] In that case, the company's Bangladesh subsidiary had given a $190,984 CAD vehicle to the Bangladesh Energy Minister, paid his travel costs ($5,000 CAD) for attending an Energy Expo in Calgary, and paid for his trips to New York and Chicago. The fine and victim surcharge that Niko was required to pay totaled $9,499,000 CAD; the terms of its probation order also subjected Niko to court supervision and regular independent audits to verify its compliance with the CFPOA.

Conclusion

Although the current CFPOA is not without its shortcomings, recent enforcement efforts of the Canadian Government and the RCMP are beginning to yield results. As a result, any entities that may have a "real and substantial link" to Canada should review their overseas business operations and consider implementing CFPOA compliance programs, to ensure that they do not violate Canada's anti-bribery laws. ■

THE *NIKO RESOURCES* ANTI-BRIBERY CASE

Ralph Cuervo-Lorens

The prosecution of Niko Resources Ltd. under Canada's Corruption of *Foreign Public Officials Act* (CFPOA) has received a great deal of attention. In addition to being the first significant prosecution under Canadian anti-bribery legislation, the case and its outcome suggest that despite the complexity and cost of what are often multi-country investigations over several years, more vigorous enforcement of anti-corruption legislation may soon be the norm in Canada.

Last year Niko pled guilty to a charge of bribery under Canada's CFPOA in connection with events surrounding an explosion that took place at Niko's natural gas field in Bangladesh. The

[13] See http://www.oecd.org/dataoecd/55/25/47438413.pdf.
[14] *Her Majesty the Queen v. Niko Resources Ltd.*, E-File No.: CCQ11NIKORESOURCES, June 24, 2011.

"...the Court imposed a probation order with far-reaching consequences. A probation order of this type has not been previously imposed in Canada."

company was fined nearly $9.5 million and was made subject to an extensive probation order. Because Niko entered a guilty plea, thus sparing the State from conducting a full prosecution, the fine imposed was less than it would otherwise have been. The extent and magnitude of the sentence also turned on the fact that as far as it could be determined no real benefit accrued to Niko from the prohibited activities at issue.

The Court's view of this type of offence was made clear at the sentencing hearing:

> "Bribery tarnishes the reputation of Alberta and of Canada [and] … is an embarrassment to all Canadians. . . .the fact that a Calgary-headquartered oil and gas company has bribed a foreign government official is a dark stain on Calgary's proud reputation as the energy capital of Canada."

At the time of the explosion Niko was in negotiations over a gas pricing contract with the Bangladeshi government. The specific conduct at issue related to two sets of benefits provided through Niko's local subsidiary to the Bangladeshi Minister of Energy: (1) a $190,984 SUV vehicle and (2) payment of a trip to Calgary for business and on the way a side trip to New York and Chicago to visit relatives (the total value of which benefits were in the range of $196,000). These amounts were found to have constituted "bribes" within the meaning of the Act.

The offence with which Niko was charged requires a "real and substantial" connection to the territory of Canada. In the past this requirement has acted as a limiting factor to successful prosecutions. In the Niko case, however, the issue was conceded. For the purposes of the case, the parties agreed that the required link between the offence and the territory of Canada had been established as Niko had funded the bribes and knew of their purpose.

A Look into the Future: Compliance Measures Imposed

As part of the penalty, the Court imposed a probation order with far reaching consequences. A probation order of this type has not been previously imposed in Canada. The order requires Niko to report suspicious activity and assist in law enforcement. But it is the measures dealing with future compliance that are of particular interest from the point of view of risk management.

In this regard, Niko was required to establish an anti-corruption compliance code. Among other things, the code is to include (1) a written policy against violations and compliance standards and procedures applicable to all directors, officers, employees, and outside parties acting on behalf of the company and (2) explicit policies and detect/control systems regarding gifts, entertainment expenses, customer travel, political contributions, charitable donations, sponsorships, etc. The code is to be put into place under the direct supervision and responsibility of senior management and the board of directors and it must extend by design to all of the company's partners and agents. Interestingly, Niko was ordered to undertake a risk assessment prior to designing and implementing any anti-corruption measures to ensure that new measures were soundly based on company-specific risks.

Another notable feature of the case was the close cooperation of Canadian and U.S. authorities (the prosecutor described the case as a "joint effort"

with the U.S. Department of Justice). The probation order reflects a certain Americanization of the legal process in this area: in addition to the close prosecutorial cooperation, the order was modeled on U.S. approaches to anti-corruption enforcement action under the American *Foreign Corrupt Practices Act*.

Conclusions

Niko is not the only instance of CFPOA enforcement action by Canada. A number of other investigations of this type appear to be presently underway. Stay tuned for further updates.

In light of these developments, it is sound advice that Canadian companies active abroad should be assessing with great care their potential exposure to foreign corruption laws and the sanctions that might be imposed. At a minimum, companies with even the minimum of linkages to Canada should put in place effective company-wide awareness, monitoring and compliance measures similar to those imposed on Niko. Further, note that heightened anti-corruption measures are not unique to Canada. A number of other countries in which Canadian business interests are often active, including the U.S. and the U.K., have also stepped up their regulation and enforcement in this area. ■

EXPECT THE BEST

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