A Closer Look at the Griffiths Energy Case: Lessons and Insights on Canadian Anti-Corruption Enforcement

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John Boscariol and Paul Blyschak, McCarthy Tétrault LLP (Canada)

On January 25, 2013, the Alberta Court of Queen's Bench approved a $10.35 million penalty against Griffiths Energy International Inc. (Griffiths) for a violation of the *Corruption of Foreign Public Officials Act*[1] (CFPOA) in connection with the actions of the company's previous management and representatives in Chad, Africa (the Griffiths Judgment).[2]

Although the CFPOA has been in force since 1999, the Griffiths conviction joins the conviction of Niko Resources Inc. (Niko) in June of 2011 (The Niko Order)[3] as only the second significant conviction rendered under Canada's foreign anti-corruption legislation to date, and as such constitutes important guidance regarding the position of the Courts, the Royal Canadian Mounted Police (RCMP) and the Crown in respect of the prosecution of foreign corrupt practices.[4]

This legal update reviews the facts of the Griffiths conviction, compares them to the Niko Order where insightful, and discusses lessons to be considered going forward by Canadian individuals and organizations facing foreign anti-corruption risk in connection with their business operations. This includes consideration of a number of important legal issues related to the enforcement of the CFPOA as well as anti-corruption liability and risk mitigation in general, including (i) the influence of self-reporting as a mitigating factor, (ii) the CFPOA's broad definition of corrupt practices, (iii) lessons for directors, (iv) the role of US FCPA precedent, (v) the treatment of proceeds of criminal activity, (vi) matters related to jurisdiction, and (vii) anti-corruption risks associated with third party agents.

1. The Prohibited Payments and Share Issuances

The Griffiths conviction relates primarily to a series of consulting agreements and related transactions entered into by the company, a Calgary-based junior oil and gas exploration and production firm, at the direction of its previous management and in pursuit of certain production sharing contracts (PSCs) in Chad.

As noted in the Agreed Statement of Facts (Statement of Facts) submitted to the Court of Queen's Bench on January 22, 2013,[5] in and around the formation of the company in August 2009, Griffiths and several of its founding shareholders (including the company's late chairman)

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1 S.C. 1998, c. 34

2 Transcript of Proceedings Taken in the Court of Queen's Bench of Alberta, Judicial Centre of Calgary, *Her Majesty the Queen v. Griffiths Energy International*, E-File No.:CCQ13GRIFFITHSENER, Action No. 130057425Q1, January 25, 2013.

3 Transcript of Proceedings Taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, Alberta, *Her Majesty the Queen v. Niko Resources Ltd.*, E-File No.: CCQ11NIKORESOURCES, June 24, 2011.

4 For further information regarding the Niko Order, please see *A Deeper Dive Into Canada's First Significant Foreign Bribery Case: Niko Resources Ltd.*, available at http://www.mccarthy.ca/article_detail.aspx?id=5461.

5 Agreed Statement of Facts, Her Majesty the Queen and Griffiths Energy International Inc., dated January 14, 2013 and submitted to the Alberta Court of Queen's Bench January 22, 2013.

set out to develop contacts and arrange meetings with senior Chadian political figures, including the Chadian Ambassador to Canada (Ambassador) and the country's Minister of Petroleum and Energy.

This led to the execution of a consulting agreement on August 30, 2009 between Griffiths and Ambassade du Tchad LLC (Tchad LLC), a U.S. registered entity wholly owned by the Ambassador. The agreement pertained to oil and gas advisory services to be provided by Tchad LLC to Griffiths and, importantly, provided for a $2 million fee payable to Tchad LLC in the event Griffiths was awarded the desired PSCs before then end of 2009 or such other date mutually agreed by the parties.

Griffiths terminated the Tchad LLC consulting agreement in early September 2009 after being advised by legal counsel that it constituted an unlawful offer of a benefit to a foreign public official. However, on September 15, 2009, Griffiths entered into a second consulting agreement on terms identical to the Tchad LLC agreement with another U.S. incorporated entity, this time wholly owned by the wife of the Ambassador and named Chad Oil Consulting LLC (COCL). Griffiths simultaneously (i) granted the Ambassador's wife 1,600,000 founder shares in the company at a price of $0.001 per share, and (ii) granted an additional 2,400,000 founder shares at the same price to two individuals nominated by the Ambassador's wife, including the wife of the then Deputy Chief of the Chadian Embassy in Washington, D.C. (Deputy Chief).

Following the expiration of its initial term, the COCL consulting agreement was renewed by the parties effective January 1, 2011, with only minor amendments. Shortly thereafter, and after months of negotiations, a Griffiths subsidiary executed a PSC with Chad on January 19, 2011. The $2 million dollar payment owing to COCL under the COCL agreement was then placed into escrow in February, 2011, before being transferred to COCL pursuant to deposit instructions received from the Deputy Chief.

2. Key Elements Of The Agreed Statement Of Facts

Griffiths acknowledged in the Statement of Facts that, by entering into the Tchad LLC and COCL consulting agreements and by issuing seed shares to the Ambassador's wife and her nominees, it violated paragraph 3(1)(b) of the CFPOA by providing direct or indirect benefits to the Ambassador in an attempt to induce the Ambassador to use his position to influence decisions of Chad in respect of the desired PSCs.

However, the Statement of Facts also contains five important acknowledgements by the Crown which informed its agreement to limit the fine imposed on Griffiths to $10.35 million (being a fine of $9 million plus a 15% victim fine surcharge).

First, the Crown acknowledged that between July and September of 2011, Griffiths hired an entirely new management team as well as appointed six new independent directors. The Crown acknowledged that the current senior leadership of Griffiths was distinct and separate from the management steering the company at the time of the corrupt practices at issue.[6]

Second, the Crown acknowledged that, following the discovery of the offending consulting agreements during due diligence performed in preparation for an initial public offering of securities (IPO) scheduled to be conducted by the company in the fourth quarter of 2011,

[6] This change in management and directorship of Griffiths occurred in part as a result of the death of a co-founder of Griffiths in a boating accident in Ontario in July of 2011.

Griffiths' current management and directorship took immediate and comprehensive corrective action. This included:

(i) the creation of a special committee comprised of the independent members of Griffiths' board of directors;

(ii) the retention by the special committee of independent and specialized external legal counsel;

(iii) the provision by the special committee of a broad mandate to its external legal counsel to conduct a thorough investigation of not only the circumstances surrounding the consulting agreements and share issuances in question, but also any other activities possibly suggestive of past corrupt practices by the company or its representatives; and

(iv) that the special committee, as well as the rest of Griffiths' directorship and management, remained fully engaged, informed and cooperative in the special investigation.

Third, the Crown acknowledged the decision of Griffiths to voluntarily self-disclose its special investigation to the RCMP and representatives of the Public Prosecution Service of Canada and Alberta Justice on November 15, 2011, as well as their counterparts in the United States shortly thereafter. Towards this end, the Crown acknowledged that Griffiths' self-disclosure marked the beginning of a full and extensive cooperative process between the company and relevant enforcement authorities that included:

(i) the sharing by Griffiths of all details of its investigation, including, in particular, legally privileged communications between the company and its former legal counsel;

(ii) Griffiths agreeing to enter into a guilty plea prior to charges being formally laid by Crown prosecutors; and

(iii) Griffiths continuing to cooperate with and assist the Crown in other processes and legal remedies related to its past activities.

Fourth, the Crown acknowledged various significant costs already incurred by Griffiths further to the corrupt practices of the company's past management and representatives. These included:

(i) legal and accounting costs incurred in relation to the special committee's investigation of approximately $5 million;

(ii) hundreds of management hours spent on the investigation;

(iii) the withdrawal by Griffiths of its IPO and the corresponding write-off of approximately $1.8 million in pre-IPO expenses, including legal and marketing costs; and

(iv) the resulting increased costs of financing experienced by Griffiths when forced to turn instead to private sources of capital.

Fifth, the Crown acknowledged that (i) Griffiths had not been previously convicted or sanctioned in respect of a similar offence, and (ii) Griffiths had already undertaken numerous actions to reduce the likelihood of it engaging in further corrupt practices, including implementing and enforcing a robust set of anti-corruption policies and procedures as well as reinforcing its existing internal control and compliance programs.

3. The Judgment Of The Queen's Bench

Similar to his admonishments in the Niko Order, Justice Brooker of the Alberta Queen's Bench emphasized that the "bribing of a foreign official by a Canadian company is a serious matter" and that, beyond being an "embarrassment to all Canadians," corrupt practices "prejudice Canada's efforts to foster and promote effective governmental and commercial relations with other countries" while also undermining the "bureaucratic or governmental infrastructure of the countries for which the bribed official works."

Towards this end, Justice Brooker explained that "the penalty imposed must be sufficient to show the Court's denunciation of such conduct as well as provide deterrence to other potential offenders."

Justice Brooker stressed that the "major aggravating factor in this case is the size of the bribe made." On the other hand, he highlighted that Griffiths' decision to self-report as well as the quick and decisive action taken by the company's management and directors constituted the most important mitigating factors. He noted that the company's decision to self-report saved enforcement authorities significant time and resources. In his view, Griffiths' conduct upon discovering a possible breach of the CFPOA demonstrated a "complete and genuine remorse for the illegal conduct manifested by its former officers."

Referring to his position in the Niko Order, Justice Brooker stated that he would only refuse to accept the sentencing recommendations of the Crown if they were unfit or unreasonable, and that this was not the case in the matter before the Court. Significantly, and in contrast to the Niko Order, Justice Brooker also confirmed that a probation order was not necessary in the circumstances considering the "effective, comprehensive and robust anti-corruption program" instituted by Griffiths.

On the basis of the foregoing, the Court approved Griffiths' guilty plea to one count of violating the CFPOA and the fine of $10.35 million.

4. Lessons and Insights From the Griffiths Case

A number of instructive observations and lessons can be gleaned from the substance of the Statement of Facts and the Griffiths Judgment, both in comparison with the Niko Order and otherwise.

(a) Self-Reporting as a Mitigating Factor

As in Niko, the sentencing factors discussed by Justice Brooker in the Griffiths Judgment exhibit the clear willingness of the Court to consider various species of mitigating factors. In the Niko Order, such factors included (i) the company's guilty plea (which avoided expending further Crown resources), (ii) Niko's cooperation with authorities once it knew it was being investigated, (iii) Niko's agreement to take remedial steps and cooperate on a go-forward basis, and (iv) Niko's lack of a prior criminal record. The Statement of Facts and the Griffiths Judgement

reiterate the value in the eyes of the Crown and the Court of these same principles of cooperation and correction. They also of course highlight the great weight placed by the Crown and the Court on Griffths' immediate commitment to self-disclosure both of its suspected violations of the CFPOA as well as its internal investigation into same.

Towards this end, it would be difficult to exaggerate the apparent influence of Griffiths' self-disclosure on the amount of the fine imposed by the Crown on the company. Niko was fined $9.5 million for gifts in kind worth an aggregate of approximately $200,000.00. Griffiths, on the other hand, was fined about 8 percent more than Niko for payments in excess of 10 times the value of gifts provided by Niko. This strongly reinforces express statements made by the Crown and Justice Brooker that the decision to self-disclose constituted a paramount consideration in their assessment of appropriate penalties and may serve as a strong inducement for companies to consider similar self-disclosure in the future.

(b) The CFPOA's Broad Definition of Corrupt Practices

Griffiths and the Crown agreed in the Statement of Facts that criminal culpability under the CFPOA resulted both from the COCL consulting agreement under which the $2 million dollar payment was made as well as from those earlier consulting agreements with COCL and Tchad LLC (even though no payments were actually made pursuant to these two agreements). This serves as a clear reminder that the CFPOA prohibits mere offers or promises made to, or for the benefit of, foreign public officials and not only actual payments made to or for the benefit of such officials.

Similarly, Griffiths and the Crown agreed in the Statement of Facts that no allegation or admission has been made that Griffiths actually experienced any benefit from the corrupt practices at issue. This is another clear reminder that, even though the CFPOA requires that an offer, promise or payment be made to, or for the benefit of, a foreign public official "in order to obtain or retain an advantage in the course of business", no such "advantage in the course of business" need actually be secured by the offending party for CFPOA liability to result.

In this regard, it is also important to note that the web cast by the CFPOA is set to soon grow even wider.[7] On February 5, 2013, Bill S-14, the *Fighting Foreign Corruption Act*, was introduced into Canada's Senate. Amongst other things, Bill S-14 removes the requirement that an entity or individual be engaged in business "for profit", resulting in potentially greater CFPOA exposure for Canadian non-profit organizations such as development agencies or charities operating overseas.

(c) Lessons for Directors

In the Statement of Facts, the parties outline the scope and substance of Griffiths' response to the actions of its previous management and representatives once discovered, including (i) immediately establishing a special committee comprised of independent members of the board of directors, (ii) engaging independent and specialized external legal counsel to conduct a special investigation, (iii) granting external legal counsel a broad mandate to investigate all matters related to the subject of concern without limitation, (iv) approving the retention of forensic accounting experts, and (v) ensuring that the special committee, as well as the

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[7] For further information in respect of the significant amendments to the CFPOA set to be effected by Bill S-14, please see Significant Amendments Proposed to Strengthen Canada's Anti-Corruption Regime, available at http://www.mccarthy.ca/article_detail.aspx?id=6169.

remainder of the board and management, remained fully informed and engaged throughout the course of the special investigation.

As noted above, Justice Brooker was also of the view that a probation order was not necessary for Griffiths in light of the robust anti-corruption compliance program implemented by the company after discovering the corruption at issue. This is to be contrasted with Niko Order in which the Court imposed a number of significant and costly ongoing obligations regarding disclosure and reporting to the RCMP, assistance to Canadian and US law enforcement authorities, strengthening internal compliance controls, and conducting independent compliance audits to be paid for by Niko.

Considering the weight placed on this quick and comprehensive response as a mitigating factor by the Crown and the Court, Griffiths' reaction to the discovery of potential corrupt practices can be considered a useful guide for companies and boards that find themselves in a similar situation in the future. However, it is also important for directors to note that the formation of a special committee comprised of independent directors, advised by independent external legal counsel and engaged in a thorough examination of all relevant activities and information may, depending on the circumstances, actually be required in order for directors to meet their duty of care owed to a corporation.[8] The actions taken by Griffiths are a reminder that issues arising with potential CFPOA violations will extend beyond exclusively criminal matters and can include compliance by directors with the requirements of their duty of care.

(d) The Role of US FCPA Precedent

The Niko Order was drafted in consultation with the US Department of Justice (USDOJ) and was described by the Crown as "a Canadianized version of similar enforcement actions in the United States." Moreover, the terms of the Niko Order closely followed those found in recent USDOJ deferred prosecution agreements under the *Foreign Corrupt Practices Act* (FCPA) and, in approving the fine recommended by the Crown, the Court also considered examples provided by the Crown of penalties levied by U.S. authorities under the FCPA.

The Griffiths Judgment differs from the Niko Order significantly in that it does not include a comprehensive set of prescriptions regarding future anti-corruption compliance policies and procedures to be adopted by the offending entity as did the Niko Order - again, because Griffiths had already voluntarily adopted a robust set of such policies and procedures during the course of its internal investigation. Although Justice Brooker commented that FCPA precedent can be of limited use for CFPOA sentencing purposes due to its heavy reliance on mathematical fomulae, the Griffiths Judgment does again exhibit the willingness of the Court to consider relevant FCPA precedent where potentially useful, on this occasion illustrated by the reference of Justice Brooker to accused companies being given a significantly discounted penalty in exchange for self-reporting and full cooperation in FCPA matters.

(e) Proceeds of Criminal Activity

In addition to monetary penalties and possible imprisonment, under the *Criminal Code* proceeds obtained from the bribery of foreign public officials may be forfeited to the Canadian government. Also, as an indictable offence, a violation of the CFPOA is considered a "designated offence" and therefore attracts the application of the *Criminal Code's* provisions

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[8] See, for example, the decision of the Ontario Securities Commission in *In re YBM Magnex*, available at http://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20030627_ybm-magnex2.pdf.

against money laundering. These prohibit dealing with any property or any proceeds of property with the intent to conceal or convert, knowing or believing that the property or proceeds were obtained directly or indirectly from the bribery of foreign officials.

Although the Crown acknowledges that that the $2 million dollar payment made by Griffiths' past management to COCL is beyond the reach of the Court, forfeiture proceedings in respect of the seed share issuances to the Wife and her nominees are understood to have been initiated and are scheduled to be next heard by the Court on February 15, 2013. The experience of Griffiths may therefore serve as the first instance in Canada of the seizure of assets tainted by foreign corrupt practices.

(f) "Territorial Jurisdiction" vs "Nationality Jurisdiction"

It was agreed by the Crown and Griffiths in the Statement of Facts that the "Court has jurisdiction over this offence by reason of the fact that there is a real and substantial link between Canada and [the] offence and that the facts of [the] case legitimately give Canada an interest in prosecuting the offence."

This is an acknowledgment that, at the date of the Griffiths Judgment, the applicable jurisdiction of the Court was that of "territorial jurisdiction". Pursuant to the decision of the Supreme Court of Canada in *R. v. Libman*, this requires that there be a "real and substantial" connection to the territory of Canada.[9] The decision in *Libman* has also led to objections to jurisdiction based on the principle of international comity (i.e., that where a crime has a closer nexus to another country, it may be more appropriate for the matter to be prosecuted there).

However, Bill S-14 discussed above is set to shift the jurisdictional standard applicable to prosecutions of violations of the CFPOA from "territorial jurisdiction" to "nationality jurisdiction".[10] Under this standard, rather than requiring a "real and substantial" connection to the territory of Canada, the Crown will merely have to establish that the violation of the CFPOA was committed (i) by a Canadian citizen, (ii) by a permanent resident (who, after the commission of the act or omission, is present in Canada), or (iii) by a company, partnership or other entity formed or organized under the laws of Canada. Importantly, this amendment will greatly reduce the ability of alleged offenders to initiate jurisdictional challenges to prosecutions brought against them by enforcement authorities based on the location in which an offence was either planned or conducted.

(g) Third Party Agents and Anti-Corruption Risk

Although the Statement of Facts paints a picture in which the previous management of Griffiths purposefully engaged a third party agent as part of a scheme to attempt to influence the government of Chad, it should not be lost on companies with overseas operations that engaging third party agents even with the best of intentions can be fraught with uncertainty and represents one of the most significant areas of anti-corruption risk facing Canadian business.

The use of third party agents in international operations or business development, whether consultants, sales representatives, customs brokers, contractors or distributors, is often unavoidable. This may be because the retention of a local agent is a requirement of foreign law, because of cultural or linguistic barriers, or because of practical or logistical realities. Canadian

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9 *R. v. Libman*, [1985] 2 S.C.R. 178.

10 See *supra* note 7.

companies and business people with overseas operations should understand that liability under the CFPOA can accrue not only where a person deliberately instructs an agent to effect a corrupt offer, promise or payment on the person's behalf but also merely where a person is 'wilfully blind' to the fact that such a corrupt offer, promise or payment would be made by an agent on the person's behalf (i.e., where the person has reason to believe such a corrupt offer, promise or payment would be made but deliberately refrained from making further inquiries because the person would prefer to remain ignorant).[11]

5. Conclusion

The experience of Griffiths and its new management and directorship emphasize the need for Canadian companies with overseas operations or business partners to implement and enforce comprehensive anti-corruption policies and procedures customized to their particular circumstances in a proactive manner.[12] This will best place an organization, as well as its management and directors, to detect and prevent potential violations of the CFPOA, and to quickly respond accordingly. As the RCMP and Crown have now made abundantly clear, with approximately 35 ongoing CFPOA investigations, the Canadian business community now operates in a new and aggressive era of anti-corruption enforcement.

John W. Boscariol is a partner at McCarthy Tétrault and leader of the firm's International Trade & Investment Law Group. He specializes in compliance and enforcement matters related to anti-corruption laws and policies, economic sanctions and export controls and other laws governing the cross-border trade in goods, services and technology and foreign investment.

Paul Blyschak is an associate in McCarthy Tétrault's Business Law Group and a member of the firm's Energy Department. His practice encompasses a range of both domestic and international transactions in the upstream, midstream and downstream oil and gas industry as well as in the resources sector. He regularly advises on corporate financings and mergers & acquisitions as well as risk mitigation strategies in international transactions, including compliance with anti-corruption laws.

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[11] For further discussion of anti-corruption risks and risk mitigation strategies related to the retention of third party agents, please see *Understanding and Mitigating Your Third Party Corruption Risk Under Canada's Corruption of Foreign Public Official's Act*, available at http://www.mccarthy.ca/article_detail.aspx?id=6146.

[12] For further information regarding anti-corruption risk assessments and customized anti-corruption policies and procedures, please see *Anti-Corruption Compliance Message Received? Risk Assessment Is Your Next Step*, available at http://www.mccarthy.ca/article_detail.aspx?id=5985.