**Canada Experiences Its Most Active Year Yet in Anti-Corruption Law and Enforcement**

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**by**

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As we start the New Year, Canadian companies are well-advised to take stock of recent developments in anti-corruption law and assess where they stand in terms of implementing appropriate internal controls and due diligence policies to ensure compliance with Canada's *Corruption of Foreign Public Officials Act* (CFPOA)[1] and other potentially applicable anti-bribery regimes, including the U.S. *Foreign Corrupt Practices Act* and the U.K. *Bribery Act*.

During 2013, there were many developments in Canadian anti-corruption law and enforcement, including new Royal Canadian Mounted Police (RCMP) investigations and charges, CFPOA convictions, legislative amendments and related regulatory initiatives. At the present time, the RCMP advises that it has over 35 CFPOA investigations ongoing. The most significant of this past year's CFPOA developments are summarized below.

**Conviction of Griffiths Energy**

The year started off with a major conviction under the CFPOA. On January 25, 2013, the Alberta Court of Queen's Bench approved a $10.35-million penalty against Griffiths Energy International Inc., a Calgary-based junior oil and gas exploration and production firm, for a violation of paragraph 3(1)(b) of the CFPOA in connection with the actions of the company's previous management and representatives in pursuing production sharing contracts (PSCs) in Chad.[2]

Although the CFPOA has been in force since 1999, the Griffiths conviction was only the second significant conviction rendered under Canada's foreign anti-corruption legislation. The first was of Niko Resources Ltd. on June 24, 2011.[3]

*Background*

As noted in the Agreed Statement of Facts,[4] in and around the formation of the company in August 2009, Griffiths and several of its founding shareholders began a campaign 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 provided for a $2-million fee payable to Tchad LLC in

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. For further information regarding the Niko Order, please see *A Deeper Dive Into Canada's First Significant Foreign Bribery Case: Niko Resources Ltd.*

4 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.

the event Griffiths was awarded the desired PSCs before the 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 entity, this time wholly owned by the wife of the Ambassador, Chad Oil Consulting LLC (COCL). Griffiths simultaneously granted 4 million founders shares in the company to the Ambassador's wife and two of her nominees, including the wife of the then Deputy Chief of the Chadian Embassy in Washington, D.C.

Griffiths acknowledged 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 had 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.

*Key Factors for the Guilty Plea and Penalty*

The Agreed Statement of Facts contained five important acknowledgements by the Crown which informed its agreement to limit the penalty imposed on Griffiths and, ultimately, the Court's approval:

> (i) between July and September of 2011, Griffiths had hired an entirely new management team and appointed six new independent directors; the current senior leadership of Griffiths was considered distinct and separate from the management running the company at the time of the corrupt practices at issue;
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> (ii) upon discovery of the offending consulting agreements during due diligence in preparation for an initial public offering of securities, Griffiths took immediate and comprehensive corrective action, including establishing a special committee of independent directors that appointed external legal counsel to conduct a thorough internal investigation;
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> (iii) Griffiths voluntarily self-disclosed the matter to the RCMP and representatives of the Public Prosecution Service of Canada and Alberta Justice on November 15, 2011, as well as to U.S. authorities; Griffiths shared all details of the investigation and waived legal privilege over communications with its former legal counsel, pled guilty prior to charges being formally laid by the Crown, and continued to assist the Crown in other processes and legal remedies related to its past activities;
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> (iv) Griffiths incurred significant costs, including $5 million in professional fees for the internal investigation, hundreds of management hours, withdrawal of its IPO and the corresponding write-off of approximately $1.8 million in pre-IPO expenses, and the resulting increased costs of financing when forced to turn to private sources of capital; and
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> (v) Griffiths had not been previously convicted for a similar offence and it had undertaken numerous actions to reduce the likelihood of its engaging in further corrupt practices, including implementing robust anti-corruption policies and procedures.

Significantly, and in contrast to the Niko case, the Court confirmed that a probation order was not necessary in the circumstances considering the "effective, comprehensive and robust anti-corruption program" instituted by Griffiths.

**Significant Amendments to the CFPOA**

On February 5, 2013, Bill S-14, the *Fighting Foreign Corruption Act,* was introduced into Canada's Senate. It proposed the most significant amendments to the CFPOA since it came into effect in 1999. On June 19, after passing through both the Senate and House of Commons without any changes, the amendments came into force. Key changes are discussed below.

*Existing Exception for Facilitation Payments to Be Repealed*

The amendments provide for the eventual elimination of the exception for "facilitation payments." The existing exception in the CFPOA covers payments made to expedite or secure the performance of acts of a routine nature that are part of the foreign public official's duties or functions – such as small payments for the processing of official documents. Though the facilitation payment exception continues to be recognized in the United States under its *Foreign Corrupt Practices Act* (FCPA), individuals and entities subject to the CFPOA will now need to amend their policies and procedures accordingly.

The repeal of the exception will become effective at a future date to be determined by the federal Cabinet, allowing time for companies to adjust their policies and being cognizant of the competitive disadvantage this may create vis-à-vis other countries (such as the United States) that continue to allow their companies to make such payments.

*New Books and Records Offence*

The amendments create a separate offence for engaging in the following when undertaken for the purpose of bribing a foreign public official or for the purpose of disguising such bribery:

> (i) establishing or maintaining 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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> (ii) making transactions that are not recorded in those books and records or that are inadequately identified in them;
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> (iii) recording non-existent expenditures in those books and records;
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> (iv) entering liabilities with incorrect identification of their object in those books and records;
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> (v) knowingly using false documents; or
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> (vi) intentionally destroying accounting books and records earlier than permitted by law.

U.S. companies (as well as any Canadian companies listed or dual-listed on a U.S. exchange) should be familiar with this kind of "books and records" offence, as it has been rigorously enforced over the past decade by the U.S.

Securities and Exchange Commission. It should be noted, however, that violation of the CFPOA's "books and records" provisions will constitute a criminal offence rather than a civil matter.

In further contrast to the FCPA, the CFPOA requires that the impugned activity be undertaken for the purpose of bribing a foreign public official or for the purpose of disguising such bribery. Nonetheless, the amendment is anticipated to have a very significant impact since parties who were not involved in the initial act of bribery can now be brought into the purview of the CFPOA as a result of their actions after the fact.

*Expanding Jurisdiction on the Basis of Nationality*

A consistent criticism of the CFPOA had been that its application is based on territorial rather than nationality jurisdiction. Up until the amendments, under Canadian common law, the commission of an offence under the CFPOA required a "real and substantial" connection to the territory of Canada. This territorial test for jurisdiction required that a "significant portion of the activities constituting the offence take place in Canada."[5]

Now, every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under the CFPOA is deemed to have committed that act or omission in Canada if: the person is (i) a Canadian citizen, (ii) a permanent resident (who, after the commission of the act or omission, is present in Canada) or (iii) a company, partnership or other entity formed or organized under the laws of Canada.

*Increased Sentences for Individuals*

The maximum term of imprisonment for violating the CFPOA, including the new books and records provisions, was increased from 5 to 14 years. Given the recent increased focus by U.S. anti-corruption authorities on prosecuting individuals as well as companies, this amendment should serve as a stark warning to the business community to conduct their affairs in accordance with the legislation.

*A Broader Definition of "Business"*

Originally, the CFPOA applied to corrupt acts committed "in the course of business," which had been defined to mean undertakings carried on "for profit." This amendment to the definition of "business" removed the requirement for the business or transactions to be for a profit. This likely increases the exposure of Canadian non-profit entities such as development agencies or charities to violations of the CFPOA.

*RCMP Has Exclusive Authority to Lay CFPOA Charges*

Previously under the CFPOA, charges could be laid by municipal or provincial police or Canada's federal police force, the RCMP. As a result of the amendments, the RCMP is accorded the exclusive authority to lay an information in respect of a CFPOA offence or related offences, including conspiracy, attempts, being an accessory after the fact, and counselling.

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

**New Initiative for Disclosure of Payments to Governments**

On June 12, 2013, Prime Minister Stephen Harper announced the introduction of a new transparency initiative in Canada that will require Canadian companies in the extractive industries, including mining, oil and gas, to disclose their payments made to domestic and foreign governments. This disclosure initiative is closely linked to the CFPOA – in addition to imposing substantial compliance burdens, it is also expected to increase scrutiny and thereby significantly impact anti-corruption enforcement in Canada.[6]

This Canadian initiative follows similar measures being adopted in the United States and the European Union,[7] both of which are already implementing mandatory payment reporting requirements for their mining, oil and gas companies.

The Canadian government has indicated that it intends to consult with the provinces and territories, Aboriginal groups, and industry and civil organizations as it begins to formulate and implement its reporting regime. Specific details as to how the reporting regime will be enforced, and by whom, as well as potential penalties for non-compliance still need to be addressed. It will be important to ensure that the new Canadian regime is sufficiently similar to those of other jurisdictions, including the United States and the EU, so that Canadian companies do not face inconsistent reporting requirements.

NGOs and industry organizations have already been formulating possible rules for a disclosure regime. For example, the Canadian Extractive Resource Revenue Transparency Working Group, comprising the Prospectors and Developers Association of Canada, the Mining Association of Canada, Publish What You Pay Canada and the Revenue Watch Institute, has been working on developing a draft reporting framework since September 2012.[8]

**First Trial Under the CFPOA Results in Conviction**

On August 15, 2013, following the first trial under the CFPOA, the Ontario Superior Court of Justice convicted a business executive, Nazir Karigar, for agreeing with others to offer bribes to foreign public officials.[9]

Karigar was convicted for his leading role in a conspiracy to bribe India's Minister of Civil Aviation and certain Air India officials in connection with the bid of an Ottawa-based security company, Cryptometrics Canada, for the supply of facial recognition software.

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6 On August 22, 2012, the SEC issued its Final Rule implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act requirement for oil, gas and mining companies to disclose payments made to governments. This, however, has recently come under attack in a challenge brought before the U.S. Court of Appeals. See *American Petroleum Institute v. U.S. Securities and Exchange Commission,* 12-1398 (April 26, 2013). The SEC recently released additional guidance on this rule: see *DoddFrank Wall Street Reform and Consumer Protection Act Frequently Asked Questions: Disclosure of Payments by Resource Extraction Issuers* (May 30, 2013).

7 On June 12, 2013, the EU Parliament voted in favour of legislation compelling forestry, oil, gas and mining companies to publish their payments made to governments and to release information on their earnings in each country. See *European Parliament / News: "Oil, gas, mineral and logging firms obliged to disclose payments to governments* (June 12, 2013).

8 See *Background Q&A: Canadian Extractive Resource Revenue Transparency Working Group* (September 6, 2012).

9 *R. v. Karigar*, 2013 ONSC 5199.

Karigar is the first individual to have been prosecuted under the CFPOA. In another contrast with previous cases, though the Court found that Karigar conspired to provide financial advantages to foreign officials, there was no evidence or admission that they were actually provided.

In June 2005, Karigar contacted Cryptometrics Canada, stating that he had good connections with Air India and was aware that the airline was planning to acquire technology to deal with airline security issues. A few months later, Karigar and Cryptometrics Canada agreed that Karigar and his associate would help Cryptometrics Canada secure the contract from Air India in return for 30% of the revenue stream. Karigar then began introducing Cryptometrics Canada executives to senior Air India officials and also provided them with information about Air India's requirements and inside information about the bid.

In February 2006, Air India released its official Request for Proposal (RFP) for the supply of a facial recognition security system. Karigar and Cryptometrics Canada worked together on a proposal for the RFP and during a meeting between the parties, Karigar's associate advised that Indian officials would need to be bribed to secure the contract. Karigar then provided Cryptometrics Canada with a spreadsheet that listed the officials and the amounts of each bribe. As the proposal was being developed by Cryptometrics Canada, Karigar continued providing the company's executives with inside information. He also advised the company to develop a second proposal that was to be presented under the name of a different company at a much higher price to create a false sense of competition.

In June 2006, Cryptometrics U.S.A., the parent of Cryptometrics Canada, transferred US$200,000 to Karigar, which was likely to be used to bribe a senior Air India official. In March 2007, an additional US$250,000 was transferred to Karigar to obtain the Air India contract.

Ultimately, Cryptometrics Canada's bid for the supply contract was unsuccessful. The Court found that there was no evidence of what became of the US$450,000 that was transferred to Karigar and therefore no evidence that any bribe was actually offered or paid to a foreign public official. However, the Court ruled that Karigar agreed with others to offer bribes to foreign public officials and therefore was guilty of an indictable offence pursuant to paragraph 3(1)(b) of the CFPOA. Karigar is currently awaiting sentencing.

**Preparing for Further Enforcement Activity in 2014**

With over 35 ongoing RCMP investigations and five individuals currently facing CFPOA charges,[10] 2014 promises to be another busy year for anti-corruption enforcement in Canada.

Canadian companies should ensure that, after having undertaken a thorough risk assessment,[11] they have developed, adopted and implemented effective internal controls and due diligence measures for compliance with the CFPOA and other applicable anti-bribery regimes.

Such measures and controls include compliance manuals that clearly articulate the company's anti-bribery policies and procedures, the appointment of authoritative compliance officer(s), regular education and training programs for

[10] See RCMP Press Release: *RCMP Charge Former SNC Lavalin Senior Executive* (September 18, 2013).

[11] For an introductory overview of the risk assessment process, see *Anti-Corruption Compliance Message Received? Risk Assessment Is Your Next Step* (August 13, 2012).

employees, executives and directors, regular internal auditing to ensure compliance with anti-bribery policies, processes for internal and external reporting of potential violations along with whistleblower protections, anti-bribery risk review of projects, screening and monitoring of agent and other business partner relationships, and internal accounting controls to ensure proper maintenance of books and records in accordance with the CFPOA.