

Corruption Crackdown - What Does Canada's More Stringent Anti-Corruption Enforcement Mean For Mining Companies?

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Canada recently strengthened its anti-corruption enforcement through the enactment of amendments to the Corruption of Foreign Public Officials Act (CFPOA) and by announcing potential new reporting rules for extractive companies.

These recent legislative developments follow significant enforcement activity by the Royal Canadian Mounted Police (RCMP) that highlight the Canadian government's recent commitment to enforcing its anti-corruption laws, following years of inactivity.

Since Canada is home to approximately 60% of the world's public mining companies, these recent developments in anti-corruption law and enforcement have a potentially significant impact on the industry globally.

Legislative Developments

The most salient development has been the recent amendments to the CFPOA. The amendments, which were passed into law on June 19, 2013, close a jurisdictional loophole, create new offences and generally strengthen Canada's international anti-corruption legislation. The significant amendments are as follows:

- Expansion of jurisdiction: Prior to the amendments, the CFPOA contained a significant loophole, since some part of the formulation, initiation or commitment of the offence had to

take place within Canada. Since the CFPOA is directed at bribery occurring in foreign countries, this significantly hampered the ability for Canadian authorities to enforce the CFPOA in cases where the bribery occurred entirely in a foreign country. Under the amended provision, Canadian authorities can now prosecute any Canadian company or individual for a bribe occurring in a foreign country, even if the transaction takes place outside of Canada.

- Increased penalties: The amendments significantly increased the penalties for a violation of the CFPOA. The maximum imprisonment for a violation of the CFPOA is now 14 years, as opposed to five years prior to the amendments. The maximum monetary penalty is still unlimited.
- Implementation of a books and records offence: This provision makes it an offence to conceal bribery in accounting records. While this new offence shares some similarity with the books and records provisions of the US' Foreign Corrupt Practices Act (FCPA), it is unlikely to have the same impact in Canada as it has had in the US. In the US, a large number of FCPA settlements have been made pursuant to the books and records provisions, which include civil resolution options, and are subject to a lower civil burden of proof. Conversely, in Canada the new books and records provisions are criminal, meaning that

the authorities must prove an offence to the higher standard of proof. There remains no CFPOA civil resolution option in Canada.

- Removal of facilitation payment exception: Previously, facilitation payments, which are small payments made to low-level officials to secure, or expedite, performance of “acts of a routine nature” were exempted from the CFPOA.

Under the amendments, this exception will eventually be removed, subject to a further order of the governor in council. Once this is made, the CFPOA will be brought in line with the UK Bribery Act, which also prohibits facilitation payments.

Notably, however, the FCPA continues to allow them, an inconsistency in anti-corruption laws, which creates a potentially uneven playing field for companies and individuals depending on their nationality.

In addition to the amendments to the CFPOA, on June 12, 2013, the Canadian federal government announced that it would work towards developing new reporting rules for extractive companies.

Under this proposed legislation, mining and oil companies must disclose all payments made to Canadian or foreign governments. These rules, if adopted, would be similar to the US Securities and Exchange Commission (SEC) rules, adopted in August 2012, which imposed annual reporting obligations on resource extraction issuers made to the US government or any non-US government relating to commercial development of oil, natural gas or minerals.

The announcement by the Federal government followed the introduction of a private member’s bill, C-474, which proposed similar rules to those implemented by the SEC.

Enforcement Activity

Along with these legislative developments, recent enforcement activity illustrates the Canadian government’s commitment to enforcing anti-corruption laws.

The recent Niko Resources Ltd (Niko) and Griffiths

Energy International Inc (Griffiths) convictions set a new benchmark for potential CFPOA fines and penalties. Prior to these cases, there was only one prior conviction under the CFPOA – the C\$25,000 (US\$24,000) fine paid by Hydro Kleen Group Inc in 2005.

In the June 2011 Niko case, Niko pleaded guilty to an offence under section 3(1)(b) of the CFPOA for bribing a public official in Bangladesh through the provision of the use of a C\$190,000 vehicle and a trip valued at C\$5,000.

Niko and the Crown put forward a joint submission for a fine of C\$8.2 million, plus a 15% victim surcharge, for a total penalty of C\$9.5 million. Niko’s sentence also provided for three years’ probation with extensive monitoring conditions.

In January 2013, Griffiths pleaded guilty to an offence under section 3(1)(b) of the CFPOA and agreed to pay a fine of C\$9 million, plus a 15% victim surcharge, for a total of C\$10.35 million. This fine related to consulting agreements that provided for payments totalling C\$2 million to two entities owned and controlled by Chad’s ambassador to Canada and his spouse.

In assessing the fine, the court noted that Griffiths had self-reported, taking the extraordinary step of sharing privileged materials with the authorities, spending C\$5 million conducting an internal investigation into the bribery, and had to postpone its planned initial public offering (IPO) at a cost of C\$1.8 million.

The first conviction of an individual under the CFPOA occurred on August 15, 2013, with Nazir Karigar being found guilty of an offence under section 3(1)(b) of the CFPOA in relation to paying bribes to Indian officials concerning a security system contract. The sentencing will occur at a later date.

The RCMP is investigating at least one Canadian mining company with respect to allegations of bribery in a foreign country. On July 20, 2012, the RCMP raided the offices of the Canadian mining company Blackfire Exploration Ltd, a privately owned junior, operating in the southern Mexican state of Chiapas.

The RCMP alleged that the company illegally paid the local mayor around C\$19,300 for security and to prevent local members in the community from taking up arms against the mine. Purportedly, when the mayor's requests became more exorbitant, including demands for airline tickets and a "sexual night" with a one-time playboy model, Blackfire complained to the state government that it was being extorted. To date, the RCMP has not laid charges against Blackfire.

In addition, the RCMP has also made it known that it has 34 on-going CFPOA investigations, including the highly publicised investigation of widespread bribery allegations against SNC-Lavalin Group Inc (SNC). Two former executives of SNC currently face CFPOA charges.

Compliance Tips

With significant potential fines and highly negative exposure for Canadian companies found guilty of a CFPOA offence, it is important to implement an anti-corruption compliance programme to prevent anti-corruption law violations. The following strategies will help promote compliance:

- **Conduct a risk assessment:** An important first step is to identify the corruption risks faced by a company. Once areas of risk are identified, assess these risks, their likelihood and potential impact, prioritise resources accordingly and develop a compliance programme.
- **Develop an internal anti-corruption policy:** The cornerstone of any compliance programme is a clearly articulated corporate policy against corrupt behaviour. The policy should send a strong message from senior management that corruption is unacceptable. It should also establish limitations and thresholds and provide guidance on risk areas.

- **Train and enforce an anti-corruption policy:** An anti-corruption policy is only as effective as the rigour with which it is implemented and enforced. The goal is to create a topdown attitude of compliance. All employees should receive periodic compliance training on anti-corruption laws and the company's anti-
- **Utilise internal controls to identify and correct issues:** Another component of an effective anti-corruption policy is a system of internal controls aimed at preventing corruption from occurring. The goal is to develop and implement internal audit mechanisms, including accounting practices, and to identify and correct issues if and when they arise.

Develop best practices for dealing with foreign agents and joint-venture partners: The best practice is to only engage a foreign agent where necessary, and only with pre-approval from your company's compliance officer. Adequate due diligence should be conducted and documented prior to hiring a foreign agent and/or before establishing a partnership abroad to ensure the foreign agent or joint-venture partner is reputable, properly qualified, and does not employ foreign officials.

Clearly the Canadian government is committed to prosecuting bribery of Canadian individuals and companies in foreign countries. Implementing the tips above will help protect against violating anti-corruption legislation.

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