insight

A WAKEUP CALL for Canadian resource companies

What the RCMP's anti-corruption efforts mean for miners operating abroad

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With the announcement in June 2011 that the Royal Canadian Mounted Police had imposed a $9.5-million fine on Niko Resources (NKO-T), a Calgary-based international oil and gas company, Canada has indicated that it is joining the growing network of countries that have started aggressively enforcing their bribery laws.

Recent reports disclose that the RCMP is investigating 22 additional cases, a significant number considering the Niko case is only the second Corruption of Foreign Public Officials Act (CFPOA) case that the RCMP has prosecuted. The RCMP is now investigating Blackfire Exploration, a private Canadian mining company, for allegedly making payments to a mayor in connection with a Mexican mine site owned and operated through a Mexican subsidiary of Blackfire. The RCMP also raided the Toronto offices of SNC-Lavalin Group (SNC-T) as part of an investigation into potential corruption in connection with the World Bank-sponsored Padma Bridge project in Bangladesh. SNC-Lavalin is reportedly co-operating with the investigation. One of SNC-Lavalin's primary businesses is mining project development, including design, engineering and construction. If SNC-Lavalin is found to have such problems in a bridge project, these issues could also affect mining projects.

These developments should serve as a wakeup call for Canadian companies — especially those in the extractive industries — that they should focus on establishing amidst their business practices a

culture of compliance with both Canadian and international anti-corruption laws. Furthermore, they should reinforce this culture by strengthening corporate anti-corruption policies and implementing mechanisms to prevent and detect any illicit activity.

A new enforcement environment

On June 24, 2011, RCMP announced that Niko had pled guilty to charges that, through a Bangladeshi subsidiary, it violated the CFPOA by purchasing a $190,000 sports-utility vehicle for AKM Mosharraf Hossain, who, at the time, was the Bangladeshi state minister for energy and mineral resources. Niko also improperly paid for Hossain's personal travel to New York and Chicago while he was attending an oil and gas exposition in Calgary.

As a consequence of its plea, Niko paid penalties totalling nearly $9.5 million, and it is subject to a probation order that requires three years of court supervision and reporting to ensure that it is complying with the Act.

The Niko case signals a new enforcement landscape for Canadian companies. Historically, enforcement of the CFPOA has been lax. In March 2011, the Organization for Economic Cooperation and Development Work Group on Bribery in International Business Transactions criticized the narrow breadth of Canada's anti-corruption framework and its enforcement efforts. Among the criticisms were the relatively small and ineffective fines and penalties imposed by the Act, and the requirement for a strong jurisdictional link to Canada. Transparency International has also been critical, ranking Canada's anti-corruption efforts as the worst of the G7 nations and among the worst of the 40 countries that it investigated as part of its grading of nations' efforts in this area. In a 2011 report, the organization gave Canada a rating of "little or no enforcement," meaning it has prosecuted very few, and/or minor cases.

Indeed, between the Act's passage in 1998 and Niko's 2011 plea, the RCMP prosecuted only one minor case, which involved a company called Hydro-Kleen Group paying a U.S. Immigration official $28,299 in bribes. The penalty assessed in 2005 was a mere $25,000. It was also a relatively unsophisticated case and dovetailed with a private lawsuit.

In contrast, the Niko case involved a sophisticated, multi-jurisdictional investigation and assessed significant penalties.

The tenor of the Niko investigation and prosecution suggests Canada is trying to answer its critics by cultivating an enforcement environment similar to the one the U.S. has created for the Foreign Corrupt Practices Act (FCPA). In addition to being a reaction to the negative OECD and Transparency International reports, this change may at least partly be the consequence of increased co-operation and co-ordination between Canadian and U.S. law enforcement. Co-operation was a hallmark of the Niko case, where Canada thanked the U.S. Department of Justice and other U.S. law enforcement agencies, as well as counterparts in other foreign jurisdictions for their assistance with the investigation and subsequent prosecution. Canadian and U.S. law enforcement are also co-ordinating in other cases, including that of Nazir Karigar, an Indian-born Canadian who the RCMP alleges participated in the bribing of of an Indian minister in order to secure a bid for airport security services on behalf of a company called CryptoMetrics. Law enforcement agencies on both sides of the border have shared tips and information in the case, and co-ordinated raids in the U.S. and Canada. This trend towards increased co-operation is likely to continue.

The structure of the plea agreement also indicates significant parallels between the enforcement approach of the RCMP and U.S. enforcement agencies. Appendix A to the Niko Probation Order is remarkably similar to and clearly modelled on — if not outright copied from — Attachment C to typical U.S. Department of Justice FCPA deferred prosecution agreements, which sets forth a company's agreement to revise or strengthen its corporate compliance program. The measures contained in Appendix A to the Niko Probation Order, which included the court-supervised implementation of detailed accounting and internal control measures, are incorporated even though the Act does not include provisions regarding books and records violations. In addition, Niko agreed to notify the RCMP and U.S. law enforcement agencies of any internal investigation, and it agreed to share with the RCMP and Canadian prosecutors the results of any internal investigations. Niko also agreed to co-operate with the RCMP, Public Prosecution Service of Canada, or any Canadian or U.S. law enforcement agency in any investigation related to the facts of the CFPOA case.

Comparison of the U.S. and Canadian laws

Both the CFPOA and the FCPA prohibit the bribing of foreign officials in order to obtain or retain business. Both statutes contain broad definitions of bribes, and are broadly worded to capture any form of benefit or value that

may be given to a foreign public official for the official's personal benefit. It can be the gift or actual payment, the offer of either a payment or a gift, or even the agreement to pay any "loan, reward, advantage, or benefit of any kind." Similarly, both laws include a broad definition of foreign official, sweeping in even low-level employees at otherwise commercial ventures. And both laws prohibit paying indirectly what it is not permissible to pay directly, i.e., third-party intermediaries cannot be used to pay bribes. Finally, both statutes contain an exception to liability for facilitation payments.

There are four ways in which the Canadian law is narrower than the U.S. law, however. First, the CFPOA does not include provisions for liability due to inadequacies in an entity's books and records and/or internal controls. (While the CFPOA does not contain civil or criminal penalties for books and records deficiencies, given the structure of the Niko Probation Order, future punitive and remedial measures under the Act may include instituting internal controls.) Second, the CFPOA is limited to criminal penalties, while the FCPA contains civil penalties for books and records violations. Third, the CFPOA is limited to for-profit businesses. Lastly, the CFPOA does not apply to bribery that does not have a "real and substantial link between the offence and Canada," meaning Canada cannot prosecute its nationals where such a link does not exist or cannot be proven. This provision of the CFPOA is being tested in the Karigar case.

Extractive industries and their exposure under the Act

Companies within the extractive industries have been the targets of RCMP, U.S. Department of Justice, and U.S. Securities and Exchange Commission investigations. The focus on extractive industries began in the U.S., where U.S. enforcement agencies have entered into multi-million dollar settlements with many companies for bribes taking place in connection with extractive industries, including: the Oil-For-Food investigation in Iraq (about 20 companies); the Panalpina cases, which involved bribing officials in numerous countries to hasten the delivery of extractive industry machinery, avoid customs duties and penalties, and get contract extensions, among other things (seven companies); and the Bonny Island case, which involved bribing Nigerian government officials in the procurement of projects for the construction of a natural gas plant (five companies).

This extractive industries trend seems to be continuing in Canada with the plea agreement of Niko and the investigations of Blackfire Exploration and SNC-Lavalin.

This focus on enforcement in the extractive industries is a direct result of the heightened risk in these areas — in order to develop new business in foreign markets, resource companies need to negotiate with the state-sponsored enterprises or state ministries that control access to much of the energy and mineral resources in these countries. Resource companies often also need to get large machinery into and out of foreign countries through state-controlled customs. The government-side personnel involved in these transactions are considered to be foreign public officials under the CFPOA and the FCPA, even if they work for a state-owned company that is conducting commercial activities on behalf of the sovereign. The risks posed by regular contacts with foreign public officials involved in large transactions may be on the rise because recent trends suggest that government ownership in the mining and oil and gas industries is increasing.

Even the structure of the RCMP's Anti-Corruption Unit's two International Anti-Corruption Teams seems to be well-suited to focusing on the extractive industries; one team is located in Calgary and the other in Ottawa. Ottawa is the capital of Canada, and it is located only a few hours' drive from Toronto, the hub of Canada's trade and finance, and the location of the headquarters of many mining companies. Calgary, meanwhile, is home to Canada's oil and gas industry.

Among the **most important steps** a company can take to **mitigate exposure** is to create a corporate environment that **rewards ethical conduct**.

Mitigating exposure

Given the heightened vigilance of Canadian and U.S. enforcement agencies, Canadian companies in the extractive industries should establish robust anti-corruption compliance policies and procedures to ensure that corruption issues do not occur, or, if they do, they are able to detect and mitigate any existing problems. In light of the RCMP ramping up its enforcement actions,

companies that fail to take such measures may face steep investigation costs and large fines.

Among the most important steps a company can take to mitigate exposure is to create a corporate environment that rewards ethical conduct. This can be achieved by getting buy-in and support from senior management and implementing anti-corruption policies and procedures that quickly detect, report, and correct any potential violations of anti-corruption criminal prohibitions or corporate policy. Because a program that exists on paper is not sufficient, corporate officers should oversee the efforts, and the company should dedicate personnel and resources to give real effect to any compliance efforts.

Even the best programs will not deter all improper conduct. When violations occur, compliance programs do not directly shield companies from criminal liability. However, in the U.S., the sentencing guidelines reward companies for strong compliance programs. The papers in the Niko case indicate that Canada will do the same. The Statement of Facts notes that the penalties contained in the Probation Order reflect the steps Niko had "already taken. . . to reduce the likelihood of it committing a subsequent related offence." Furthermore, timely disclosure to prosecuting officials and co-operation in investigations are avenues for significantly reducing any criminal liability that may result. The Niko Statement of Facts indicates that the company's co-operation, which began as soon as it was aware it was under investigation, was taken into account in the Probation Order.

Canadian extractive industries have now been placed in the crosshairs of anti-corruption enforcement. Luckily, there are compliance steps that can be taken to mitigate the risks posed. Because of the apparent parallels between U.S. and Canadian enforcement, the U.S. experience with anti-corruption compliance should guide the structure of compliance programs of Canadian companies. MM

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