

Concerns about Alberta Companies Bribing Public Officials in Developing Countries

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Risk Factors for Corruption in Developing Countries

- Weak regulatory structures in many developing countries
 - Mad quest to attract FDI
 - Poorly paid public servants
 - Malfunctioning justice system
- Aggressive growth targets by companies
- Short deadlines to establish new business
- Heavy involvement in gov't regulated industries with ill-paid public officials
- A history of management override of internal controls or weak internal controls

Corruption Cases involving Alberta/Canadian Companies in Developing Countries

- Niko Resources Ltd – Calgary-based oil and gas comp.
 - Bribing of Bangladesh Energy Minister to help settle a natural gas explosion incident
 - Vehicle worth approx. \$190,000 + \$5000 in travel costs for a personal trip
 - \$9.5 million in fines
- Griffiths Energy – Calgary-based oil and gas comp.
 - Bribery of wife of Chadian Ambassador to the US (\$2 million) through her consulting firm
 - \$10.5 million in fines
- SNC-Lavalin – Montreal-based engineering firm
 - \$47.7 million in bribes to Libyan public officials

Costs of Corruption to Albertan/Canadian Companies

- Reputational damage to the corp. involved
- Potential harm to the competitiveness of other Canadian corporations
- Reputational damage to Canada as a country

Antibribery Statutory Framework in Canada

- *Corruption of Foreign Public Officials Act, 1998* (CFPOA) (amended 2013)
 - Implements Canada's obligations under the OECD Antibribery Convention
- *Extractive Sector Transparency Measures Act, 2014*
 - Implements Canada's obligations in the fight against corruption
 - Applicable only to the extractive sector

CFPOA

- Foreign Public Official
 - a person who holds a legislative, administrative or judicial position of a foreign state
 - an official or agent of a public international organization
- Types of business subject to the Act
 - All businesses – profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere

CFPOA

- Persons subject to the Act:
 - Category 1 (s. 5(1)):
 - Canadian citizens
 - Permanent residents
 - Any “public body, corporation, society, company, firm or partnership” incorporated, formed or otherwise organized under Canadian law
 - Canadian parent corporations
 - their foreign subsidiaries
 - Category 2 (ss. 3(1)):
 - No citizenship or residency requirement

CFPOA (cont'd)

- Geographical Application
 - Category 1 (s. 5(1)) – Offences committed outside Canada
 - No requirement that any element of the offence must occur in Canada
 - No requirement that the person must be present in Canada at the time of the offence
 - Permanent Residents
 - Permanent resident who “after the commission of the act or omission, is present in Canada” (s. 5(1)(b))

CFPOA (cont'd)

- Category 2 (s. 3(1)) – no explicit territorial language
 - Every person
 - *Chowdhury v HMQ*, 2014 ONSC 2635 (CanLII)
 - Mr Chowdhury was
 - A staff of SNC-Lavalin
 - Neither a Canadian citizen nor permanent resident
 - Held: section 3 has no extraterritorial reach.

CFPOA (cont'd)

- Offences created under the Act
 - **Bribery of a foreign public official**
 - Giving or offering, or an agreement to give or offer
 - Giving or offering could be directly to the intended recipient or indirectly
 - What is given/offered or agreed to be given/offered could be a loan, a reward, an advantage or a benefit
 - Beneficiary of the “thing” must be a foreign public official or any person on his/her behalf
 - No requirement to show that the giver of the bribe realized the desired results of the bribe – *R v Griffiths Energy*
 - *Quid pro quo*

CFPOA (cont'd)

– Accounting/Disclosure Offences (s. 4)

- With intent to bribe or conceal the bribery of a foreign public official
 - Establishes or maintains accounts which do not appear in their books of accounts
 - Fails to record transactions in the books and records or failure to adequately identify the transactions
 - Records non-existent expenditures in the books and records
 - Enters liabilities with incorrect identification of their object in the books and records
 - Knowingly uses false documents, or
 - Intentionally destroys accounting books and records earlier than permitted by law

CFPOA, Exemptions to Bribery

Exemptions to the Offence of Bribery

- Payments that are permitted or required under the laws of the foreign country
 - Does foreign law encompass both written and unwritten law (e.g., customary law)?
 - UK antibribery law refers to “written law”, defined as both statute law and judicial decisions

CFPOA, Exemptions to Bribery

- “reasonable expenses incurred in good faith by or on behalf of the foreign public official”
 - Payment must relate directly to:
 - promotion, demonstration or explanation of the person’s products and services, or
 - execution of a contract between the person and the foreign state for which the official performs duties or functions

CFPOA

- Facilitation Payments (s 3(4))
 - Payment “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”
 - issuance of a permit, licence or other document to qualify a person to do business
 - processing of official documents, such as visas and work permits
 - provision of services normally offered to the public

Extractive Sector Transparency Measures Act (ESTMA)

- **Entities Subject to the Act**

- Entities engaged in the commercial development of oil, gas or minerals in Canada or elsewhere or entities that control an entity engaged in the activities
- Entities listed on a Canadian stock exchange
- Entities that
 - have a place of business in Canada,
 - does business in Canada, or
 - has assets in Canada, and meets at least 2 of the following:
 - has at least \$20 million in assets
 - has generated at least \$40 million in revenue
 - has an average of at least 250 employees

ESTMA (cont'd)

- **Reporting Obligations**

- What is to be reported?

- Payments made within a financial year:

- To any govt in Canada or elsewhere

- » National and subnational govts, Aboriginal govts

- To a body established by two or more govts

- To an agency of a govt

- Time to report

- Not later than 150 after the financial year

ESTMA (cont'd)

- **Scope of payments to be reported**
 - Taxes – not including consumption and personal income taxes
 - Royalties
 - Fees – entry fees, licence/permit fees, regulatory charges
 - Production entitlements
 - Bonus – signature, discovery, production bonuses
 - Dividends – other than those paid as ordinary shareholders
 - Infrastructure improvement payments

ESTMA (cont'd)

- **Reporting Threshold (s. 9(2))**
 - the amount prescribed by regulation for the category of payment
 - \$100,000 if no amount is prescribed
 - Is \$100,000 too high or too low?

ESTMA (cont'd)

- **Recognition and acceptance of equivalent reporting regimes (s 10)**
 - Submitting a report that was prepared and filed in another jurisdiction
 - Foreign report “an acceptable substitute”
 - Foreign reported to the foreign jurisdiction’s competent authority
 - Entity provides the report to the Minister
 - Meets any conditions imposed by the Minister

ESTMA (cont'd)

- **Report by entities and their subsidiaries (s. 11)**
 - Entity provides a report that also covers payments by its wholly owned subsidiary
 - Subsidiary notifies the Minister that the entity is providing the report
 - Subsidiary provides a report for any uncovered payments

ESTMA (cont'd)

- Public accessibility of reports (s. 12)
- Record keeping of reports (s. 13)
 - 7 years or as prescribed

What's on Alberta Corporate Directors' "To Do" List?

- Be familiar with anti-corruption legislation
- Take the lead in:
 - Developing, implementing and improving internal controls to prevent such activity
 - Ensure that breaches of internal controls are:
 1. Swiftly investigated
 2. Corrected as part of a continuous improvement program
 - Discipline internal violations of policy

Alberta Corporate Directors' “To Do” List (cont’d)

- Effective compliance programs must be in place in order to help convince the public that any corruption is the result of a rogue employee
- Prosecutors may be disinclined to prosecute if they are satisfied that a robust compliance program is in place as prosecuting will not serve a public purpose

Conclusion

- Threat of prosecution for corruption is real
- An effective corporate compliance policy will pay for itself
 - Reducing the risk of corruption
 - Reducing fines from corruption charges
 - Reduce reputational costs