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Bribery & Corruption

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Contributing Editor: Jonathan Pickworth

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Riyaz Dattu
Osler, Hoskin & Harcourt LLP

Overview

Canada implemented its foreign anti-bribery legislation following its ratification of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("Convention") on 17 December 1998. The *Corruption of Foreign Public Officials Act* (CFPOA) came into force on 14 February 1999. Subsequent amendments have been made thereafter with the latest of these in June, 2013.

The principal criminal offence of bribery of foreign public officials is to be found in section 3 of the CFPOA. It reflects a consolidation of the principles of the bribery offence found in the Convention with the wording that already existed in the domestic corruption provisions of Canada's *Criminal Code*. All of the offences under the CFPOA are also included in the list of offences under section 183 of the *Criminal Code*. As a result, it is possible for Canadian law enforcement authorities, through the lawful use of a wiretap and other electronic surveillance, to gather evidence concerning the offence of bribery of foreign public officials cases.

Corruption of Foreign Public Officials Act

Subsection 3(1) is the principal bribery provision within the CFPOA, and provides as follows:

Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official:

(a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions.

This provision within the CFPOA, although based in part on the *Criminal Code*, is quite similar to the bribery provision within the *Foreign Corrupt Practices Act* of 1977 ("FCPA") in the United States. It makes illegal the giving of a benefit of any kind, in addition to those enumerated, to a foreign public official or for the benefit of such an official.

A foreign public official is defined in the CFPOA fairly broadly, as in the case of the FCPA, with minor differences:

"foreign public official" means:

(a) a person who holds a legislative, administrative or judicial position of a foreign state;

(b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
(c) an official or agent of a public international organisation that is formed by two or more states or governments, or by two or more such public international organisations.

The issue of employees of state-owned or controlled corporations being considered foreign public officials has been considered in a recent Canadian enforcement case which is discussed below.

The June 2013 amendments expanded in a very significant way the scope of the CFPOA, and clarified a number of areas of ambiguity within the legislations. These amendments provided for the following:

- Introduced a books and records provision that imposes extensive and detailed requirements which prohibit certain bookkeeping practices and types of transactions (inadequately identifying, falsifying, hiding, destroying, recording of non-existent expenditures, or using false records), if related to bribery of foreign public officials. This provision of the CFPOA may be applied along with other provisions of Canadian law such as section 155 (financial disclosure) of the *Canada Business Corporations Act* and sections 361 (false pretence), 380 (fraud), and 397 (falsification of books and documents) of the *Criminal Code*.
- Significantly expanded the scope of Canadian prosecutorial jurisdiction to cover activities of Canadians (including officers and directors) and Canadian corporations, even if all the activities related to the alleged bribery take place or the falsification of books and records occurs outside Canada, thereby displacing the previous view that there had to be a "real and substantial link" between the offence and Canada. The basis for the offence will include conspiracy to commit, an attempt to commit, being an accessory after the fact or any counselling in relation to the offences of bribery or falsification of books and records.
- Increased the maximum term of imprisonment for individuals convicted under the CFPOA from five years to 14 years. The consequential result of this is that individuals found to have violated the CFPOA will not be eligible upon conviction for either conditional sentences or discharges. In addition, both individuals and corporations will continue to be subject to monetary fines at the discretion of a judge, who will not be restricted by a maximum prescribed amount.
- Clarified the definition of "business" by removing the words "for profit". The government's stated intent is to make this provision applicable to all businesses, regardless of whether they are seeking profits. It will therefore eliminate the potential defence that may have been available to non-profit organisations and unprofitable businesses that their activities were outside the ambit of the CFPOA.
- Provided exclusive authority to the Royal Canadian Mounted Police ("RCMP") to lay charges pursuant to the CFPOA against Canadian companies, Canadian citizens and permanent residents in Canada.
- Finally, the exception for "facilitation payments" – which in some very limited circumstances permits nominal payments made to expedite or secure the performance of an act of a routine nature by a foreign public official – will be eliminated on a date to be fixed by an order of the federal Cabinet.

The increased prison terms for Canadian nationals including officers and directors of Canadian corporations, the elimination of the territorial jurisdiction test, the increased exposure to CFPOA penalties by adding a books and records provision, and the elimination

of exceptions and defences such as those for facilitation payments and businesses not earning profits, all point towards continuing vigorous enforcement by the Canadian government of the CFPOA.

Enforcement of the CFPOA

Niko Resources

On June 24, 2011, Niko Resources Ltd. ("Niko"), a TSX-listed international oil and natural gas exploration and production company, entered a plea of guilty to a single charge under the CFPOA. This was the first major enforcement action taken by Canada since the coming into effect of that legislation.

Niko pleaded guilty to the charge that between February 1, 2005 and June 30, 2005, it provided goods and services to a person for the benefit of a foreign public official to induce the official to use his position to influence acts or decisions of a foreign state, in order to obtain or retain an advantage in the course of business.

Through an Agreed Statement of Facts between Niko and the Crown, it was admitted that its Bangladesh subsidiary had provided a Toyota Land Cruiser SUV valued at $190,000 to the State Minister for Energy and Mineral Resources in order to influence him in dealings with that Niko.

Furthermore, the company also paid travel and accommodation expenses (valued at $5,000) for that official to travel to Calgary and New York and Chicago, to attend a conference and visit family.

Niko was required to pay $9.5 million in fines and was subject to a three-year corporate probationary term, during which it was required to implement and comply with an anti-corruption compliance programme.

Griffiths Energy

Griffiths Energy International Inc. ("GEI") entered a guilty plea on January 22, 2013 to a criminal charge under subsection 3(1) of the CFPOA, and agreed to a fine in the amount of $10.35 million. The criminal charge related to using the cover of sham consulting agreements to funnel or agree to funnel payments in the amount of US$2 million to two entities owned and controlled by Chad's ambassador to Canada and his spouse.

GEI acknowledged in its settlement agreement that the consulting agreements, even those pursuant to which no amounts were actually paid, violated the anti-bribery provision of the CFPOA, as they constituted agreements to provide, directly or indirectly, a benefit to a foreign public official so as to induce the official to use his position to influence decisions of a foreign state for which he performs duties and functions.

Karigar

Following the first trial under the CFPOA, Nazir Karigar, an agent for Ottawa-based technology company Cryptometrics Canada, was convicted for conspiring to bribe a foreign public official. On May 23, 2014, Mr. Karigar was sentenced to three years in jail at a federal penitentiary, notwithstanding his advanced age of 67 years and failing health. His sentencing occurred based on the law that existed prior to June 2013, as the events transpired prior to the date of the amendments when the maximum term increased from five years to 14 years.

The foreign bribery scheme related to attempts by Mr. Karigar to secure a contract for Cryptometrics Canada from Air India for the supply of biometric facial recognition security

technology. Mr. Karigar provided Cryptometrics with a spreadsheet listing bribes to be paid to certain Air India officials. In June 2006, Cryptometrics' U.S. parent corporation transferred US$200,000 to Mr. Karigar's account, which Mr. Karigar claimed would be used to ensure that only Cryptometrics' bids qualified under a public tender. Under a later agreement, a further US$250,000 would be transferred to obtain the Indian Minister of Civil Aviation's approval of the Cryptometrics' bid. Ultimately, the Air India contract was not awarded to Cryptometrics, and there was no evidence that Mr. Karigar paid any bribe or the whereabouts of the funds transferred to him. Notwithstanding the absence of this evidence, the trial judge convicted Mr. Karigar holding that section 3 of the CFPOA also prohibits any scheme that amounts to a conspiracy or agreement to bribe foreign public officials.

Further enforcement activity after the conviction and sentencing of Mr. Karigar has occurred in this case. Charges were laid on June 4, 2014 by the RCMP against two U.S. nationals, Robert Barra (former Cryptometrics CEO) and Dario Berini (former Cryptometrics COO), and UK national, Shailesh Govinda, who worked with Cryptometrics. These further charges relate to bribing a foreign public official contrary to the CFPOA and fraud contrary the Criminal Code.

SNC Lavalin

On February 19, 2015, the RCMP National Division laid charges against the SNC-Lavalin Group Inc., its division SNC-Lavalin Construction Inc. and its subsidiary SNC-Lavalin International Inc. (together SNC). Each entity was charged with one count of corruption under paragraph 3(1)(b) of the CFPOA and one count of fraud under paragraph 380(1)(a) of the Criminal Code.

These charges against SNC resulted from a three-year criminal investigation in which the RCMP reviewed the company's business dealings in Libya. The alleged criminal activities took place over 10 years between 2001 and 2011 and relate to CAD 47.7 million in alleged bribes to public officials, and a supposed CAD 130 million fraud in relation to the construction of the Great Man Made River Project in Libya. Three individuals had previously already been charged as part of the Libya-related investigation, including former SNC executive vice-president Riadh Ben Aissa, who was extradited to Canada in October following the entering of a plea agreement in Switzerland. Several other former SNC-Lavalin executives and employees have been charged in connection with an investigation into a bridge building project in Bangladesh, and the company's operations in Algeria have also been under investigation. On September 10, 2014, a prominent Montreal tax lawyer was also charged with extortion and obstruction of justice for his part in the alleged scheme, which is said to have defrauded SNC-Lavalin of several millions of dollars.

The RCMP has indicated that it has 35 active CFPOA investigations.

Extractive Sector Transparency Measures Act

The *Canadian Extractive Sector Transparency Measures Act* (the "ESTMA") was proclaimed into force on June 1, 2015. The ESTMA's stated purpose is "to implement Canada's international commitments to participate in the fight against corruption through the imposition of measures applicable to the extractive sector". The legislation requires Canadian businesses involved in resource extraction to file and make publicly available reports on certain types of payments made to both domestic and foreign governments.

The ESTMA requires certain entities with connection to Canada, that are engaged in commercial development of oil, gas or minerals in Canada or elsewhere, or that control such entities, to report payments made to any government, whether foreign or domestic, in excess of CAD 100,000 in a given year. These reports are to be made available to the public.

Reports must be filed annually within 150 days of the end of each financial year of any entity subject to the ESTMA. However, the ESTMA provides that reporting is not required for the year in which the ESTMA comes into force, or for any prior year. As an example, a company with its fiscal year ending on December 31, 2015 will be obligated to report payments made from and after January 1, 2016 with its first report to be filed by May 30, 2017.

In addition, the reporting of payments made to Aboriginal governments or entities will be deferred for a two-year period following the date that the ESTMA comes into force, so the obligation to report such payments does not apply until June 1, 2017.

Natural Resources Canada (NRCan) has recently issued the following draft implementation tools for the ESTMA, which it created in consultation with industry, civil society organisations, Aboriginal experts, and provinces:

- Guidance to help businesses in the exploration and extractive sectors understand the requirements of the ESTMA;
- Technical Reporting Specifications for the reporting process including instructions on how to complete the reporting template and how reports are to be published; and
- Reporting Template in both XLS and PDF formats.

NRCan solicited comments on the implementation tools until September 22, 2015, following which it is expected that it will publish the final versions no later than November, 2015.

The Guidance provides an overview of the requirements of the ESTMA with illustrative examples, including guidance on whether a Canadian extractive business is an "entity" that engages in the "commercial development of oil, gas or minerals", whether it meets the criteria of an entity that is required to report under the ESTMA and what payments it is required to report:

***Entity**:* The Guidance confirms that the term "entity" is to be interpreted broadly to include not only those prescribed by the ESTMA (i.e. any corporation, trust, partnership or other unincorporated organisation) but also similar types of organisations such as unlimited liability corporations, limited partnerships and royalty trusts, but does not capture individuals or sole proprietorships.

***Commercial Development**:* The Guidance clarifies that the exploration or extraction of oil, gas or minerals "refers to the key phases of commercial activity" during the life cycle of a project, from prospecting to remediation, but is not intended to include "ancillary or preparatory activities" such as construction of an extraction site. The Guidance also confirms that businesses that provide goods or services associated with or related to commercial development of oil, gas or minerals would not constitute "entities" under the ESTMA, given that the activities they perform are outside the scope of commercial development. Contractors that provide such goods and services are not subject to the ESTMA by virtue of their contractual arrangements with a reporting entity.

***Reporting Entity**:* The Guidance clearly states that a business must be subject to Canadian law in order to be subject to the reporting obligations under the ESTMA. Accordingly, a parent company that is not subject to Canadian law would not be required to report even if it wholly owns a Canadian subsidiary that is required to report. The Guidance also better defines how to apply the size-related criteria in determining whether an entity is required to report payments under the ESTMA:

- the CAD 20 million in assets and CAD 40 million in revenue tests are to be based on amounts reported in an entity's consolidated financial statements in one of its two most recent financial years for its global assets and revenue (and not those of any parent

company), and converted into Canadian dollars either using the exchange rate as of the entity's financial year end or the entity's method of translating the currency conversion used in its financial statements; and

- the number of employees should be based on the average of all employees over the two most recent financial years and should include full-time, part-time and temporary employees but not independent contractors (applying the Canadian common law definition of an employee).

***Payments**:* In determining whether a payment is required to be reported under the ESTMA, the Guidance and the Technical Reporting Specifications emphasise substance over form. The Guidance provides a brief overview of the seven categories of "payments" that must be reported under the ESTMA, and directs reporting entities to use their reasonable judgment in cases where it may be unclear whether a payment should be reported under one category or another. The Guidance also specifies that, in determining whether a series of payments constitute payments to the "same payee," reporting entities must group together departments, ministries, boards, bodies and other authorities that perform or are established to perform a power, duty or function on behalf of a particular level of government (e.g. national/regional/municipal) but encourages reporting entities, where practical, to list each department or agency to whom a payment is made. For example, fee payments to the National Energy Board, Environment Canada and NRCan (which are all Canadian federal bodies) would constitute payments to the "same payee" under the ESTMA, but the report should note three separate payments made to the National Energy Board, Environment Canada and NRCan.

The Guidance also notes that the Government of Canada is monitoring risks of potential conflict between the ESTMA and the laws of a foreign jurisdiction that may hinder reporting (for example, if the terms of a concession or licence are confidential and not to be disclosed by the reporting entity) and engaging directly with jurisdictions where measures exist that may raise concerns regarding the application of the ESTMA. Reporting entities that encounter challenges in meeting the reporting requirements under the ESTMA may provide details of these circumstances to NRCan.

The Technical Reporting Specifications contain step-by-step instructions on how to complete the reporting template in XLS or PDF form and how the form is to be made available to the public and NRCan, and includes requirements for project-level reporting and online reporting.

Finally, with the issuance of the implementation tools for the ESTMA for public comment, NRCan issued a substitution determination, confirming that reports submitted to European Union and European Economic Area member states that have implemented the EU Directive at a national level may be submitted to the Minister of Natural Resources as a substitute for a report prepared under the ESTMA, provided that reporting entities include an attestation statement in their report and indicate which jurisdiction the substituted report was originally filed, and that they file within the timeframe prescribed by the other jurisdiction. Reporting entities must also notify NRCan within the deadline under the ESTMA if the filing deadline in the other jurisdiction extends beyond 150 days after the end of its financial year.

Riyaz Dattu
Tel: +1 416 862 6569 / Email: RDattu@osler.com

Riyaz advises multinational and domestic businesses on international trade policy and investment matters, international trade strategies and market-access concerns. On international trade regulations, Riyaz assists clients in designing and implementing compliance programmes on money laundering and anti-terrorist financing, export and import controls, economic sanctions and other national security issues, and in carrying out due diligence in mergers and acquisitions and other international business transactions. Riyaz also acts as counsel in international trade and investment disputes involving the application of trade laws and regulations and the enforcement of treaties. He has acted as counsel from the time of the very earliest WTO disputes concerning Canada, and the first two investment arbitrations under Canada's bilateral investment promotion and protection treaties. During his more than 25 years of practice, Riyaz has advised and represented leading businesses in a full range of industry sectors.

Osler, Hoskin & Harcourt LLP

100 King Street West, 1 First Canadian Place, Suite 6200, P.O. Box 50, Toronto ON M5X 1B8, Canada
Tel: +1 416 362 2111 / Fax: +1 416 862 6666 / URL: http://www.osler.com

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