Client Alert

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A New Era of Canadian Anti-Corruption Enforcement?

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This year has been a watershed in terms of Canada's enforcement of its Corruption of Foreign Public Officials Act ("CFPOA"):

- In January 2013, a record fine of CAD 10.35 million (USD 10.27 million) was imposed on Griffiths Energy International ("Griffiths Energy"), now known as Caracal Energy Inc., for paying a USD 2 million bribe in order to secure lucrative oil contracts in the Republic of Chad. This was the largest fine Canadian authorities have secured in a foreign corruption case, and Griffiths Energy was the first company to self-report international bribery.
- In June 2013, the Canada's federal parliament enacted several amendments that broadened the range of conduct that the CFPOA prohibits, increased the maximum penalty for violations, and expanded the jurisdiction of Canadian law enforcement to prosecute corruption by Canadian companies and individuals abroad, among other changes.
- On August 15, 2013, the first individual ever was found guilty under the CFPOA. This conviction was significant both because all prior convictions under the Act were against corporations, and because of the implications for jurisdiction over individuals as well as corporations under the amended CFPOA going forward.

I. GRIFFITHS ENERGY: CANADIAN CAPITAL, CHADIAN OIL, AND THE COST OF CORRUPTION

The case against Griffiths Energy embodied many of the challenges prosecutors faced under the version of the CFPOA that existed before the recent amendments, including a limitation on jurisdiction to conduct taking place in Canada.

Between June and November 2008, well-known Canadian investment banker Brad Griffiths and two brothers, Naeem and Parvez Tyab, unsuccessfully pursued the acquisition of petroleum exploration areas (known as "blocks") in the Republic of Chad through contacts with the Chadian embassy and meetings with government officials in Chad. In August 2009, Griffiths and the Tyabs incorporated Griffiths Energy. Later that month, Griffiths Energy signed a USD 2 million consulting agreement with a U.S. company wholly owned by Chad's ambassador to the U.S. and Canada; payment contingent on Griffiths Energy being awarded two blocks in Chad. The consulting agreement was terminated without any payment being made after Griffiths Energy's outside counsel advised against paying a government official. Griffiths Energy then entered into an identical consulting agreement with a U.S. company wholly owned by the Chadian ambassador's wife, who was also issued Griffiths Energy shares.

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On January 19, 2011, a Griffiths Energy subsidiary entered into a production sharing contract ("PSC") with the Republic of Chad; giving the subsidiary exclusive rights to two blocks in southern Chad. The arrangement included a USD 40 million signature bonus to the Chadian government. On February 7, Griffiths Energy paid the USD 2 million to the ambassador's wife's company. On July 1, 2011, a new management team was hired to run Griffiths Energy's operations. Three weeks later, Brad Griffiths drowned in a sailing accident. In early November of the same year, Griffiths Energy's new management and independent directors uncovered the consulting agreements while conducting due diligence for a planned IPO. After conducting an internal investigation into the agreements, the new management and independent directors subsequently cancelled the IPO. Griffiths Energy then reported the consulting agreements to Canadian and U.S. authorities and agreed to an information-sharing plan with the authorities. Griffiths Energy concluded its internal investigation in May 2012 and issued a public statement disclosing it. On January 14, 2013, in a sentencing agreement endorsed by the Canadian prosecutor, Griffiths Energy agreed to a CAD 10.35 million fine and to plead guilty under section 3(1),(b) of Canada's CFPOA.[1] The Crown prosecutor has since stated that he expects U.S. authorities to "back off" their investigation into Griffiths Energy now that Canada has dealt with the charges.[2]

Griffiths Energy's Decision to Self-Report During an Ongoing Internal Investigation

Griffiths Energy is the first Canadian company to self-report international bribery, and the cost to it as a result of this case is unquestionably significant. In addition to receiving the largest fine to date in Canada for foreign corruption, Griffiths Energy spent CAD 1.5 million on the internal investigation, along with time lost by management, and forfeited CAD 1.8 million in sunk pre-IPO costs. In cancelling the IPO, Griffiths Energy was forced to seek more costly private placements in order to have the necessary capital to build the infrastructure in Chad required to extract and transport oil and gas.

Consequently, the magnitude of the decision whether or not to self-report a foreign corruption violation, particularly when an internal investigation is still ongoing and the bribe is inexorably tied to the company's only asset (the PSC with Chad), cannot be overstated.

On the other hand, by proactively notifying authorities and agreeing to an information-sharing arrangement, Griffiths Energy was able to conduct its own internal investigation and disclose information to the public on its own terms once the investigation concluded. The Statement of Facts described Griffiths Energy's cooperation as "full and extensive" and its changes to internal controls as "robust." The prosecution was clearly influenced by management's openness. First, the settlement agreement did not include a ban on the Griffiths Energy directors serving on the board, finding that none of the new management team was involved with or knew about the consulting agreements in advance. Second, and unlike the company in Canada's previous high-profile foreign

[1] Section 3(1),(b) of the CFPOA provides that "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; (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions." *See* CFPOA, S.C. 1998, C.34, http://laws-lois.justice.gc.ca (last amended June 19, 2013).

[2] *See* Carrie Tait, *Griffiths to pay millions in African bribery case*, THE GLOBE AND MAIL (Jan. 22, 2013), http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/griffiths-to-pay-millions-in-african-bribery-case/article7622364.

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corruption case, Griffiths Energy is not subject to a probation period. Finally and critically, there was no disgorgement component of the settlement, and Griffiths Energy was not required to void its PSC with Chad. The Statement of Facts concludes that the fine, though considerable, will not "impact the continued economic viability of [Griffiths Energy]."

II. CANADA'S ANTI-CORRUPTION LAW: FROM LAMB TO LION?

Canada's CFPOA and the U.S. Foreign Corrupt Practices Act ("FCPA") have always had many significant parallels that are illustrated by the facts of the Griffiths Energy case. However, there were also notable differences between the two that had significant implications for enforcement in Canada, particularly regarding jurisdiction. The recently-enacted amendments in large part eliminate those differences.

Longstanding Similarities Between the CFPOA and the FCPA

As in the FCPA, indirect benefits are treated the same as direct bribes under the CFPOA so long as the intent is to induce a foreign official to use his or her influence in their role as an official.[3] Thus, for example, while Griffiths Energy's original external legal counsel was correct to advise Griffiths Energy that it could not pay the ambassador's company the USD 2 million consulting fee; paying his wife's company the fee instead had no meaningful distinction under the CFPOA.

In addition, neither the FCPA nor CFPOA require that the bribe be successful to be a violation; the attempt to influence a foreign official is enough. In the Griffiths Energy case, the Canadian prosecution did not allege that any payment actually had an impact on the oil rights Griffiths Energy received. In the course of the investigation, Chad's Minister of Petroleum and Energy provided a statement that the ambassador had no influence on or role in granting the PSC. Furthermore, after the consulting agreement with the ambassador's wife was signed and before the PSC was endorsed, the Republic of Chad, which currently ranks as the 11th most corrupt country in the world according to Transparency International, changed its procedure for approving development rights to a three-step legislative process so that no single individual could be responsible for the decision to grant the rights. Additionally, it took Griffiths Energy two years and an increase of USD 38 million in the signature bonus payable to the Chadian government before its application was accepted.

The Previous Difference in Scope of Enforcement Under the CFPOA and the FCPA

Before the recent amendments to the CFPOA, an important distinction between the CFPOA and the FCPA related to their jurisdictional reach. The FCPA applies to (1) issuers with registered U.S. securities; (2) U.S. domestic concerns; and (3) foreign persons or entities that engage in any act in furtherance of a corrupt payment while in U.S. territory. In contrast, under established principles of Canadian law, the CFPOA's jurisdiction extended only to cases that had a "real and substantial" link to Canada,[4] i.e., the statute did not explicitly provide for jurisdiction over extraterritorial conduct by Canadian nationals (nationality jurisdiction). The Canadian government had taken the position that it would apply nationality jurisdiction only where it had a treaty obligation

[3] *See* 15 U.S.C. §§ 78dd-2(a)(3), 78dd-3(a)(3)

[4] *R. v. Libman,* [1985] 2 S.C.R. 178 (Can.).

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to do so, which the Canadian government believed it did not with respect to foreign bribery.[5] In light of the Organisation for Economic Co-operation and Development's ("OECD") concerns regarding this narrow basis of jurisdiction, Canadian prosecutors began expressing an intent to apply territorial jurisdiction with a "broad understanding" of the real and substantial link test until they were either curtailed by the courts or the legislation was amended to include nationality jurisdiction.[6] Despite this, in a 2011 report on Canada's enforcement of its anti-foreign bribery legislation, the OECD found that "the absence of nationality jurisdiction leaves a substantial loophole in the coverage of the CFPOA, and needlessly poses a substantial hurdle to investigation and prosecution in obliging authorities to prove 'a real and substantial link' to the territory of Canada."[7]

Although in the Griffiths Energy case, the illegal conduct was carried out in the U.S. and Chad, Canadian prosecutors apparently took the position that the involvement of a Canadian company and its wholly owned subsidiary alone provided a "real and substantial" link sufficient to subject Griffiths Energy to the CFPOA. This would appear to show that, even before the CFPOA was amended to provide for nationality jurisdiction, the Canadian government was moving towards the approach provided for in the FCPA in terms of enforcement.

June Amendments to the CFPOA: The Fighting Foreign Corruption Act

In February 2013, less than two weeks after Justice Scott Brooker of the Alberta Queen's Bench approved the record judgment against Griffiths Energy, Canadian Foreign Affairs Minister John Baird announced that several amendments to the CFPOA were being introduced to the Canadian Senate "to help ensure that Canadian companies continue to act in good faith in the pursuit of freer markets and expanded global trade" and as a "a good faith sign that Canada's good name retains its currency."[8] On June 19, 2013, these amendments received Royal Assent and became law. The amendments, known as the *Fighting Foreign Corruption Act*, include several provisions designed to strengthen and broaden enforcement under the CFPOA.[9] As described below, these new provisions appear to bring the CFPOA more closely in line with the FCPA.

Applying nationality jurisdiction. Perhaps most notably, the Fighting Foreign Corruption Act contains a provision that addresses the OECD's concerns over the limitations of territorial jurisdiction by formally authorizing nationality jurisdiction. The CFPOA now applies to the actions of Canadian citizens, permanent residents, companies, and partnerships irrespective of the connection of the act (or omission) to Canada.[10] Again, this

[5] OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (March 2011) at 37, *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf.

[6] *Id.*

[7] *Id.* at 38.

[8] News Release, Dep't of Foreign Affairs & Int'l Trade Can., *Strengthening Canada's Fight Against Foreign Bribery* (Feb. 5, 2013), http://www.international.gc.ca/media/aff/news-communiques/2013/02/05b.aspx?lang=eng&view=d.

[9] Fighting Foreign Corruption Act, S.C. 2013, c. 26 (Can.) sections 4-6, http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6246177.

[10] *Id.* sections 5(a)(1) – (c).

> 1) Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 or 4 — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counseling in relation to, an offence under that section — is deemed to have committed that act or omission in Canada if the person is
>
> (a) a Canadian citizen;

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aligns enforcement under the CFPOA with that under the FCPA by focusing on the nationality of the person or entity committing the act of bribery rather than solely the location of or circumstances surrounding the bribe itself.

Broadening definition of "business." The amendments remove the "for profit" requirement from the definition of a "business." The new definition is consistent with the FCPA, which does not distinguish between for-profit and not-for-profit entities.

Adding a "books and records" violation. The amendments add an accounting violation to the CFPOA by criminalizing the falsifying of records to disguise instances of bribery and concealing bribery payments in an entity's books and records. Although similar to the FCPA's books and records offense, this accounting provision only applies to bribery-related violations. However, under the amended CFPOA, such violations are exclusively criminal and subject to the enhanced penalty described below.

Increasing penalties. Previously, the maximum penalty for violations of the CFPOA by individuals was five years' imprisonment. Under the amendments, this has been increased to 14 years for both bribery and for violations of the new accounting provisions. This is considerably harsher than the FCPA for bribery violations (maximum of five years) but less harsh for books and records violations (maximum of 20 years).

Eliminating facilitation payment exception. The amendments provide for the repeal of the exception for so-called "facilitation payments,"[11] that is, payments for an "'act of a routine nature' that is part of the foreign public official's duties or functions." In this regard, the new CFPOA more closely resembles the UK's Bribery Act 2010 and the domestic bribery laws of many countries, which do not make an exception for facilitation payments— and differs from the FCPA, which does provide such an exception.

Limiting enforcement to one agency. The CFPOA previously allowed for a variety of agencies to bring charges under the Act, including municipal, provincial, or federal police. The amendments limit this authority to the federal police force, the Royal Canadian Mounted Police. In addition to removing the uncertainty "that would attend parallel enforcement by different levels of government,"[12] this change is consistent with the FCPA, the criminal enforcement of which is carried out exclusively by the Department of Justice.[13]

It may be premature to call the amended CFPOA "the Canadian FCPA" until cases are brought and tried under the new provisions, but the enactment of the *Fighting Foreign Corruption Act* can certainly be viewed as evidence

(b) a permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act who, after the commission of the act or omission, is present in Canada; or

(c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.

[11] *Id.* (The Governor in Council is to decide when the repeal of the "facilitation payments" provisions will become effective).

[12] *Bill S-14 − Fighting Foreign Corruption Act,* Canadian Bar Ass'n Anti-Corruption Team (March 2013), *available at* http://www.cba.org/CBA/submissions/pdf/13-17-eng.pdf.

[13] Because the CFPOA does not have a civil component there is no SEC-equivalent agency charged with its enforcement.

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of Canada's effort to continue its, as the OECD put it in a May report, "enforcement momentum."[14] This momentum can be seen in the most recent conviction in the *Karigar* case.

III. *KARIGAR:* THE FIRST CONVICTION OF AN INDIVIDUAL UNDER THE CFPOA

On August 15, 2013, Nazir Karigar became the first individual to be found guilty under the CFPOA.[15] Karigar was arrested in 2010 for his alleged participation in a conspiracy to bribe Air India, an airline owned and controlled by the Government of India, to obtain business for a Canadian security company.[16] During trial, Karigar's lawyer claimed that Canada had no jurisdiction over Karigar's activities because the key events took place in India, and the Canadian security company was controlled by executives based in the United States.[17] However, Justice Charles Hackland of the Ontario Superior Court of Justice concluded that there was a "real and substantial connection" to Canada because Karigar is a Canadian and the U.S. executives planned to use bribes to benefit the Canadian security company, not its U.S. affiliate; effectively finding nationality jurisdiction applied.[18] A date for sentencing has not been set.[19]

CONCLUSION: IMPLICATIONS FOR ANTI-CORRUPTION ENFORCEMENT IN CANADA

Commenting on the Griffiths Energy case after its conclusion, Justice Brooker called it an "embarrassment" to Canadians, as well as undermining of Chad's government (in the week following the fine's announcement, Chad fired its ambassador). Following a CAD 9.5 million fine issued by Justice Brooker against another Canadian company in 2011 and the recent enactment of the Fighting Foreign Corruption Act, it is clear that Canada is becoming more sensitive to the participation of Canadian companies in foreign corruption. It remains to be seen, however, whether the new provisions combined with the record fine in the Griffiths Energy case (mitigated as it was with some apparent leniency for cooperation) will lead to more voluntary disclosure by Canadian companies.

Given the recent amendments to the CFPOA and the real possibility of individual exposure to criminal liability, management and independent board members of Canadian companies should take a preemptive approach by implementing a rigorous set of internal controls, particularly in closely-held companies. In the case of Griffiths Energy, the founder's accidental death and the company's subsequent undertaking of due diligence for an IPO resulted in the bribery coming to light in time for the new management to take action ahead of the authorities. In the absence of these rather singular occurrences, management should adopt a policy of regularly scrutinizing business practices that involve dealings abroad, including conduct of Canadian employees traveling overseas and of the foreign subsidiaries of Canadian companies.

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[14] OECD Working Group on Bribery, *Canada: Follow-up to the Phase 3 Report & Recommendations* (May 2013) at 3, *available at* http://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf

[15] *See* Chloé Fedio, *Canadian business man guilty of conspiring to bribe Indian officials*, OTTAWA CITIZEN (Aug. 15, 2013), http://www.ottawacitizen.com/news/ottawa/Canadian+business+guilty+ bribing+Indian+officials/8794439/story.html.

[16] *Id.*; News Release, *Accused Guilty in Corruption Case*, Marketwired (Aug. 15, 2013), http://www.marketwire.com/press-release/accused-guilty-in-corruption-case-1821573.htm.

[17] See Megan Gillis, Hi-tech exec Nazir Karigar guilty of trying to bribe Air India officials, Ottawa Sun (Aug. 15, 2013), http://www.ottawasun.com/2013/08/15/high-tech-exec-nazir-karigar-guilty-of-trying-to-bribe-air-india-officials.

[18] *Id.*

[19] *Id.*

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