

## A Deeper Dive into Canada's First Significant Foreign Bribery Case: Niko Resources

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The guilty plea of Calgary-based Niko Resources Ltd. (Niko) represents the most significant development in Canada's efforts to fight foreign bribery since the 1999 implementation of Canada's *Corruption of Foreign Public Officials Act* (CFPOA).

Along with investigations initiated by the RCMP in 2011 against Blackfire Exploration and SNC-Lavalin and the continued prosecution Nazir Karigar for alleged bribery of officials in India, the Niko case appears to signal a new era of aggressive enforcement of foreign anti-bribery rules in Canada. Additional prosecutions or settlements are expected in the near future as it is understood that the RCMP has approximately 30 other foreign corruption investigations ongoing.

The general facts surrounding the Niko case are now well known<sup>1</sup>, but a closer examination of the Alberta Court of Queens Bench sentencing proceedings<sup>2</sup> and the Agreed Statement of Facts<sup>3</sup> provides helpful insights into the approach Canadian authorities are taking to the investigation and prosecution of foreign bribery and the steps companies should be taking to minimize risk of CFPOA violations.

### Background

On June 24, 2011, Niko pled guilty to a single charge of bribery under the CFPOA related to two incidents that occurred in 2005 following an explosion at its Bangladesh natural gas field. At that time, Niko was also engaged in negotiations of a gas pricing contract with the Bangladesh government. Niko's Bangladesh subsidiary provided a \$190,984 vehicle to the Energy Minister in Bangladesh and paid his travel costs of \$5,000 to attend an Energy Expo in Calgary and for a trip to New York and Chicago to visit family.

The Court accepted the sentencing recommendation which included a fine and victim surcharge totalling \$9,499,000 and a Probation Order under which Niko will be subject to Court supervision and regular independent audits to confirm its compliance with the CFPOA. Costs of compliance with the Probation Order will be borne by Niko.

In accepting the sentence, the Court noted that the foreign bribery "tarnishes the reputation of Alberta and of Canada [and]...is an embarrassment to all Canadians." The Court went on to state that "the fact that a Calgary-headquartered oil and gas company has bribed a foreign government official is a dark stain on Calgary's proud reputation as the energy capital of Canada."

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<sup>1</sup> For a general background of the case, see "\$9.5 Million Fine is First Significant Action Under Canada's Foreign Corruption Law", June 27, 2011, McCarthy Tétrault LLP Legal Alert (at [http://www.mccarthy.ca/article\\_detail.aspx?id=5461](http://www.mccarthy.ca/article_detail.aspx?id=5461)).

<sup>2</sup> Transcript of Proceedings Taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary Alberta, *Her Majesty the Queen v. Niko Resources Ltd.*, E-File No.: CCQ11NIKORESOURCES, June 24, 2011.

<sup>3</sup> Agreed Statement of Facts, Court of Queen's Bench of Alberta, Judicial District of Calgary, *Her Majesty the Queen and Niko Resources Ltd.*, June 23, 2011.

## **Key Points and Observations**

A number of instructive compliance points and observations can be gleaned from Niko's sentencing.

### **Complexity of the Investigation**

It is trite to observe that corporate criminal investigations can be particularly resource-intensive, and Niko's case was no exception. This extensive multi-country investigation spanned six years and was complex and costly.

The RCMP alone incurred expenses of \$870,000 and worked in cooperation with the Bangladesh Anti-Corruption Commission, the US Department of Justice Fraud Section, the US FBI International Corruption Unit, and law enforcement in Japan, the United Kingdom, Switzerland and Barbados. It also involved reviewing ten terabytes of data obtained from Niko, conducting witness interviews in several countries as well as obtaining numerous judicial authorizations.

In addition to demonstrating Canada's willingness to commit significant resources to CFPOA enforcement, this also reflects how costly it is for target companies. In order to effectively respond to these investigations, they must devote considerable internal resources, including the time and effort of company executives and board members, as well as retain external counsel and other advisors.

### **Influence of US FCPA Enforcement**

In the investigation and prosecution, Canadian authorities worked very closely with US officials - so much so, that the Crown characterized the prosecution as a "joint effort" by the Alberta prosecution service and the US Department of Justice (DOJ).

The Probation Order, believed to be the first of its kind in Canada, was drafted in consultation with the US DOJ and described by the Crown as "a Canadianized version of similar enforcement actions in the United States" - notably, it requires Niko to assist not just Canadian authorities, but also US law enforcement agencies with respect to any investigation or prosecution arising out of the matter. The terms of the Probation Order closely follow those found in recent US DOJ deferred prosecution agreements under the *Foreign Corrupt Practices Act* (FCPA). Further, in approving the fine, the Court also considered examples provided by the Crown of US penalties imposed under the FCPA.

There are some important differences between the Canadian and US anti-bribery regimes, including lack of civil enforcement mechanism in the CFPOA and the absence of books and records obligations (which comprise a significant portion of US enforcement action). However, the Niko plea and sentencing suggest that Canadian prosecutors and courts will be significantly influenced by US precedent and practice in this area.

### **Sentencing Factors Before the Court**

On sentencing, the Court observed that "any sentence imposed by this Court must have, as its priority, the objectives of demonstrating the Court's strong denunciation of such conduct and providing a meaningful deterrence for others who might be tempted to commit the same

offence.” The Crown put before the Court and the Court considered a number of important mitigating and aggravating factors supporting the amount of the fine and the Probation Order.

Although Niko had not come forward to voluntarily disclose these issues prior to the RCMP’s initiation of the investigation, there were other mitigating factors before the Court. These included Niko’s guilty plea which avoided expending further Crown resources, its cooperation with authorities once it knew it was being investigated, its agreement to take remedial steps and cooperate on a go-forward basis, its lack of a prior criminal record, and the absence of evidence that any benefit actually accrued to Niko as a result of the bribes.

Aggravating factors considered to support the large size of fine included Niko’s position as a large and globally successful company, the seniority of the bribed Bangladeshi official, the existence of two separate incidents of bribery, and the significant resources expended on the RCMP investigation.

### **“Real and Substantial” Link**

Under Canadian common law, the commission of an offence under the CFPOA requires a “real and substantial” connection to the territory of Canada. This territorial test for jurisdiction requires that a “significant portion of the activities constituting the offence took place in Canada”.<sup>4</sup> In the past, some have pointed to this test as limiting the ability of Canadian authorities to pursue CFPOA prosecutions and convictions. Although amendments to the CFPOA were proposed in the past to provide for nationality rather than territorial jurisdiction, the bill died on the Order Paper when Parliament was prorogued in 2009 and has not since been reintroduced.

In the Niko case, the parties agreed that there was a “real and substantial link between Canada and the offence”. Niko conceded that (i) it funded its subsidiary’s acquisition of the vehicle and knew that the subsidiary had delivered it to the Bangladeshi Minister and (ii) it had paid the travel and accommodation expenses of the Minister.

Notably, the Court has before it a number of factors connecting Niko to the impugned activity, including the following: Niko’s Chief Executive Officer was a director of the subsidiary “ensuring Niko Canada’s knowledge of Niko Bangladesh’s activities”, the subsidiary was solely funded by Niko, the president of the subsidiary reported up chain to Niko, Niko “closely monitored” all of its foreign subsidiaries, most of the subsidiary’s transactions were monitored from Canada, and the subsidiary’s accounting was managed from an Indian subsidiary which reported to Niko.

### **Guidance on Anti-bribery Compliance Measures**

Niko’s Probation Order contains a number of continuing obligations imposed on Niko regarding disclosure and reporting to the RCMP, assistance to Canadian and US law enforcement authorities, strengthening internal compliance controls, and conducting independent compliance audits to be paid for by Niko.

The internal controls and policies specified in the Order are particularly instructive as a list of CFPOA compliance measures expected to be implemented by Canadian companies, and include:

- (i) internal accounting controls for maintaining fair and accurate books and records;

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<sup>4</sup> *R. v. Libman*, [1985] 2 S.C.R. 178 (Supreme Court of Canada).

- (ii) a rigorous anti-corruption compliance code designed to detect and deter violations of CFPOA and other anti-corruption laws, which includes:
  - (a) a clearly articulated written policy against violations of the CFPOA and other anti-bribery laws;
  - (b) strong, explicit and visible support from senior management;
  - (c) compliance standards and procedures that apply to all directors, officers, employees, and outside parties acting on behalf of the company; and
  - (d) policies governing gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorships, facilitation payments and solicitation and extortion.
- (iii) conducting risk assessment in order to develop these standards and procedures based on specific bribery risks facing the company and taking into account a number of specified factors, including the company's geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, and involvement in joint venture agreements;
- (iv) reviewing and updating anti-corruption compliance measures at least annually;
- (v) assigning anti-corruption compliance responsibility to senior corporate executive(s) with direct reporting to independent monitoring bodies, such as internal audit or the Board of Directors;
- (vi) a system of financial and accounting procedures designed to ensure fair and accurate books and records and that they cannot be used to effect or conceal bribery;
- (vii) periodic training and annual certification of directors, offices employees, agents and business partners;
- (viii) systems for providing anti-corruption guidance and advice within the company and to business partners, confidential reporting of possible contraventions, protection against retaliation, and responding to reports and taking appropriate action;
- (ix) disciplinary procedures for violations of anti-corruption laws and policies;
- (x) due diligence and compliance requirements for the retention and oversight of agents and business partners, including the documentation of such due diligence, ensuring they are aware of the company's commitment to anti-corruption compliance, and seeking reciprocal commitments;
- (xi) standard provisions in agreements with agents and business partners to prevent anti-corruption violations – representations and undertakings, the right to audit books and records of agents and business partners, and termination rights in the event of any breach of anti-corruption law or policy; and

- (xii) periodic review and testing of anti-corruption compliance systems.

### **Continuing Developments**

2011 has been a watershed year for Canadian enforcement of anti-corruption rules. In addition, Canadian companies should be carefully monitoring their exposure to developments in other jurisdictions, including the implementation of the UK Bribery Act 2010, the continuing extraterritorial reach of the US FCPA, and new US Securities and Exchange Commission whistleblower rules that provide significant financial incentives for employees and others to report potential FCPA violations.

If they haven't already, companies should be ensuring that they have developed, implemented and are following robust anti-bribery compliance measures.

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