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$9.5 Million Fine is First Significant Action Under Canada's Foreign Corruption Law

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On June 24, 2011, after entering a plea of guilty to a charge of bribing a foreign public official, Calgary-based Niko Resources Ltd. (Niko) was sentenced to a fine of approximately $9.5 million and placed on three years' probation.

This 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) and signals a new era of enforcement of foreign anti-bribery rules in Canada. The RCMP has indicated that it is currently conducting over 20 investigations of Canadian companies allegedly engaged in the corruption of officials overseas.

If it hasn't already, any Canadian company engaged in cross-border transactions should be carefully reviewing its practices and procedures, including effective due diligence, to ensure full compliance with Canadian anti-corruption laws, and to the extent applicable, the U.S. *Foreign Corrupt Practices Act* (FCPA) and The *Bribery Act* 2010 in the United Kingdom.

State of Affairs Prior to the Niko Plea

Until now, instances of public enforcement of the CFPOA have been few and far between. The only previous conviction occurred in 2002, when the Hydro Kleen Group pleaded guilty to bribing a U.S. immigration officer working at the Calgary International Airport and was fined $25,000. Two other charges against the president and an employee of Hydro Kleen were stayed. Notably, the fine imposed was less than the amount of the bribe at issue.

In recent years, Canada has come under significant international pressure to demonstrate its commitment to enforcing its laws against the bribery of foreign public officials. In January 2008, Canada established an international anti-corruption unit in the RCMP's commercial crime unit consisting of two teams, one in Calgary and the other in Ottawa, dedicated to investigating potential contraventions of the CFPOA, as well as bribery of domestic public officials contrary to Canada's *Criminal Code* and the laundering of the proceeds of crime inside Canada. The RCMP is now reported to have over 20 on-going investigations of Canadian companies suspected of CFPOA violations.

Fruits of that labour appeared to emerge in May 2010, when charges were brought against Nazir Karigar for allegedly bribing an Indian government official in order to facilitate a multi-million dollar contract for the supply of a security system. The company in that case has not yet been charged and the matter is still before the courts.

More recently, Canada has been criticized by the Organization of Economic Cooperation and Development (OECD) for inadequate enforcement of its prohibitions against foreign bribery. In its March 18, 2011 report, the OECD expressed significant concerns with Canada's enforcement record and identified a number of problematic areas, including the application of insufficient penalties and the requirement at common law that the commission of an offence under the CFPOA requires a "real and substantial" connection to the territory of Canada. Although amendments to the CFPOA were proposed to address the latter concern by providing for nationality jurisdiction, the bill died on the Order Paper when Parliament was prorogued in 2009 and has not since been reintroduced.

The Niko Plea

Niko, but none of its executives, filed a guilty plea in relation to a single charge of bribery under the CFPOA relating to two incidents occurring in 2005 following explosions at its northeastern Bangladesh natural gas field. The agreed statement of facts filed with the Court by Niko and the Crown indicates that at that time Niko had provided a vehicle worth approximately $190,000 to the Energy Minister in Bangladesh and paid his travel costs of $5,000 to attend an Energy Expo in Calgary and for a personal trip to New York.

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 audits to confirm Niko's compliance with the CFPOA. Costs of compliance with the Probation Order will be borne by Niko.

According to press reports, the presiding judge, Justice Scott Brooker of the Alberta Court of Queen's Bench, described Niko's conduct as "an embarrassment to all Canadians" and a "dark stain on Calgary's proud reputation as the energy capital of Canada."

Canada's *Corruption of Foreign Public Officials Act*

The Niko case represents the first significant enforcement action taken under the CFPOA. The CFPOA was enacted in 1999 in accordance with Canada's commitments under the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. The CFPOA, like the Convention itself, was partly the result of U.S. efforts to see its trading partners establish anti-corruption standards similar to those contained in its FCPA and thus level the playing field for U.S. businesses in the international market place.

Violation of the CFPOA's anti-bribery prohibition consists of four principle elements:

i. a direct or indirect giving, offering or agreement to give or offer a loan, reward, advantage or benefit of any kind,
ii. to any foreign public official or any person for the benefit of a foreign public official,
iii. as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or 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, and
iv. in order to obtain or retain an advantage in the course of a business.

Canadian companies can be liable under the CFPOA, not only for making improper payments but also for making an offer to pay that does not involve an actual payment. Further, a company may be liable for payments by its local agent if the company authorized the payment or if it knew the illicit payment would be made.

The CFPOA provides an exception for so-called facilitation or "grease" payments, i.e., payments to expedite or secure the performance by a foreign public official of routine acts that are part of the foreign official's duties — for example, issuing licences to do business or processing visas or work permits. Payments that are allowed or required under the laws of the foreign state are also exempted as are those that are for reasonable expenses incurred in good faith by the foreign official and are directly related to (i) the promotion, demonstration or explanation of the company's products and services or (ii) the execution or performance of a contract with the foreign state.

Penalties under the CFPOA are criminal in nature. Any person who contravenes the CFPOA is guilty of an indictable offence and liable to imprisonment for a term of up to five years. In addition, under Canada's *Criminal Code*, individuals and organizations may be subject to fines with no upper limit. Proceeds obtained from the bribery of foreign public officials may also be forfeited to the Canadian government. As an indictable offence, the CFPOA violation is also considered a "designated offence" which means that the *Criminal Code*'s provisions against money laundering apply. Those provisions prohibit dealing with any property or any proceeds of property with the intent to conceal or convert, knowing or believing that the property or proceeds were obtained directly or indirectly from the bribery of foreign officials.

Beyond the financial penalties, there are of course significant reputational consequences for failing to abide by the CFPOA which can lead to substantial deterioration of shareholder value. Further, many anti-bribery investigations and convictions, particularly under the U.S. FCPA, have been the result of potential violations discovered during the due diligence phase of M&A transactions. A target company's failure to have appropriate compliance measures in place can raise significant corruption risk, thereby affecting the purchase price or, in some cases, causing the entire deal to fall apart.

Impact of the Niko Plea

The Niko case sends a strong signal to Canadian companies that they are now facing a new enforcement environment. It is expected that, as the 20 or so on-going RCMP investigations progress, further prosecutions, settlements and convictions for non-compliance with anti-bribery rules will be announced.

Canadian companies should be carefully reviewing their processes and procedures to ensure that their internal controls effectively detect and prevent foreign bribery and thereby minimize the risk of exposure to CFPOA violations. The core elements of these measures should include:

i. a compliance manual available to all employees that clearly articulates the necessary requirements and due diligence for compliance with anti-bribery laws;
ii. appointment of authoritative officers who are responsible and accountable for anti-bribery compliance;

iii. regular education and training programs for employees and executives;
iv. regular and comprehensive auditing to assess and confirm compliance levels;
v. processes for internal and external reporting of potential violations and protections against reprisals when employees raise concerns with potential non-compliance;
vi. an anti-bribery risk review of projects or proposals involving business with other countries; and
vii. review of relationships, including governing legal agreements, with all business partners to establish and document compliance with anti-bribery rules; this includes, for example, requiring specific provisions in agency agreements to ensure third party representatives understand and comply with these requirements.

It is also important to be aware of developments beyond Canada. In certain circumstances, Canadian companies may be subject to the requirements of aggressive anti-bribery laws in other jurisdictions, including The *Bribery Act* 2010 in the United Kingdom and the U.S. FCPA. The U.K. legislation comes into force on July 1, 2011 and, *inter alia*, makes it an offence for a commercial organization to "fail to prevent bribery by associated persons," including its employees, agents and subsidiaries. Unlike most other anti-bribery legislation, it also bans facilitation payments. In the United States, there have been many cases of multi-million dollar fines imposed for FCPA violations in recent years — this will undoubtedly intensify with the Securities and Exchange Commission's new whistleblower rules that reward individuals who come forward with information with up to 30 percent of the fines eventually imposed.

McCarthy Tétrault's International Trade and Investment Law Group has extensive experience in assisting Canadian companies in dealing with anti-bribery measures and is available to advise on related compliance, enforcement and strategic planning issues.