

# The Niko Resources Anti-Bribery Case

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The prosecution of Niko Resources Ltd. under Canada's *Corruption of Foreign Public Officials Act* (CFPOA) has received a great deal of attention. In addition to being the first significant prosecution under Canadian anti-bribery legislation, the case and its outcome suggest that despite the complexity and cost of what are often multi-country investigations over several years, more vigorous enforcement of anti-corruption legislation may soon be the norm in Canada.

Last year Niko pled guilty to a charge of bribery under Canada's CFPOA in connection with events surrounding an explosion that took place at Niko's natural gas field in Bangladesh. The company was fined nearly \$9.5 million and was made subject to an extensive probation order. Because Niko entered a guilty plea, thus sparing the State from conducting a full prosecution, the fine imposed was less than it would otherwise have been. The extent and magnitude of the sentence also turned on the fact that as far as it could be determined no real benefit accrued to Niko from the prohibited activities at issue.

The Court's view of this type of offence was made clear at the sentencing hearing:

"Bribery tarnishes the reputation of Alberta and of Canada [and] ... is an embarrassment to all Canadians. . . .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."

At the time of the explosion Niko was in negotiations over a gas pricing contract with the Bangladeshi government. The specific conduct at issue related to two sets of benefits provided through Niko's local subsidiary to the Bangladeshi Minister of Energy: (1) a \$190,984 SUV vehicle and (2) payment of a trip to Calgary for business and on the way a side trip to New York and Chicago to visit relatives (the total value of which benefits were in the range of \$196,000). These amounts were found to have constituted "bribes" within the meaning of the Act.

The offence with which Niko was charged requires a "real and substantial" connection to the territory of Canada. In the past this requirement has acted as a limiting factor to successful prosecutions. In the Niko case, however, the issue was conceded. For the purposes of the case, the parties agreed that the required link between the offence and the territory of Canada had been established as Niko had funded the bribes and knew of their purpose.

#### A LOOK INTO THE FUTURE: COMPLIANCE MEASURES IMPOSED

As part of the penalty, the Court imposed a probation order with far reaching consequences. A probation order of this type has not been previously imposed in Canada. The order requires Niko to report suspicious activity and assist in law enforcement. But it is the measures dealing with future compliance that are of particular interest from the point of view of risk management.

In this regard, Niko was required to establish an anti-corruption compliance code. Among other things, the code is to include (1) a written policy against violations and compliance standards and procedures applicable to all directors, officers, employees, and outside parties acting on behalf of the company and (2) explicit policies and detect/control systems regarding gifts, entertainment expenses, customer travel, political contributions, charitable donations, sponsorships, etc. The code is to be put into place under the direct supervision and responsibility of senior management and the board of directors and it must extend by design to all of the company's partners and agents. Interestingly, Niko was ordered to undertake a risk assessment prior to designing and implementing any anti-corruption measures to ensure that new measures were soundly based on company-specific risks.

Another notable feature of the case was the close cooperation of Canadian and U.S. authorities (the prosecutor described the case as a "joint effort" with the U.S. Department of Justice). The probation order reflects a certain Americanization of the legal process in this area: in addition to the close prosecutorial cooperation, the order was modeled on U.S. approaches to anti-corruption enforcement action under the American *Foreign Corrupt Practices Act*.

#### CONCLUSIONS

Niko is not the only instance of CFPOA enforcement action by Canada. A number of other investigations of this type appear to be presently underway. Stay tuned for further updates.

In light of these developments, it is sound advice that Canadian companies active abroad should be assessing with great care their potential exposure to foreign corruption laws and the sanctions that might be imposed. At a minimum, companies with even the minimum of linkages to Canada should put in place effective company-wide awareness, monitoring and compliance measures similar to those imposed on Niko. Further, note that heightened anti-corruption measures are not unique to Canada. A number of other countries in which Canadian business interests are often active, including the U.S. and the U.K., have also stepped up their regulation and enforcement in this area.