

Anti-bribery laws: The net tightens

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In the spring of 2005, two representatives from Calgary-based Niko Resources's subsidiary in Bangladesh delivered a new Toyota Land Cruiser worth \$190,984 to the country's state minister for energy and mineral resources. Little did they know that the relatively small bribe would lead to a fine that would ultimately cost their parent company about 50 times that amount — and ratchet up anti-corruption compliance standards in a country with a reputation for complacency.

Niko Resources ended up pleading guilty to an offence under *Canada's Corruption of Foreign Public Officials Act* (CFPOA) and paid \$9.5-million in fines and penalties. The court also ordered the company to undertake a thorough review of its existing internal controls, policies and procedures; implement a detailed compliance program and conduct compliance audits at least once a year thereafter, among other things.

Corporate Canada is paying attention.

"There is a sense that the net is starting to tighten and that the importance... of Western companies having to stay clear of corruption has become much more intense," says James Klotz, a partner with Miller Thomson LLP in Toronto and president of Transparency International Canada.

"Until now, the vast majority of inquiries from corporate counsel were generated because of [*Foreign Corrupt Practices Act*] practices in the U.S.," says John Boscariol, a partner with McCarthy Tétrault LLP in Toronto. "But Niko has fundamentally changed that. Now, the questions are based on what's going on in Canada. Finally, we've got a case that shows Canadian law has teeth. It's a very strong signal that the Canadian government is serious about enforcement in this area."

The Niko case is the latest broadside in the global effort to crack down on corruption. Anti-bribery legislation is not new — the United States was one of the first countries to tackle corruption with the introduction of the *Foreign Corrupt Practices Act* (FCPA) in 1977 (amended in 1998), and many Canadian companies that do business in, or with the U.S. have already implemented measures to comply with the legislation. But the stakes are getting higher: The cost of getting caught is escalating — the German multinational Siemens AG paid a record \$1.6-billion (U.S.) in 2008 — and the net has been cast even wider with the introduction of the U.K.'s *Bribery Act* on July 1 — on paper the strongest anti-corruption law yet to be enacted, observers say.

"Anti-bribery laws are front and centre now," says Amita Kent, regional lead counsel for Europe and Canada with Merck Canada Inc. in Montreal. "This is forcing companies to have a long hard look at their policies [and] training."

A brand new era

Earlier this year, the Organization for Economic Development and Co-operation (OECD) released a highly critical report of Canada's anti-corruption practices. For example, it noted that since the introduction of the CFPOA in 1999, only one company — Alberta-based Hydro Kleen Group Inc. — had been found guilty of paying a bribe to a foreign government official. (The company was fined \$25,000 in 2005 for bribing a U.S. immigration officer at Calgary's international airport.)

But since the Niko case this summer, the RCMP has raided the office of Calgary-based mining company Blackfire Exploration Ltd. based on allegations that it

Here's what your organization needs to do to stay out of trouble.

By Pablo Fuchs



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bribed the mayor of a small town in Mexico. In early September, it was reported Montreal-based engineering giant SNC-Lavalin's offices near Toronto were raided in connection with allegations of corruption related to a project in Bangladesh.

Meanwhile, the introduction of the U.K.'s *Bribery Act* has ramped up compliance requirements for any company doing any type of business in or through the U.K. For example, an Australian oil and gas company that has assets in Africa, but is raising money in the U.K., must comply with the legislation.

"The act itself is quite worrisome for companies because it sets a higher bar than the Canadian or U.S. legislations," Klotz points out. The law goes further than in the U.S. and Canada in several respects: it prohibits facilitation payments (minor bribes paid to officials to expedite jobs they were going to do anyway); it covers bribery of not only public officials, but private citizens and corporations; it creates a corporate offence for failing to prevent bribery; it makes it illegal to receive a bribe; and it sets much higher standards for what properly can be considered corporate hospitality.

"It sets the highest standards in the world," says Richie Clark, a Canadian lawyer who is a partner and head of capital markets with Fox Williams LLP in London, England. Canadian companies need to be concerned because the Act "applies to British citizens, no matter where they are; anyone in the U.K., regardless of nationality; or a U.K. company doing business anywhere."

Even if a company doesn't directly do business in the U.K., it should still consider adopting measures to comply with these laws because they extend "not just to companies and their employees, but to agents and joint-venture partners," Clark adds. "So, companies doing business internationally need to



look carefully to see if they have proper measures in place... and they need to decide if they want to adopt the highest standards.”

Corporate counsel are responding with a fresh look at their compliance policies. Some, like McCain Food Ltd., are adopting the highest standards to bulletproof their operations. Others point out that having an ethical culture to begin with is the first step in adjusting to the new reality.

McCain Foods, the world’s largest producer of frozen French fries and frozen foods, has 20,000 employees and 55 production facilities in 12 countries. The New Brunswick-based company hired Christa Wessel as chief legal officer in April 2010 “to raise the bar” and develop an anti-corruption program.

Wessel had helped Siemens set up its anti-bribery policy after it paid the record fine. McCain already had an “excellent” code of conduct that dealt with anti-corruption, but based on the prominence the issue was gaining, Wessel decided to roll out an anti-corruption policy that expanded and integrated the code of conduct.

The policy, which is supported by management and a strong in-house training and e-learning program, provides more content and explanations of the rules in the code of conduct. “It’s important for our people on the front lines to give them context as to why we’re asking them to follow certain procedures and why it’s important to be aware of corruption risks,” Wessel says.

The policy aims to employ the highest standards. “The approach we are taking is to use the OECD’s Good Practice Guidance on Internal Controls, Ethics and Compliance as the principles in our anti-corruption policy because we operate in many OECD countries,” she says. “Facilitation payments are now prohibited in the U.K. and we’ve chosen to adopt that approach in order to hold ourselves to the highest standards.”

Good policies begin with an ethical culture, others point out. “A good defence is a good offence, and that’s having a strong culture,” says Eric Miller, senior vice-president, general counsel and secretary with Calgary-based Nexen Inc. “You can have all the programs in the world, but if you don’t have an ethical culture, the game’s lost.”

Nexen builds on that culture with a “robust anti-corruption program in which risk-based training is provided for different people at different levels of risk,” says chief compliance counsel Martin Mueller. The company provides targeted training for employees who can effect a bribe, those who can see it (their supervisors) and for financial people, who also receive training in forensic accounting.

The strength of the company’s compliance program means the impact of recent changes, particularly those relating to the U.K. law, won’t be felt as deeply, Mueller says. “We now have to flush out our practices to the private side; what we didn’t have was a document dealing with corruption in the private sector,” he says, pointing out Nexen’s British operations are wholly at risk of the new laws.

“Overall, we’re very happy with our program and ensuring that the right people get proper risk-based training,” he adds. “That, fundamentally, hasn’t changed. But what has changed is the aggressiveness of regulators in Canada and other countries. They now have more dedicated prosecution staff and this is evident when you look at the size of the judgments. In the U.S., the Department of Justice is now even looking for jail terms.”

Merck, whose parent is based in the U.S., falls under the FCPA and, thus, it has had anti-corruption compliance programs for many years, Amita Kent points out: “Having said that, our programs are global to begin with, and applicable to all. They

Martin Mueller
Chief compliance counsel
Nexen Inc.
Calgary

include live training, web-based training, refresher courses, testing, internal audits and [whistleblower] hotlines.” The firm is currently reviewing the U.K. legislation and exploring how it can address it in its current policies.

Making the necessary adjustments is easier for companies such as Nexen and Merck, which have had established anti-corruption policies for years. For corporate counsel at firms looking to develop and expand such policies, some preliminary work is necessary, experienced counsel agree.

First, they “need to make sure that, from a corporate perspective, everyone’s on board, says Kent. “You need to have the board and executives buy-in and provide the requisite funding.”

Then, they must examine their businesses and see where the issues relating to anti-corruption risks arise. “Many companies run before they walk,” says Wessel. “The approach we took at McCain was to focus on areas that were major issues for the company, and making those areas our priority, such as expanding supplier due diligence. We can’t do everything at once, and we’re trying to do it with existing budgets and resources.”

The next step is to develop the policy, including all the elements needed to ensure its success, such as mandatory training, reviews to ensure the standards set out are being met and the policy is meeting objectives. A process should also be established to ensure the company learns from its mistakes, says Michel Jutras, compliance leader with GE Capital Canada in Montreal.

It is also worth considering a dedicated compliance organization with independent functions that reports directly to the CEO and has full-time compliance officers in place, Jutras adds.

Those looking for more guidance on the matter would be wise to look at the appendix to the Niko probation order, which sets out the compliance program ordered by the judge, says Boscariol. “It’s a very interesting set of parameters and expectations.”

Getting employees and third-party agents to comply with anti-corruption rules and policies is a major challenge. In fact, it’s one of the greatest concerns for U.S. executives. A survey conducted by management consultancy Deloitte LLP, released in September, showed that 90 per cent of 276 U.S. business executives surveyed say their companies have anti-corruption policies in place covering bribes, but only 29 per cent said they were confident the programs would prevent or detect corrupt activities.

A solution is to have an improper payments policy in place with thorough reporting tools, says Jutras. “We limit the number of people who have [authority to sign] contracts and we have procedures in place to approve any third-party representatives. Anyone who represents us as an agent has to be pre-approved.”

As for reporting, Jutras says GE Capital has “highly developed software that tracks escalations via workflows and ensures everything is documented and reported. It’s a very effective way of doing things.”

The net will continue to tighten. There is pressure on the federal government to bring back Bill C-31 which would no longer

require prosecutors to prove that a bribery-related crime has a real and substantial connection to Canada. The laws of most OECD are based on nationality as opposed to territory. "I've written to the Prime Minister as president of Transparency International

Canada requesting the government bring back the bill — and I expect them to do so," says Klotz. ■

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Lois anticorruption: l'étau se resserre.

À l'été de 2005, deux représentants d'une filiale de la compagnie Niko Resources, de Calgary, ont donné un nouveau Toyota Land Cruiser d'une valeur de 190 984 \$ à un ministre du Bangladesh responsable de l'énergie et des ressources minérales. Ce qu'ils ne savaient pas, c'est que le pot-de-vin allait leur coûter beaucoup plus cher : l'été dernier, la compagnie-mère a plaidé coupable à une accusation portée en vertu de la Loi sur la corruption d'agents publics étrangers (LCAPE) et payé 9,5 millions \$ en amendes et pénalités. La cour a aussi ordonné à la compagnie d'entreprendre une révision complète de ses systèmes de contrôle internes et à mettre sur pied un programme de conformité et des vérifications annuelles.

La situation a attiré l'attention du monde corporatif. « Il y a un sentiment que le filet s'étend et qu'il est de plus en plus pressant pour les compagnies occidentales de se tenir à l'écart de la corruption », estime James Klotz, associé au bureau de Toronto de Miller Thomson et président de Transparency International Canada.

La législation anticorruption n'est pas un phénomène nouveau: les États-Unis ont été l'un des premiers pays à adopter une loi à cet égard : la Foreign Corrupt Practices Act, en 1977. Plusieurs compagnies canadiennes qui font affaire de l'autre côté de la frontière ont déjà adopté des mesures internes pour s'y conformer.

Mais plus tôt cette année, le Canada s'était fait pointer du doigt par l'Organisation de développement et de coopération économiques. Dans un rapport critique, l'OCDE a noté que seulement une entreprise avait

été condamnée en vertu de la LCAPE depuis son adoption en 1999 : l'Albertaine Hydro Kleen Group, qui s'est fait imposer une amende de 25 000 \$ pour avoir donné un pot-de-vin à un agent de l'immigration à l'aéroport de Calgary.

Depuis, la situation a évolué. En plus de l'affaire Niko, la GRC a fouillé les bureaux de la compagnie minière de Calgary Blackfire Exploration, répondant à des allégations qu'elle aurait cherché à corrompre le maire d'une petite ville mexicaine. Et en septembre, on a pu voir dans les bulletins de nouvelles que le géant montréalais de l'ingénierie, SNC-Lavalin, avait vu ses bureaux de Toronto être fouillés à leur tour pour des allégations de corruption dans le cadre d'un projet au Bangladesh.

Parallèlement, l'adoption de la Bribery Act au Royaume-Uni a haussé les exigences de conformité pour toutes les compagnies qui font affaire sur son territoire, au sens large du terme. Par exemple, une compagnie pétrolière de l'Australie avec des actifs en Afrique, mais qui serait financée en partie au Royaume-Uni, serait touchée par cette loi.

Ces nouvelles règles vont encore plus loin que celles des lois canadienne ou américaine. Et même si une compagnie ne fait pas affaire au Royaume-Uni, elle devrait tout de même considérer l'adoption de pratiques pour s'y conformer, estime Richie Clark, un avocat canadien qui est associé chez Fox Williams à Londres, en Angleterre — surtout si elles font affaire à l'international.

« Les compagnies doivent décider si elles veulent se conformer aux normes les plus élevées », tranche M^e Clark.

Certaines entreprises, comme McCain

Foods, ont décidé de s'engager dans cette voie. Le plus grand producteur de nourriture surgelée au monde a embauché Christa Wessel comme chef de son service juridique afin d'« élever la barre » et développer un programme anticorruption. M^e Wessel avait auparavant aidé Siemens à établir ses politiques anticorruption, après que la compagnie eut payé une amende record dans le passé.

« L'approche que l'on prend est d'utiliser le Guide de bonnes pratiques pour les contrôles internes, la déontologie et la conformité de l'OCDE en tant que principes sous-jacents à notre politique interne parce que nous opérons dans plusieurs pays de l'Organisation », explique l'avocate. Cette politique interne a aussi incorporé certains éléments de la loi britannique, dont l'interdiction des paiements de facilitation.

Comme McCain Foods, les compagnies devront trouver les moyens pour ajuster les pratiques internes à la nouvelle donne. Entre-temps, la pression se maintient sur le Canada pour qu'il continue sur sa lancée et pour que le gouvernement réintroduise le projet de loi C-31, mort au feuillet lors de la prorogation de décembre 2009. Ces changements feraient en sorte que les procureurs ne devraient plus prouver qu'un crime dans ce domaine a un lien suffisant avec le Canada — à l'instar des exigences en vigueur dans plusieurs pays de l'OCDE. « J'ai écrit au premier ministre en tant que président de Transparency International Canada pour demander que le gouvernement réintroduise le projet de loi — et je m'attends à ce que ce soit fait », indique James Klotz. ■