BAKER & McKENZIE

Client Alert

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Energy Firm Comes Clean with a Voluntary Disclosure about a Foreign Bribe; Internal Investigation and Cooperation with Authorities Results in a Comparatively Modest Fine

On January 25, 2013, Alberta Court of Queen's Bench Justice Scott Brooker accepted a joint submission by the Crown and the lawyer of Griffiths Energy International Inc. (GEI), a private, Calgary-based oil and gas company, on a single count of bribery under Canada's *Corruption of Foreign Public Officials Act (CFPOA)*.[1] The charge arose from GEI's illegal payment of US $2 million to Chadian officials, a transaction described by Justice Brooker as "an embarrassment to all Canadians."[2] After extensively cooperating with authorities in Canada and the U.S., GEI was fined CDN $10.35 million.

This client alert raises four critical issues to consider. First, Canadian businesses engaged in overseas ventures must not assume that establishing a clever corporate structure will insulate themselves from the reach of the CFPOA. Second, corporate entities will not be protected if illegal activities are discovered after they have blindly relied on the assurances of outside counsel. Third, cooperating with authorities once wrongdoing has been discovered and implementing robust compliance procedures can reduce penalties resulting from such misconduct. And fourth, the case of GEI makes clear that outside counsel must carefully identify, investigate, and resolve red flags in third-party consulting agreements prior to moving forward with similar types of transactions.

The facts of the case are complex. In 2008, late Bay Street financier, Brad Griffiths, was actively involved in seeking oil and gas opportunities in Chad. Much of the initial negotiations between Griffiths and the Chadian government involved the Ambassador of Chad, who then made the necessary introductions to officials in the country's government.

By mid-2009, Griffiths had incorporated GEI, and sought to finalize an arrangement with Chad. An initial part of the bargaining process involved outside counsel drafting a consulting agreement whereby GEI would pay a US $2 million fee to Chad's Ambassador for "advisory, logistics, operational" and other services to assist GEI in implementing its projects in the country. Upon learning of the

1 Daryl Slade, "Griffiths Energy fined $10.35-million in bribery case; Calgary CEO says company 'blew the whistle' on themselves" *Edmonton Journal* (25 January 2013), online: http://www.edmontonjournal.com/business/Griffiths+Energy+fined+million+bribery+case+Calgary+says/7873431/story.html [*Slade*].

2 Kelly Cryderman, "Judge approves $10.35-million fine for Griffiths Energy in bribery case" *Globe and Mail* (25 January 2013), online: http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/judge-approves-1035-million-fine-for-griffiths-energy-in-bribery-case/article7858675/?service=mobile [*Cryderman*].

Ambassador's involvement, however, outside counsel informed GEI that as a public official, he could not be offered a payment for any type of services. The agreement was subsequently terminated.

Over the next two years, the company made attempts to enter into a new agreement – one almost identical to the previous arrangement with the Ambassador – only this time the consultant fees were to be paid to a company owned by his wife. Company shares were also to be granted to the wife and two others as part of the deal. By early 2011, and with new outside counsel, a formal consulting agreement was finalized, with the US $2 million consulting fee held in escrow until certain conditions were fulfilled. Subsequently, in January, 2011, GEI concluded successful negotiations with the Chadian government for the rights to the oil and gas properties in question. The consulting fees were then released to the company of the Ambassador's wife in February, 2011.

By the summer of 2011, a new management team was in place at GEI. During an internal audit in preparation for a proposed IPO, management discovered the consulting fee arrangement and immediately engaged new legal counsel and forensic accountants to provide a complete report on the transaction. The investigation led to the company cooperating fully with both the RCMP and U.S. authorities. Following the approval of its joint submission with the Crown, GEI was fined a total amount of CDN $10,350,000.00.

Lessons Learned

A range of issues arise from this case, as do a number of lessons learned for both corporate and legal entities. First, despite GEI having been informed of the CFPOA rules against bribing public officials, they attempted to circumvent the prohibitions by funnelling the consulting fees to the diplomat's wife. This plan was unsuccessful, and ought to inform Canadian businesses engaged in overseas ventures that it is unwise to think that establishing a clever corporate structure will insulate you from the legislation. While courts are now more willing to look beyond the corporate veil in such cases, compliance investigations are also on the rise in Canada, due in large part to the more robust infrastructure in place and the increasing sophistication of investigators. As the RCMP's International Anti-Corruption Unit currently has 35 cases on the docket, Canadian companies must be aware of the serious implications that arise when attempting to skirt the reach of legislation like the CFPOA.[3]

Second, a corporation's blind reliance on the assurances of outside counsel offers no protection if illicit activities are discovered. Just because counsel is involved with and signs-off on an agreement does not insulate you from possible criminal charges. The cautionary tale for both clients and counsel is that they need to dig deeper into proposed transactions to identify all of the possible issues that could arise from such transactions. The prudent course of action is for corporations to recognize their need for competent outside legal service providers who are well-versed and knowledgeable of all applicable Canadian and U.S. laws, and the law of the jurisdiction in issue.

Third, GEI's admission of guilt and cooperation with authorities ought to serve as an example that despite the fine imposed, the benefits dramatically outweigh the

[3] Theresa Tedesco, "The fight against foreign corruption begins in the boardroom" *Financial Post* (23 January 2013), online: http://business.financialpost.com/2013/01/23/boards-must-step-up-fight-against-corporate-crime-or-pay-the-price/.

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costs. Consider the end result of Niko Resources Ltd. after they pled guilty to bribing Bangladeshi officials in 2011. While the bribes included a luxury SUV, and trips to New York and Calgary, the illicit contributions only amounted to approximately CDN $200,000. However, the firm was still slapped with a fine of almost CDN $10 million. Comparatively, GEI's bribe to Chadian officials was over 10 times as high, and yet as a result of the company's cooperation with authorities (and new internal compliance policies now in place), the fine was almost identical. Self-reporting in GEI's case was clearly beneficial as their voluntary disclosure was noted by Justice Brooker as having resulted in the fines being more favourable.[4]

Fourth, this case highlights how critical it is for outside counsel to thoroughly identify, investigate and resolve any red flags that may arise out of third-party consulting agreements before moving these types of transactions forward. From the magnitude of the payment to the lack of expertise of the Ambassador's wife to provide the services agreed upon, there were numerous red flags in the case of GEI's agreement. However, outside counsel must also be comprehensive in their review so as to identify those parties and services that are legitimate, and could advance their client's interests in full respect of the law.

Canadian companies that operate globally must heed the results of the GEI case and act proactively. This involves ensuring that five essential elements of compliance are in place: the program is founded upon strong leadership, a proper risk assessment is completed, standards and controls are developed and implemented, training and communication protocols are rolled-out, and the program is properly monitored, audited, and updated as necessary.

In future, Canadian authorities may look south of the border for guidance in developing additional procedures to further encourage voluntary disclosure in cases of bribery and corruption. For example, in less egregious instances, the RCMP and Crown prosecutors may contemplate procedures, such as those in the U.S., where authorities have been successful in using deferred and non-prosecution agreements when assurances are given for full disclosure and independent monitors are put into place to oversee the implementation of compliance procedures.

Compliance investigations in Canada are heating up. As the case of GEI proves, corporate clients require sound and competent legal advice, and comprehensive internal policies to reduce the chances of corrupt practices taking place – at home, and abroad.

[4] Cryderman, *supra* note 2. It should also be pointed out that while government officials say the CDN $2 million cannot be retrieved, the Crown has initiated forfeiture proceedings in relation to the shares purchased by the wife of the Ambassador and two others. This effort could signal a new tactic by federal authorities to investigate beyond the bribe to secure any other illicit proceeds derived by the beneficiary.