The Anti-Corruption Dilemma for Canadian Companies — Just How Far Must Companies Go to Comply with the Law?

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According to the International Anti-Corruption Unit of the Royal Canadian Mounted Police (RCMP), there are currently over 34 anti-corruption investigations ongoing in Canada, a remarkable increase from zero merely four years ago. As a consequence, it was no surprise that Transparency International, in its recently issued 8th annual progress report on the enforcement of the OECD Anti-Bribery Convention, moved Canada up from the "little or no enforcement" category to the "moderate enforcement" category. Canada is now taking action, and Canadian companies are scrambling to ensure that they do not become ensnared in violations of Canada's version of the *FCPA*, the *Corruption of Foreign Public Officials Act*, known as the *CFPOA*.

This article will examine the key elements of the current standard for a rigorous anti-corruption program for Canadian companies, and will address some of the specific dilemmas that those key elements raise.

Canadians are Law-Abiding, but Uninformed

Canadians have always been highly law-abiding. There is very little domestic bribery in Canada as Canadian companies are well aware of the Canadian *Criminal Code* and the fact that, in Canada, domestic bribery is a crime. However, until 1999 when Canada enacted the *CFPOA*, it was not illegal for Canadian companies to pay bribes to foreign officials, and Canadian companies routinely did, typically through the use of agents and other third party intermediaries. Unfortunately, when Canada enacted the *CFPOA*, it did not take the necessary step to educate corporate Canada about the new law. While Canada went through the motions of creating the *CFPOA*, there was never any indication that the government believed there was a problem with corruption, and as a result, it did not allocate any resources to either educate the public or to uncover and investigate cases.

In the US, the Department of Justice investigates cases and has access to FBI resources, but Canada's law enforcement system works differently. The Crown must wait for a case to be brought to it before charges can be laid. As anti-corruption cases are expensive to investigate, without the political will to pursue them, no cases came forward. With the absence of adverse press and "perp walks" on the front page of local newspapers, most Canadian companies had no idea that it was no longer "business as usual" and that foreign bribes could no longer be paid. Even those companies that were educated about the *CFPOA*, took great comfort in the fact that no charges were laid in the first ten years of the law's existence, and inertia set in. While companies may have created compliance programs to address international corruption, they did not perceive it to be high risk, and accordingly, companies were lax in training their staff and in monitoring their anti-corruption programs.

This all changed as a direct consequence of the multiple drubbings that Canada received at the OECD for failing to bring any meaningful cases, contrary to Canada's obligations under the OECD treaty. When Canada ratified the UN Convention in 2007, the RCMP went the extra step to set up an International Anti-Corruption Unit in 2008. It is comprised of two international anti-corruption teams with a focus on public sector corruption dedicated to investigating international corruption cases. One team is strategically located in Ottawa, Ontario and the other in Calgary, Alberta. Each team has six RCMP officers and a civilian or public servant. These dedicated investigative resources have resulted in a surge in enforcement activity.

While those Canadian companies that are cross-listed on US stock exchanges have long been aware of the *FCPA* and the requirement to comply with anti-corruption legislation, it is only this rapid surge in Canadian investigations that has finally caught the attention of the rest of corporate Canada.

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Suddenly, Canadian companies are becoming aware that it is not acceptable to pay bribes and that corporate executives could go to jail. At the same time, they are learning that, even if they have put an end to corrupt practices, they may have liability for acts that have taken place in earlier years. It is cause for concern, especially since 75 per cent of all mining and exploration companies are headquartered in Canada and account for almost half of the entire world's exploration expenditures. Canadian companies have faced, and continue to experience, a high risk of exposure to corruption in foreign markets, as mining, oil, and gas exploration often takes place in highly corrupt countries.

The Key Ingredients of a "Made in Canada" Compliance Program

Legal experts generally agree that having a robust anti-corruption compliance program (Program) is the solution for a company to significantly reduce corruption risk. While no program can eliminate a single "bad apple", a vigorous Program should ensure that even the insidious forms of corruption come to light before the company is exposed to liability. The dilemma for Canadian companies is to determine what that Program should look like, and how extensive it must be. Canadian companies are understandably cost conscious and undertake the minimum to avoid liability. While advisors can recommend the "Platinum" Program, if a lower cost Program will do, that will most often be preferred. Fortunately, there has been a lot of guidance in this area, including the OECD's "Good Practice Guidance on Internal Controls, Ethics, and Compliance", the guidance issued by the UK Serious Fraud Office, and Transparency International's "Anti-Corruption Compliance Checklist". The Canadian courts have also waded in with guidance, in the first (and to date, only) significant conviction under the *CFPOA*, the *Niko* case.

In June 2011, Niko Resources Ltd., a Calgary-based oil and natural gas exploration and production company with international operations, pleaded guilty to paying bribes to the Bangladeshi State Minister for Energy and Mineral Resources. The bribes included a C$190,000 luxury sports utility vehicle and C$5,000 for the Minister's travel costs to New York after he attended an oil and gas exposition in Calgary. The Minister was responsible for deciding the amount of Niko's compensation to be paid to villagers whose community was damaged by a blowout of one of Niko's wells earlier that year. For Canada's first real case, the C$9.5-million fine levied was seen to be exceptionally high.

What is most interesting about the *Niko* case is that as part of a three-year probation order Niko was required to both pay for and implement an anti-corruption program and to address deficiencies in its internal controls, policies and procedures. The judgment sets out the details of the requirements of the anti-corruption program. Notably, the probation order lifts, verbatim, the anti-corruption program set out in an earlier US case, *U.S. v. Panalpina*.

My review of the law and of the related case histories revealed 21 points for an effective Program. These are as follows:

- Identify the required legal obligations (*CFPOA*, *FCPA,* UK *Bribery Act 2010*)
- Ensure buy-in of senior management in strongest terms
- Identify a senior corporate officer to have ownership of the Program and clarify reporting structure to audit committee
- Conduct a corruption risk assessment and identify existing and potential "touchpoints"
- Make a determination on acceptability of facilitation payments. If allowed, create approval process for facilitation payments
- Develop and promulgate compliance standards and procedures designed to reduce the prospect of violations at all levels of the company and the parties with which it deals
- Incorporate the anti-corruption policy into employee travel, gifts and entertainment rules
- Develop guidance for charitable giving, political gifts, and sponsorships
- Implement anti-corruption financial controls, including double controls for agency payments
- Clearly articulate and promulgate the anti-corruption policy
- Make the policy applicable to all employees, officers, and directors
- Implement culture of compliance. Start anti-corruption training with a certification program
- Ensure training in all subsidiaries, and with agents and business partners
- Use a whistleblower system and a hotline to facilitate compliance with the program
- Apply proper discipline for violations
- Adopt special policies for comprehensive due diligence/ compliance re: agents or business partners
- Incorporate anti-corruption procedures into mergers, acquisitions and joint ventures due diligence
- Include standard provisions in contracts to prevent violations of anti-corruption laws, with audit rights
- Audit for anti-corruption compliance
- Review, test, and update program at least annually
- Create a Search Warrant protocol

While following all 21 of these points may result in a "Platinum" Program, numerous judgment calls are required. Indeed, these give rise to fundamental dilemmas that Canadian companies now face. For the balance of this paper, I will review 14 of these dilemmas from a specifically Canadian point of view.

Examining the "Platinum" Program

1. Identify the required legal obligations (*CFPOA*, *FCPA*, UK, *Dodd-Frank*)

For a Canadian company involved in international business, the considerations are fairly simple. If it does business with the US or UK, it will also need to be conscious of the applications of the *FCPA* and the UK *Bribery Act 2010*. Fortunately, these laws are similar to the *CFPOA*. The *CFPOA* is a short Act, and the following is a brief primer. The operative clause is Section 3, which creates the sole bribery offense. Under Canadian law, an individual and an organization can be prosecuted separately, or one can be prosecuted and not the other.

Section 3 makes it an offense,

> … in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or (b) 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.

The core of the bribery offense is the conferring of something of value to a foreign public official in return for a benefit. This benefit must involve something that confers a business advantage to the company.

There are a number of *FCPA*-like exceptions and defenses available under the *CFPOA*, including exceptions for facilitation payments, hospitality expenses, promotional and demonstration expenses, and contract execution expenses. Other defenses include that the payment is permitted under local law, as well as the common law defense for personal health, safety or security.

Contravention of the *CFPOA* is an indictable offense with a prison term of up to five years. There is no maximum fine, and the court has the discretion to set a fine at the level that it sees fit in the circumstances. Unlike the US, there is no limitation period in Canada, although companies cannot be charged for conduct that predates the Act.

2. Ensure senior management buy-in in strongest terms

Nothing gets the attention of senior management faster than the word "jail". While none of the directors or officers of Niko Resources were charged with an offense, two senior officers of SNC-Lavalin, a publicly listed Canadian engineering company involved in construction projects around the world, have been recently charged with *CFPOA* offenses. Also, the president of the corporation resigned over the approval of a payment to a foreign agent. The corporation and its board are also facing two class actions alleging failure to supervise. For Canadian companies, a review of this case with the board and senior management is an excellent tool for ensuring management buy-in. The difficulty thereafter is in ensuring that the necessary resources are allocated to the Program, particularly the initial risk assessment. Historically, when Canadian companies need to reduce expenditures, the compliance department is one of the first departments to be reduced.

3. Identify a senior corporate officer to have ownership of program and clarify reporting structure to audit committee

The dilemma is who should have ownership of the Program? Most Canadian companies delegate or assign the task to their General Counsel, if they have one, to take charge of the Program. The alternative is to have a separate compliance officer. Whoever occupies the role, or is responsible, should report directly to the audit committee of the board. Unfortunately, most companies prefer to have their compliance officer report to the General Counsel, who then reports to the audit committee. In practice, this creates a filter that is best avoided.

4. Conduct a corruption risk assessment and identify existing and potential "touchpoints"; involve "owner"

The risk assessment is the cornerstone of the Program. Without undertaking a comprehensive risk assessment, the company will be unable to design a Program that will truly ensure that all corruption risk is captured. A risk assessment can be undertaken in a myriad of ways. However, the more complex the organization, the more dynamic and probing the risk assessment must be. There are two practical problems concerning risk assessments. The first is a broad approach that identifies all of the "touchpoints" where the company and its personnel interact with public officials, directly or indirectly. To do this, an intimate knowledge of the company is required in order to identify where interaction may occur, requiring trained individuals who can determine who qualifies as a public official. For example, in many socialist countries, it is difficult to determine whether employees of state-owned entities are public officials (generally, they may be). The ideal risk assessment requires the development of a comprehensive risk assessment questionnaire, which then serves as a template for on-site interviews to extract the required information. However, this is an expensive process and it is a judgment call as to whether doing less will be sufficient.

The second dilemma with a comprehensive risk assessment is that it will often result in the discovery of a compliance problem.

While problems should obviously be identified and dealt with appropriately, if legal counsel is not present to protect privilege, it can be problematic for a company when potential problems are identified in a risk assessment or compliance review.

5. Make a determination on acceptability of facilitation payments. If allowed, create an approval process for facilitation payments

The *CFPOA*, like the *FCPA* (and unlike the UK *Bribery Act*), permits the payment of facilitation payments. Generally, when drafting compliance programs, Canadian companies fall into two camps — those that have been involved in long standing business relationships in countries where facilitation payments have been the norm, and thus are loath to give them up; and those companies that have less international experience and who are thus keen to have a zero tolerance policy toward the payment of any bribes whatsoever. Where permitted, the company must then monitor for UK business where such payments are prohibited. It is problematic to write a policy that permits facilitation payments in all countries except the UK (or in connection with UK-based business), as it requires a level of knowledge of the business affairs of the company that the employee may not have.

6. Develop and promulgate compliance standards and procedures designed to reduce the prospect of violations at all levels of the company and the parties it deals with

This requires a detailed policy setting out anti-corruption principles and rules. This policy must be tailored to each company, and there is no such thing as an "off-the-shelf" product. Unfortunately, that does not stop many companies from lifting the policies that other companies have posted on their website. Without putting the necessary effort and expense into customizing a policy, the company's new policy will not come to life.

7. Incorporate the anti-corruption policy into employee travel, gifts and entertainment rules

An exception exists in the *CFPOA* for reasonable expenses incurred in good faith by or on behalf of a foreign public official, including hospitality and gifts of nominal value. For example, refreshments, meals or token mementos of a meeting are not illegal. What is reasonable depends on the circumstances in which the gift or hospitality was extended and its absolute value. However, unlike the UK *Bribery Act 2010*, there is no guidance on what "reasonable" means. As a result, it is often a judgment call on what constitutes a legal payment, and what constitutes a bribe. Inexperienced Canadian businesspeople, relying solely on the bald language of the *CFPOA*, can easily justify inappropriate payments as falling within the law.

The *CFPOA* permits a company to pay the expenses of an official to visit Canada for the purposes of signing a contract or for an annual review of that contract. Indeed, it is becoming more frequent for clever Canadian companies to suggest that their contract include a mandatory meeting in Canada each year for purposes of "consultation and assessment" of the contract. However, paying for a side trip to see Niagara Falls is not permissible.

If no contract is involved, these reasonable expenses must be related to the promotion, demonstration or explanation of the person's products and services. Thus, it is possible to pay for an official to travel to Canada to see a factory that produces the Canadian company's goods. But, it may not be possible to pay for that official to visit the company's mine in the foreign country for the purpose of, for example, issuing a permit.

Most gift and entertainment policies contain rules and restrictions on entertainment expenses. These rules need to be reviewed frequently to ensure that the employees are complying with them as written, but also in spirit. For example, one "enterprising" employee took an entire government department out for a meal, with each person's meal coming in below the permitted limit.

8. Develop guidance for charitable giving, political gifts, and sponsorships

Charitable and political gifts create much more complicated problems than simple entertainment expenses. Most anti-corruption policies tend to be quite vague on these payments, typically setting a dollar limit and some general rules, with exceptions requiring executive approval. The problem lies with this default to the executive, as political gift giving tends to be a senior executive initiative. As noted below in point 9, the policy must be applicable to all employees, officers, and directors. Creating a rule that can be overridden by directors and officers has a problematic aspect to it.

9. Make the policy applicable to all employees, officers, and directors

In drafting compliance programs, it is not uncommon to receive a request from senior management that the Program need not apply to them. Their concern is usually centered around the monetary limits that are imposed on gifts and hospitality. This must be resisted. However, a compromise is to permit senior management to obtain exceptions on a case-by-case judgment call basis.

10. Ensure training in all subsidiaries, and with agents and business partners

Training can be accomplished in many ways. The dilemma for companies is in how to create a training program where the employees truly develop an understanding of what

constitutes a bribe. The required standard is the amorphous one of "reasonableness".

Agents and business partners tend to be the weak link in anti-corruption compliance. In addition to performing due diligence to ensure that the third party does not have an unsavory past and is unlikely to pay bribes, most companies with compliance programs will require the third party to sign an anti-bribery contractual commitment. However, it is obvious that without the third party having a Program with satisfactory training, there is an increased risk that the third party will participate in corruption. While some companies have the economic clout to insist upon their third parties having a Program in place, the reality is that most Canadian companies do not have such power, and are obliged to rely on the contractual prohibition.

11. Adopt special policies for comprehensive due diligence/compliance re agents or business partners

Regrettably, the definition of "comprehensive due diligence" on agents and business partners remains undefined, even though it is a requirement of the *Niko* Probation Order. How much due diligence is enough remains a judgment call, and is a potent combination of risk as determined by the risk assessment, money, and time. Some third parties, by virtue of the risk assessment, will require deeper due diligence than others. A risk matrix can assist in determining where third parties sit within the diligence universe. However, Canadian companies have not yet become used to spending significant sums to vet business partners, nor do they typically have the patience for the long process some US companies have adopted. Some have taken the time to develop a step-by-step decision tree to assist in making the required judgment calls as to what expenditure is required to satisfy a reasonableness standard. Even when comprehensive due diligence is undertaken, third parties can morph over time, and it is yet another judgment call about how often the due diligence should be updated.

12. Incorporate anti-corruption procedures into mergers, acquisitions and joint ventures due diligence

Some Canadian lawyers are now adding anti-corruption compliance to their due diligence checklist for acquisitions. Again, it is a question of judgment about how much due diligence is reasonably sufficient. Deal practice in Canada is to provide clients with a firm quote on due diligence costs, so there is often little room for a significant anti-corruption review (corporate intelligence and background checks on owners/directors/officers, review of the anti-bribery program, interviews of key staff, external reviews and site visits, *etc.*). Standard practice, for those who have an anti-corruption review on their checklist, is to advise the client that the due diligence will not include these items and get the client's sign-off. While this will off-load the potential liability to the client, it is a judgment call as to whether the client will appreciate the risk that it is taking in doing so.

13. Include standard provisions in contracts to prevent violations of anti-corruption laws, with audit rights

Anti-corruption clauses for third party contracts have improved dramatically, in both obligations and content. A comprehensive clause can easily be three pages in length. Unfortunately, Canadian companies are loath to make contracts with third parties unduly burdensome and balk at the commitments in this clause. Also, not all third party contracts require audit rights, which can be invasive. Again, it presents a dilemma. The clause can only be shortened by removing audit rights and a variety of obligations that the company should ideally require of the third party.

14. Create a Search Warrant Protocol

There is no obligation in Canada to self-report conduct that may be offside, though the discovery will require the company to restate its financial statements and tax returns as bribes are not a deductible expense. Unlike the US, Canada does not have a voluntary disclosure program for *CFPOA* offenses. Companies that choose to come forward voluntarily, may be treated more leniently, but have no guarantee that will be the case. Most companies under investigation will have no idea that they are under investigation until the RCMP arrives at their door with a search warrant. The search warrant process in Canada differs from that of the US, and it is critical not to obstruct the officers executing the warrant. Few Canadian companies have the faintest idea of what to do when the RCMP arrive. As a result, part of the compliance program should include a detailed Canada-specific search warrant protocol to be followed if the RCMP arrive. Note that in Canada, any statements made by employees may be used against them and the company. Although employees are not required to speak with police, they must not be prevented from doing so if they wish, and they may have counsel present.

Conclusion

Creating a robust anti-corruption program is now on the critical "to do" list of most major Canadian corporations. Whether they get it right or not will depend on how those corporations craft their program and the decisions that they make about its applicability, rules, training, and the myriad of other requirements that such a program demands. Most of these requirements have a cost, and there is so far little guidance as to where the right balance rests. However, the balance must be found and to do so, the company must effectively determine, measure, and constantly reassess the corruption risk it faces in its business. ■

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