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COMMENTARY

Canada's anti-bribery laws: It may not be enough to say you didn't know . . .

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Over the past few years, mining companies have become increasingly aware of the potential civil and criminal liability arising from the payment of bribes to foreign government officials.

Under Canada's *Corruption of Foreign Public Officials Act* (CFPOA), companies and individuals can face unlimited fines, and individuals can face up to five years in jail, if they are found to have bribed a foreign official. The $10.35-million fine newly levied against privately held Griffiths Energy International for its payments to relatives of Chad officials in 2009 is one recent example.

Violations of the CFPOA are in essence criminal offences and are dealt with as criminal prosecutions. Canada is not at all unique in this respect: criminal liability for foreign bribery arises under anti-bribery laws in many other countries, notably the U.S., the U.K. as well as in all other countries that are members of the Organisation for Economic Co-operation and Development (OECD).

While conscious of the legal liability arising from direct acts of bribery and other corrupt activities, senior management of mining firms may be less aware that corrupt activities by third-party agents may also be a source of criminal liability for their company, as well in certain cases for their employees and directors. Where there is some evidence of wrongdoing in the form of illegal payments to foreign government officials, willful ignorance on the part of senior management of a company agent's corrupt activities is unlikely to shield the company from liability for such acts under Canadian law.

The CFPOA prohibits bribery payments made "directly or indirectly" to a foreign official. An indirect bribe includes a bribe through a third party, such as an agent, as the Canadian Department of Justice has made clear in its 1999 *Guide to the CFPOA*. As with other criminal offences, there is a requirement of intention for criminal liability to arise. Whether or not intention exists is determined in accordance with common law principles of criminal culpability.

Under Canadian law, even if a company or its employees did not actually know that a third party agent was engaging in bribery, criminal law principles allow a court to infer knowledge of, and therefore impute liability for, a criminal act if the court finds that a company or individual was being "willfully blind" to illegal activities.

The CFPOA contains no definition of what constitutes "willful blindness" unlike the U.S. *Foreign Corrupt Practices Act*, where there is a broad concept of imputed knowledge.

However the Canadian Supreme Court has elaborated on the concept of willful blindness in a number of cases. Most recently, in the 2010 case of *R. v. Briscoe*, the Supreme Court stated that:

> The doctrine of willful blindness imputes knowledge to an accused **whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries**. ... [a] finding of willful blindness involves an affirmative answer to the question: **Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?**
>
> ... willful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry **because he does not wish to know the truth. He would prefer to remain ignorant...**

The practical implications of this willful blindness principle are not hard to discern. For example, a company might hire a third party agent to obtain permits, and then subsequently become aware of certain facts leading to an inference that the agent may be paying bribes to obtain those permits but fail to inquire further into the

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matter for fear of what such inquiries might reveal. In the event of a prosecution under the CFPOA, the company could potentially be found liable for the agent's corrupt activities on the basis that the company deliberately chose to abstain from further inquiry and thus knowledge of the agent's activities could be imputed through the company's willful blindness.

It is not enough to turn a blind eye to potential acts of bribery by company agents in foreign lands.

The implications of this for companies subject to Canada's CFPOA are clear. It is simply not enough to turn a blind eye to potential acts of bribery by company agents in foreign jurisdictions on the principle that what the company does not know about the activities of its foreign agents will not hurt it.

Rather, it is very likely to be the case that in situations where a company is operating in a foreign jurisdiction, particularly in those that have a reputation for bribery and corruption, additional diligence on the part of company senior management in relation to potential acts of bribery will be prudent and necessary. It is unlikely that it would be a sufficient defence to a charge of violation of the CFPOA to simply allege lack of knowledge of such acts, particularly where companies are operating in high-risk jurisdictions and there are already factual indications of irregularities.

This in turn implies that Canadian and foreign mining companies should undertake a number of precautionary measures to forestall future liability for acts of bribery or corruption in relation to foreign government officials by their foreign subsidiaries or agents. Such measures might include, but are not limited to: thorough review of the terms and conditions of contracts with third-party agents, comprehensive background checks of all persons hired to represent the company abroad and rights of audit of all financial records of an agent acting on the company's behalf. There should be appropriate sanctions for non-compliance.

A failure by a Canadian firm to exercise such basic due diligence will substantially increase the potential for a successful prosecution in the event that charges of bribery are brought under the CFPOA against the company.

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