

# Canada's *Corruption of Foreign Public Officials Act*: Niko Resources Ltd. Receives a \$9.5 Million Fine for Bribery

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## Introduction

A “wake-up call” was delivered to Canadian companies last summer when Niko Resources pleaded guilty to offences under the *Corruption of Foreign Public Officials Act* and was forced to pay a \$9.5 million fine. If Canada has been criticised for lax enforcement of the *Corruption of Foreign Public Officials Act*, this case may signal the beginning of a new era. The case of *R. v. Niko Resources Ltd.* shows that Canadian companies implicated in the bribery of foreign public officials will be subject to prosecution. Canadian companies with foreign operations should implement an anti-corruption program and conduct a compliance review to determine whether they are exposed to penalties under anti-corruption legislation. The following is a brief outline of the *Corruption of Foreign Public Officials Act*, the Niko Resources case and a compliance checklist for Canadian companies with foreign operations.

## ***Corruption Of Foreign Public Officials Act***

While the United States led the way with the implementation of foreign anti-corruption legislation in the 1970's, Canada's *Corruption of Foreign Public Officials Act* did not come into force until about a decade ago. Section 3 of the *Corruption of Foreign Public Officials Act* describes what constitutes the offence of bribery of a foreign public official:

1. Every person commits an offence who, 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.

Companies and individuals may be liable to criminal sanctions with imprisonment and significant fines.

Prior to Niko Resources, there had only been one prosecution which resulted from an RCMP investigation. As a result of criticism relating to the lack of enforcement, Canada established the RCMP International Anti-Corruption Unit. The Anti-Corruption Unit officers are based in Calgary and Ottawa.

## ***R. v. Niko Resources Ltd.***

Niko Resources is a publicly traded corporation with a head office in Calgary, Alberta. It conducted international business operations in countries outside of Canada through wholly owned subsidiaries. The prosecution alleged that Niko Resources, directly and indirectly, provided improper benefits to a foreign public official in Bangladesh in order to further its business objectives and that of its subsidiaries. In 2005 Bangladesh was identified by Transparency International as the most corrupt country in the world in which to do business

Niko Resources owned 100% of a holding company, which in turn owned 100% of Niko Bangladesh. Niko Bangladesh was funded solely by Niko Resources. The flow of money from Canada to support Niko Bangladesh was monitored from Canada. The CEO of Niko Resources sat on the Board of Directors of Niko Bangladesh.

In 2003 Niko Bangladesh signed a joint venture agreement with the joint venture partner, the Bangladesh Petroleum Exploration & Production Company Limited (“BAPEX”) to conduct petroleum operations in gas fields in Bangladesh. In early 2005 a blow-out occurred at a Niko Bangladesh gas well which left a massive crater in the earth, resulting in significant damage to a surrounding village.

Niko Bangladesh had to deal with significant pressures as a result of the blow-out. The Niko Group began to receive negative press. The Bangladeshi government began an inquiry. A government committee provided a report to a Bangladesh Minister for Energy and Mineral Resources. It alleged that Niko Resources was responsible for the explosion and triggered a legal proceeding. This was problematic particularly because Niko Bangladesh had not yet concluded a gas purchase and sales agreement with the joint venture partner BAPEX.

Subsequently, Niko Bangladesh paid for and delivered a Toyota Land Cruiser to the Minister of Energy and Ministerial Resources. The purchase was known by Niko Canada which funded Niko Bangladesh’s acquisition costs. A Niko Bangladesh vice president wrote a letter to the Managing director of BAPEX indicating that the vehicle had been turned over to the Minister and thanking him for the support that Niko management had received in the past and hoped to receive in the future.

An investigation commenced after a Bangladesh newspaper published an article titled “*Niko gifts minister luxurious car*”. This triggered action on the part of the Canadian Diplomatic Corps and the RCMP. Ultimately, Niko Resources was charged and convicted. The Court imposed a significant fine and probation order in order to reflect the degree of planning, duration and complexity of the offence. It also reflected the fact that Niko Resources made these payments in order to persuade the Bangladeshi Minister to exercise his influence to secure a gas purchase and sales agreement acceptable to Niko and to ensure that it was fairly dealt with in regards to compensation claims.

### **Conclusion – Compliance Checklist**

While payments to induce public officials to use their position to the benefit of companies might be described by some as the “cost of doing business” in certain parts of the world, the decision in Niko Resources indicates there is risk associated with such activity. In order to protect themselves from the risk of prosecution, companies doing business ought to implement anti-corruption programs. Some steps are outlined below:

1. Review internal audit and accounting systems to ensure they meet OECD Convention standards for recordkeeping, disclosure, accounting and auditing.
2. Provide a robust code of conduct, educating employees about what constitutes a bribe.
3. Adopt a code of conduct regarding improper payments.
4. Monitor and audit activities subject to the code of conduct.
5. Implement a policy requiring that employees report suspicious payments.
6. Determine where sales agents' businesses are located, who their partners are, their agents' histories, track records, and reputations, including:
  - (a) business case for engaging the agent;
  - (b) selection criteria review of the agent;
  - (c) compensation comparable analysis of the agent;
  - (d) list of all the owners, directors, officers, partners and key employees of the agent;
  - (e) past or current governmental employment of the agent;
  - (f) agents' family members in government employment or office;
  - (g) political party officials or candidates linked to the agent;
  - (h) financial and business references relating to the agent; and
  - (i) registration, permits, residency and citizenship of the agent.
7. Review agents' background references and connections.
8. Review ordinary commissions, fees or payments to unrelated offshore accounts.
9. Examine distribution agreements.
10. Consider the use of organizations that provide due diligence services.

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