



Impact and Benefit Agreements: Identifying and Managing Corruption Risk

Anti-Corruption Issues Facing the Oil and Gas
Industry

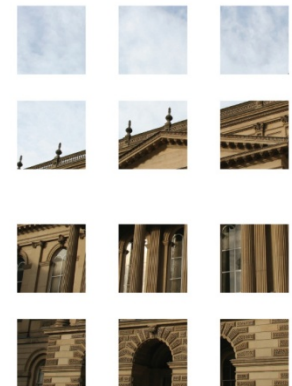
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Introduction

- Impact and Benefit Agreements (IBA's) are required by and exist within a framework of Canadian constitutional and statute law
- Negotiation and implementation of IBA's also constrained by Canadian criminal law and international anti-corruption law
- First Nations officials are NOT covered by core public bribery provision of Criminal Code (s. 121)
- First Nations officials ARE covered by “breach of trust” provisions of Criminal Code (s. 122) and foreign corrupt practices laws of foreign countries



The Legal Framework and Risk Factors

- IBA can be required by Canadian law
- Determination of authorized representatives and scope of authority – constitutional and administrative law backdrop
- Distinguishing between legal entitlement and “shake-down”
- Economic development vs. collateral benefits for First Nations officials
- Business opportunities for First Nations businesses vs. “pay-offs” and feather-bedding



Overview of Applicable Anti-Corruption Law

- Canadian Criminal Code
 - Section 426 – Secret Commissions
 - Section 121 – Breach of Trust
 - Section 380 – Fraud
- International anti-corruption law
 - OECD Convention
 - UNCAC
- Foreign anti-corruption law



Criminal Code – Section 426

- Secret Commissions
- Covers both Offence of offering/giving and soliciting/accepting secret commissions
 - Agent/Employee – receiving an award, advantage or benefit for:
 - For doing or not doing an act
 - Showing favour or disfavour to another person,
 - In relation to the affairs of his principal
- Knowledge of principal vitiates offence
- Punishable by up to 5 years imprisonment or fine in the discretion of the court for corporation (ie, no maximum)



Criminal Code – Section 122

- Breach of Trust
- Fraud or breach of trust by “official” in connection with his duties
- “Official” is defined as person who holds an office or is elected to perform a public duty
- “Office” is inclusively defined (but not limited to):
 - Federal or provincial office
 - Civil or military commission
 - Appointment or election to perform public duty



Criminal Code – Section 122 (Cont'd)

- Jurisprudence recognizes that “official” can include First Nations
- Breach of trust can apply even if Band Council and Leadership are aware of the facts
- Fills the gap left by s. 426
- Key is abuse of public trust – owed to band, not council or leadership
- Punishable by up to 5 years imprisonment or fine in the discretion of the court



Criminal Code – Section 380

- Defrauding the public or any person
- By deceit, falsehood or other fraudulent means
- Of any property, money, valuable securities or services
- Punishable by up to 14 years imprisonment or fine in the discretion of the court



Ancillary Criminal Exposure

- Section 21 – Aiding and Abetting
- Section 22 – Counselling
- Section 465 – Conspiracy
- Section 462.31 – Money Laundering
- Section 354 – Possession of Proceeds of Crime



International Anti-Corruption Law

- International treaties require countries to prohibit bribery of foreign public officials by imposing criminal or equivalent sanctions
- 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- 1997 OAS Inter-American Convention Against Corruption
- 2003 United Nations Convention on Combatting and Preventing Corruption
- Canada implemented the conventions by adopting the *Corruption of Foreign Public Officials Act (CFPOA)* in December 1998



International Anti-Corruption Law (Cont'd)

- CFPOA does not apply to corruption involving First Nations in Canada
- However, other countries' international anti-bribery laws DO apply where there is a sufficient jurisdictional basis
- US Foreign Corrupt Practices Act (FCPA)
- UK Bribery Act
- And many other countries, including most capital exporting countries



International Anti-Corruption Law (Cont'd)

- International anti-corruption laws potentially apply to foreign-owned Canadian oil and gas companies alongside Canadian Criminal Code prohibitions
- Disclosure of the bribe or knowledge by the official's superiors is generally not a defence
- FCPA also applies to Canadian companies who are "issuers" under US Securities and Exchange Act



Mitigating Risk

- Transparency and due diligence are key issues
- Be mindful of and respect First Nations governance rules



Transparency

- Transparency issues include:
 - Tailored representations and warranties in IBA's
 - Verification
 - Publication of contract awards to First Nations businesses
 - Require compliance commitments from First Nations partners
 - Anti-corruption/no kick-back provisions
 - Monitoring



Due Diligence

- Carry out targeted due diligence
 - Ownership and affiliations of First Nations businesses
 - Relationships with band officials
 - Past business dealings and references
 - Independent evaluation of qualifications



Compliance

- Consider implementation of compliance programs by
 - Proponents
 - First Nations
 - First Nations business
- Coordination of of compliance efforts (through joint Monitoring Committee)
- Education and Training



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