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Griffiths Energy International: The Board’s Dilemma (B)

Dawn Oosterhoff wrote this case under the supervision of Professor Gerard Seijts solely to provide material for class discussion. The authors do not intend to illustrate either effective or ineffective handling of a managerial situation. The authors may have disguised certain names and other identifying information to protect confidentiality.

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Recap

Griffiths Energy International Inc. (GEI) had secured the land leases needed to begin drilling for oil in Chad and was preparing to go public with an initial public offering (IPO) at the end of 2011. During the due diligence, the company’s lawyers uncovered consulting contracts that appeared to be payments to a public official to gain a business advantage. GEI’s management and board of directors were new, and its founder and former chairman, who might have been able to explain the contracts, had died in a boating accident. The company’s directors needed to decide what to do: continue with the IPO and deal with disclosure if the matter later surfaced or report the findings to the authorities now and bear the consequences.

First Steps

The board of directors and management decided the first step was to consult with a lawyer. On October 31, 2011, they had their first conversation with Kristine Robidoux, a lawyer experienced in dealing with international anti-bribery and corruption laws and well-versed in the oil and gas industry. Robidoux recommended that the directors initiate an investigation to determine what, exactly, they had uncovered and were dealing with. Only with that information could the directors decide what needed to be done.[[1]](#endnote-1)

If the investigation uncovered bribery, the directors would need to decide whether the matter should be voluntarily disclosed to the enforcement authorities or the company should keep its investigative findings confidential and wait to see whether bribery charges were eventually laid and were defensible in a criminal trial. If the decision was made to voluntarily disclose the investigative findings to the authorities, it was unclear to which authorities they would need to report. Chad’s ambassador to Canada and the United States was based in Washington, so if any bribery involved the ambassador or his associates, the Canadian company would be subject to both U.S. and Canadian legislation.

The directors decided the best course of action was to advise enforcement authorities in both countries that the company had launched an investigation, but they declined at that point to commit to sharing the results of their investigation. The board’s strategy was to wait to see what was uncovered in the investigation, since only then would the board have a thorough understanding of the potential jeopardy. In any event, only then could a proper voluntary disclosure be made.

The IPO was less than a month away, so the directors also needed to decide how to deal with the IPO in light of the uncertainty surrounding the pending investigation. They concluded that they would proceed with the IPO but would add information about the investigation to the preliminary prospectus. In the press release, the company announced:

The Prospectus notes that an investment in the common shares of Griffiths Energy is speculative and involves a high degree of risk. The Company’s business is subject to risks normally encountered in the oil and gas industry as well as additional risks typical of conducting oil and gas operations in developing countries in Africa. Among the risks noted in the Prospectus is an ongoing internal investigation into certain consulting agreements entered into by prior management.[[2]](#endnote-2)

Changing Investment Strategies

The IPO was expected to raise approximately CA$300 million[[3]](#endnote-3)—a significant realization for the initial investors and enough to sustain GEI through its launch of oil production in Chad. However, it soon became clear that launching the investigation and disclosing the possible bribery to the authorities cast a pall over the IPO; potential investors were skittish because of the uncertainty over the nature and extent of any potential penalties. In February 2012, with the initial planned date for the IPO already past, the directors elected to voluntarily withdraw the company’s IPO.[[4]](#endnote-4) That decision cost the company $1.8 million in sunk pre-IPO expenses.[[5]](#endnote-5)

Still, the potential in Chad was favourable, and some analysts maintained that GEI was promising. In March 2012, the company announced private financing of $125 million, placing the value of the shares at $6 each. GEI also secured a $75 million credit facility with a syndicate of lenders.[[6]](#endnote-6) It was not the stock value of $10 per share that was the goal in the IPO, but it was what the company needed to continue developing its operations in Chad. GEI was on schedule and on budget with its development plans for 2012 and expected its first well to begin producing oil early in 2013.[[7]](#endnote-7)

The Investigation

In May 2012, the directors received the results of the internal investigation. It had been an extensive and costly process. When the legal team, led by Robidoux, alerted the enforcement authorities in both countries that an internal investigation was underway, they had to convince the authorities to defer any police investigative action until after the company had completed its own review. Robidoux added U.S. legal advisors to the team to ensure that laws and quality standards for internal investigations in both countries were being respected. Hodgins noted, “We had to do the investigation to a standard that would be as good or better than the RCMP [Royal Canadian Mounted Police] or the U.S. Department of Justice would have done. Otherwise, they would say, ‘that’s not good enough’ and would not respect our findings.” Lawyers and forensic accountants reviewed the contracts and accounting records, sent representatives to speak to officials and contacts in Chad, and interviewed anyone who was connected to and might have material impact on the investigation and its outcome. GEI later reported that the investigation had cost the company $5 million.[[8]](#endnote-8)

The directors ultimately learned that the questionable consulting contracts, worth US$2 million, had been awarded to a company owned and controlled by the wife of Chad’s ambassador to Canada and the United States. One of GEI’s founding partners had initially attempted to contract with Chad’s ambassador; however, the company’s previous legal counsel had instructed GEI that such a contract was illegal under anti-corruption legislation.[[9]](#endnote-9) The partner then awarded an identical consulting agreement to the ambassador’s wife.[[10]](#endnote-10) In addition, the company had granted 4 million founders’ shares in the company directly and indirectly to the ambassador and his wife, which would attract further scrutiny of the enforcement agencies as constituting another payment or benefit illegally given in hope of a business advantage in Chad.

The board of directors elected to voluntarily disclose the results of the internal investigation to both Canadian and U.S. authorities, informing the RCMP, the Public Prosecution Service of Canada,[[11]](#endnote-11) and the U.S. Department of Justice. The directors turned over thousands of pages of documents and co-operated fully with the authorities. They also elected to disclose communications that had taken place between the previous management and the company’s former legal advisors, although the company was not obliged to do so. This communication was legally privileged,[[12]](#endnote-12) but the information was material.[[13]](#endnote-13)

OUtcome

Dealing with the Canadian prosecution (the Crown) was at times an enervating experience. Time was of the essence to avoid putting GEI in peril of bankruptcy. Hodgins recalled, “We had a terrible time trying to keep them moving forward. Our pace and their pace in resolving the issue were miles apart. If it didn’t get resolved quickly, we were going to go bankrupt. We just had to push and figure out a way forward.”

Months later, in January 2013, GEI and the Crown filed an agreed statement of facts with the court. The company pleaded guilty to one count of foreign corruption and reached an agreement with the Crown to pay $10.35 million in penalties.[[14]](#endnote-14) No corporate probation or other form of external monitoring was imposed. The court approved the plea deal, noting that “bribing of a foreign official by a Canadian company is a serious matter [that is] an embarrassment to all Canadians [and is a] prejudice [to] Canada’s efforts to foster and promote effective governmental and commercial relations with other countries.”[[15]](#endnote-15)

It was only the second prosecution under Canada’s anti-bribery legislation and the first where the company investigated itself and self-reported its findings to the authorities. The previous conviction under Canada’s *Corruption of Foreign Public Officials Act* had resulted from exhaustive police investigations into another company. That company was fined $9.5 million when it pleaded guilty to having used a luxury sport utility vehicle (SUV) and trips to New York City and Calgary to bribe a Bangladeshi minister. The court justified the larger fine for GEI, despite its self-investigation and self-disclosure, citing the “major aggravating factor [of the] size of the bribe made.”[[16]](#endnote-16)

The court did, however, praise GEI for its actions:

There is a new management team at Griffiths. The people involved in authorizing the bribe are no longer with the company. Most importantly, in my view, when new management came in at Griffiths and discovered the bribe, they acted quickly and decisively to fully investigate the matter and they self-reported the crime to the various relevant law enforcement authorities. Conceivably, had they not done so, this crime might never have been discovered.

Then, having reported the matter, Griffiths co-operated fully with the authorities, sharing the results of their investigation with the authorities, including privileged information and documents which the authorities were not otherwise entitled to. . . .

The cost of this investigation is said to be in the range of $5 million and thus sharing this information with the RCMP has obviously saved the prosecution a significant amount of money.

Further, I am satisfied from the representations made to me that Griffiths has instituted an effective, comprehensive, and robust anti-corruption program such that it is unlikely that there will be any repetition of such illegal conduct.

Griffiths’ actions since discovering the bribe have saved the prosecution significant money and time in investigation. The guilty plea has avoided the cost of a full-blown trial. And very importantly, Griffiths’ entire course of conduct since discovering the bribe demonstrates a complete and genuine remorse for the illegal conduct manifested by its former officers.

These are very significant mitigating factors and must be accounted for and reflected in the sentence I impose.[[17]](#endnote-17)

Law enforcement officials expressed the hope that the actions of GEI’s board of directors would set a precedent for other companies. Although the United States had witnessed numerous cases of voluntary disclosure, the limited Canadian case law made it difficult for companies to determine whether it was worth the risk to self-report and accept the consequences. One official, referring to GEI’s directors, commented, “It’s significant leadership on the corporate governance side, and that’s really to be commended.”[[18]](#endnote-18)

Robidoux also applauded the board of directors for their actions, noting the company “took every step that we could ever have recommended they take.” She pointed out that when the directors made the discovery and decided to launch the investigation, the company “had no tangible concessions from the Crown—no promises that were made. . . . All they had were the hope and expectation that the authorities would see that they were acting in good faith.” Robidoux acknowledged that “[s]ome of the advice was difficult for them. The advice that we gave them was going to cause them to incur significant expense.”[[19]](#endnote-19)

In the end, uncovering the bribery cost the company more than $17 million: $5 million for the investigation, $1.8 million in lost costs for the IPO, and $10.35 million in fines. The company also suffered the loss of gains unrealized when the IPO had to be withdrawn—conceivably a loss of $175 million.

Reflection

Hodgins recalled being disheartened with the settlement:

We hoped we were going to pay $2 million, or at least an amount equal to or less than the amount paid in the previous CFPOA [*Corruption of Foreign Public Officials Act*] case in Canada, where the company had not self-disclosed. Paying $10 million when we did everything right was a disappointment. We had to choose between being prosecuted by the Canadians and the Americans and [we] elected [to be prosecuted by] Canada because we had confidence in the system. In hindsight, the U.S. system might have been better: they had experience and they had a system of credits for those who self-reported. And we had to settle in Canada for what we could settle for to get the matter resolved in decent time.

Still, he felt the directors made the right decision:

You have to look for the long game—stand back and consider what is the right thing to do. You have your own values and you need to live by those values. You need to parlay that into your business dealings. You also want to make sure you’ve got the right people there and know who you’re working with. There are some people who are quite vocal, but you’ve got to know what your values are, stand, and be counted.

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Endnotes

1. Carrie Tait, “Getting to the Bottom of the Griffiths Energy Bribery Case,” *Globe and Mail*, February 1, 2013, accessed May 23, 2018, www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/getting-to-the-bottom-of-the-griffiths-energy-bribery-case/article8122202. [↑](#endnote-ref-1)
2. Griffiths Energy International Inc., “Griffiths Energy International Files Preliminary Prospectus,” press release, November 23, 2011, accessed May 23, 2018, www.newswire.ca/news-releases/griffiths-energy-international-files-preliminary-prospectus-509152701.html. [↑](#endnote-ref-2)
3. All dollar amounts are in CA$ unless otherwise specified. [↑](#endnote-ref-3)
4. Boyd Erman and Carrie Tait, “Griffiths Energy Cancels Ambitious IPO Plan,” *Globe and Mail*, February 5, 2012, accessed May 23, 2018, www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/griffiths-energy-cancels-ambitious-ipo-plan/article543815. [↑](#endnote-ref-4)
5. Trace Compendium, *Griffiths Energy International, Inc*., accessed May 23, 2018, www.traceinternational.org/TraceCompendium/Detail/408?class=casename\_searchresult&type=1. [↑](#endnote-ref-5)
6. Griffiths Energy International Inc., “Griffiths Energy International Inc. Arranges Private Equity Financing and Credit Facility and Provides Progress Update,” Cision: Press Release, March 8, 2012, accessed May 23, 2018, www.newswire.ca/news-releases/griffiths-energy-international-inc-arranges-private-equity-financing-and-credit-facility-and-provides-progress-update-509773161.html. [↑](#endnote-ref-6)
7. Griffiths Energy International Inc., “Griffiths Energy Discloses High Flow Rates at Badila-1 and Other Updates Including Conclusion of Internal Investigation,” Cision: Press Release, May 15, 2012, accessed May 23, 2018, www.newswire.ca/news-releases/griffiths-energy-discloses-high-flow-rates-at-badila-1-and-other-updates-including-conclusion-of-internal-investigation-510238621.html. [↑](#endnote-ref-7)
8. Trace Compendium, op. cit. [↑](#endnote-ref-8)
9. Carrie Tait, “Griffiths to Pay Millions in African Bribery Case,” *Globe and Mail*, January 22, 2013, accessed May 23, 2018, www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/griffiths-to-pay-millions-in-african-bribery-case/article7622364. [↑](#endnote-ref-9)
10. Susan Linnee, “Griffiths Energy Faces Corruption Charge, Expects Negotiated Resolution,” *Globe and Mail*, January 16, 2013, accessed May 23, 2018, www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/griffiths-energy-faces-corruption-charge-expects-negotiated-resolution/article7409965; Carrie Tait and Kelly Cryderman, “The Canadian Energy Executive at the Centre of the Griffiths Corruption Scandal,” *Globe and Mail*, January 24, 2013, accessed May 23, 2018, www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/the-canadian-energy-executive-at-the-centre-of-the-griffiths-corruption-scandal/article7725093. [↑](#endnote-ref-10)
11. “About the Public Prosecution Service of Canada,” Public Prosecution Service of Canada, updated April 16, 2018, accessed March 15, 2018, www.ppsc-sppc.gc.ca/eng/bas/index.html#intro. The Public Prosecution Service of Canada was the federal arm of Canada’s criminal law structure, responsible for prosecuting criminal offences under federal jurisdiction, which included, for example, fraud, bribery, and money laundering. [↑](#endnote-ref-11)
12. Legal privilege protected communication between a client and lawyer, exempting the communication and associated documents from having to be disclosed in legal proceedings. The client could elect to waive the privilege, but it was not commonly done. *Black’s Law Dictionary*, s.v. “privilege.” [↑](#endnote-ref-12)
13. Trace Compendium, op. cit. [↑](#endnote-ref-13)
14. Tait, “Griffiths to Pay Millions,” op. cit. [↑](#endnote-ref-14)
15. *R. v. Griffiths Energy International Inc*. (January 25, 2013), Calgary 130057425Q1 (Alta. Q.B.). [↑](#endnote-ref-15)
16. Ibid. [↑](#endnote-ref-16)
17. Ibid. [↑](#endnote-ref-17)
18. Kelly Cryderman, “Judge Approves $10.35-Million Fine for Griffiths Energy in Bribery Case,” *Globe and Mail*, January 25, 2013, accessed May 23, 2018, www.theglobeandmail.com/report-on-business/industry-news/the-law-page/judge-approves-1035-million-fine-for-griffiths-energy-in-bribery-case/article7858675. [↑](#endnote-ref-18)
19. Tait, “Getting to the Bottom,” op. cit. [↑](#endnote-ref-19)