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Foreign bribery and Conspiracy: the Plot Thickens

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I have previously written about the *Karigar* case in this Journal under the title of "Foreign Bribery and Conspiracy: A Plot that could be written in Hollywood".[1] The Ontario Court of Appeal has affirmed the conviction of Karigar,[2] citing the Supreme Court of Canada's comment on the significance of corruption in international business practices in *World Bank Group v. Wallace:*[3]

> Corruption is a significant obstacle to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity. Corruption often transcends borders. In order to tackle this global problem, worldwide cooperation is needed.[4]

In my previous article, I noted that a very unusual aspect of the case is that Mr. Karigar described the scheme in an e-mail sent under a pseudonym "Buddy" to the Fraud Section (FCPA) of the US Department of Justice stating he had information about US citizens paying bribes to foreign officers and inquired about reporting the matter. Mr. Karigar subsequently admitted that he is "Buddy". The statement, also cited by the Court of Appeal, described the scheme as follows:

> *There was a tender put out by Air India (Government of India enterprise) for a biometric security system, Cryptometrics bid on the system.*
>
> *Cryptometrics Paid USD 200,000 to make sure that only 2 companies were technically qualified.*
>
> *They paid $250,000 for the minister to 'bless' the system. There are documents executed to return the funds if the contract is not awarded. There are recordings asking for the money back.*
>
> *The People involved are Mr. Robert Barra, US citizen, CEO of Cryptometrics and Dario Berini, COO of Cryptometrics, also US Citizen.*
>
> *I am a Canadian Citizen on contract with the Canadian subsidiary of Cryptometrics.*
>
> *What about my immunity?*

[1] *Toronto Law Journal* February 2014.
[2] *R. v. Karigar*, 2017 ONCA 576
[3] *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 1
[4] *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 1, cited in *R. v. Karigar*, 2017 ONCA 576 at paragraph 39.

Justice Feldman for the Court of Appeal highlights some more salient facts of the case that underscore why this case could indeed be a Hollywood script. Karigar had approached Robert Bell, Vice-President, Business Development, for Cryptometrics Canada, with a business proposal. (Bell testified as an unindicted co-conspirator). Karigar said he was president of IPCON, a firm that had business dealings in India. Karigar explained he had good connections with certain Air India officials and advised that the airline was seeking technology to deal with security issues. The two discussed whether Cryptometrics's biometric facial recognition technology might provide a solution.

On February 24, 2006, Air India released its Request for Proposals to supply a biometric passenger identification security system. Crytometrics corporate officers met with Karigar and his colleagues in a hotel room in Mumbai to discuss submission of the Cryptometrics Canada bid. During this meeting, it was explained that Indian officials would have to be paid in order for Cryptometrics Canada to obtain the contract.

Cryptometrics officers developed financial spreadsheets that listed Air India officials who would be paid bribes and the amount of money and Cryptometrics's shares these officials would be offered. Karigar would subsequently admit in a statement to the RCMP that he furnished the information reflected in the spreadsheets.

The case also goes beyond the corruption field to encompass inside information and potential bid rigging. Karigar provided inside information regarding potential competitors for the contract. Later, under Karigar's direction and advice, the Cryptometrics team prepared a second proposal for the contract, using Karigar's company IPCON, creating the appearance of a separate competitive bidder using Cryptometrics Canada technology but at a higher price. This second proposal was designed to create the false impression of a competitive bidding situation, providing Cryptometrics Canada with certain procedural advantages.

Karigar e-mailed Bell requesting $200,000 for Air India's Deputy Director of Security. The $200,000 was subsequently transferred from Cryptometrics USA to Karigar's bank account in Mumbai. The trial judge found that this money was intended for the purpose of bribing the Deputy Director of Security.

Justice Feldman also cites a meeting with the Consulate General for Canada in Mumbai. The passage from the Appeal decision is worth repeating in full as it reflects an old style attitude that bribes were a standard cost of business:

> On May 15, 2007, the appellant and Berini met with Annie Dubé at the Consulate General for Canada in Mumbai. During the meeting, the appellant stated that Cryptometrics had paid a bribe to Praful Patel (Minister of Civil Aviation - India) through an agent in order to clear the process and obtain the Air India contract. The appellant also stated that their agent confirmed the bribe money had been received by Patel. The appellant did not disclose the identity of the agent, nor the amount of money that was paid. The appellant also talked about corruption in general in India and specifically how government figures would get up to eight

> percent of the value of a contract as a bribe payment. The appellant stated "but we know he received the money" and "you didn't hear that from us". He continued that "we went to an agent and he received something. And we got information from the agent that the Minister received it." Dubé testified that she was shocked and expressed that they could be prosecuted (or sued);[5]

Before considering the legal issues in this case, it is worth taking a step back to reflect about the potential impact of corruption. If this was a Hollywood script, here is where the drama would build. Air India flight 182 was flying over the Atlantic Ocean en route to New Delhi from Montreal via London on June 23, 1985 when it exploded in mid-air, killing all 329 people on board, including 22 crew members. The biometric passenger identification security system that Cryptometrics was bidding on would be part of the system to prevent future terrorist attacks. As the Supreme Court of Canada recognized, corruption undermines confidence in public institutions. Air India officials had a duty to ensure that their security systems would prevent future tragedies, and bribery undermines confidence in that process.

There were three key grounds of appeal in Karigar.

1) Territorial Jurisdiction

The offence was committed prior to the enactment of Bill S-14, which includes a new provision to establish territorial jurisdiction based on Canadian nationality or permanent residency of a person who has committed an offence under the Act.

The trial judge had observed that this new basis for jurisdiction was not retroactive and did not apply to the present case. He referred instead to the test for territorial jurisdiction stated by the Supreme Court in *Libman* that it is sufficient that there be a "real and substantial link" between an offence and Canada.

The Court of Appeal affirmed that there was a real and substantial link based on a myriad of factors, including the fact that a Canadian company was the proposed contracting party, the unfair advantage and fruits of the contract obtained through bribery would benefit that company and a great deal of the contract work was to be done in Canada.

2) The agreement to pay a bribe is not restricted to a direct bribe with the foreign official

Karigar submitted that giving the word "agree" its ordinary meaning, the *Corruption of Foreign Public Officials Act* (CFPOA) requires proof of an agreement between the accused and the foreign public official, and does not include an agreement between one or more other persons to offer a bribe to a foreign public official. This interpretation would have made offences much harder to prove, given the hidden nature of bribery. The Court of Appeal rejected this argument.

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[5] *R. v. Karigar*, 2017 ONCA 576 at paragraph 17.

The centerpiece of the CFPOA,[6] section 3, states that the offence is committed when a person "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." The offence is clearly committed when a person agrees with a foreign public official to give that official a benefit. Justice Feldman writes that equally clearly, the offence is not limited to that scenario. "It includes both a direct ***and an indirect*** agreement to give or to offer an advantage. There is no limiting language on who must "agree", prescribing the parties to the agreement. It does not say that the agreement must be with the foreign official, only that the loan, reward, advantage or benefit that is the subject of the agreement must be a loan, reward, advantage or benefit *to* (or for the benefit of) a public official. On the language alone, there is no basis to read in a limitation on who must be parties to an agreement"[emphasis added].[7]

3) Co-conspirators' exception to the hearsay rule

The Court found no error in the trial judge's acceptance that Bell was an unindicted co-conspirator who could give in evidence against Karigar about the statements of other co-conspirators. Of course, his evidence as a witness recounting events from his own knowledge was not hearsay and was admissible as direct evidence.

Conclusion

The *Karigar* case ends with a Hollywood ending. It is also a message to the Canadian business community that anti-corruption compliance ought not to be relegated to the back row.

[6] For an expanded analysis, see Archibald, Jull and Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Thomson Reuters) chapter 17, "The Canadian Corruption of Foreign Public Officials Act: Mandatory Risk Assessment".
[7] *Karigar* at paragraph 43.