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E-Bulletin

Canada's First Foreign Anti-Corruption Trial

Lessons from R. v. Karigar

On August 15, 2013, the Ontario Superior Court of Justice convicted Canadian Nazir Karigar for agreeing to offer bribes to public officials in India, contrary to Canada's *Corruption of Foreign Public Officials Act* ("CFPOA"). It is the first time an individual has been convicted under the CFPOA. The Karigar case is also the first prosecution that has proceeded to trial, providing an interpretation by a Canadian court of CFPOA provisions. This bulletin considers the facts of the Karigar case, the Court's decision and corresponding guidance Canadian companies may draw from it.

1. CFPOA Background

Canadian companies have become increasingly aware of potential liability under the CFPOA, which makes it an offence to "directly or indirectly give, offer or agree to give or offer an advantage or benefit of any kind" to a foreign public official.

While the law has been on the books in Canada since 1998, it has only been in the last five years that enforcement has become a priority, with greater resources being given to the RCMP for investigations. Three CFPOA convictions have been issued in the last two years. Convictions of Canadian companies Griffiths Energy International and Niko Resources Inc. both resulted from guilty pleas and led to fines of $10.35 million and $9.5 million respectively. Currently, there are reportedly over 35 active RCMP investigations into violations of the CFPOA.

2. Facts of Nazir Karigar Case

In the Karigar case, the Crown alleged that Mr. Karigar assumed a leading role in a conspiracy to bribe Indian officials to secure the award of a tendered Air India contract for facial recognition software for a Canadian company Cryptometrics Canada ("Cryptometrics") which is a subsidiary of a U.S. company, Cryptometrics Corporation ("Cryptometrics U.S.A.").

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According to the Court's decision, in 2005 Nazir Karigar contacted Cryptometrics and offered assistance to them in winning the Air India contract using his good contacts with Air India officials. Cryptometrics, together with its parent U.S. company, ultimately accepted Mr. Karigar's offer. In return, Mr. Karigar and his colleague were to receive 30% of the expected revenue stream from the contract.

In 2006, Air India released its Request for Proposal for its facial recognition project. Before and after that time, Mr. Karigar provided inside information about the bid to Cryptometrics. When Cryptometrics began preparing its bid, Mr. Karigar presented them with financial spreadsheets listing the Air India officials who would be paid bribes in order to secure the bid, and the amount of money and number of Cryptometrics shares to be offered to these officials.

Cryptometrics submitted its proposal, and a higher bid was submitted by a company controlled by Mr. Karigar to give the appearance of competition in the tendering process.

Mr. Karigar requested that Cryptometrics provide $200,000 to him, for the purpose of giving it to the co-chair of the selection committee for the Air India project. The money was transferred from Cryptometrics U.S.A. to Mr. Karigar's Mumbai bank account.

As the process continued in 2007, the CEO of Cryptometrics U.S.A. and Mr. Karigar entered into a Letter of Agreement, providing that $250,000 would be transferred to Mr. Karigar's Mumbai bank account in order to secure the Air India contract, and the money was transferred accordingly. The money was to be repaid if the contract was not secured. Mr. Karigar later claimed it was paid to Prafu Patel, then Minister of Aviation, in order to approve the contract award to Cryptometrics.

Mr. Karigar and a Cryptometrics U.S.A. representative later met with an officer of the Consulate General for Canada in Mumbai. Mr. Karigar advised her that Cryptometrics had paid a bribe to the Minister of Civil Aviation through an agent in order to win the Air India tender, although he didn't disclose the identity of the agent nor the amount paid. Several months later, Mr. Karigar sent an anonymous email to the Fraud Section (Foreign Corrupt Practices Act) of the U.S. Department of Justice in which he inquired about reporting the matter.

It appears that Mr. Karigar ultimately had a falling out with the principals behind the Cryptometrics bid. In 2008, Mr. Karigar emailed the U.S. Justice Department indicating that Cryptometrics paid a total of $450,000 in bribes to obtain the Air India contract, and enquiring about his own immunity.

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Cryptometrics did not ultimately win the Air India contract.

3. Court's Decision

Justice Hackland of the Ontario Superior Court of Justice found there was sufficient evidence to find Mr. Karigar had contravened section 3(1) of the CFPOA by agreeing or conspiring to pay a bribe to foreign public officials. Several aspects of the Court's reasons provide important interpretations of certain provisions of the CFPOA.

a. Employees of State-owned Companies may be considered to be "foreign public officials" for purposes of the CFPOA

The Court found that Air India is a corporation owned and controlled by the Government of India. The targeted Air India officials, therefore, fell within the definition of "foreign public official" in the CFPOA.

The decision highlights the broad scope of the term "foreign public official". Companies should remember that liability for foreign bribery can arise not only when dealing with direct representatives and employees of governments but also with employees of state-owned companies and other bodies that are performing duties on behalf of a state or public international organization.

b. No bribe was actually paid

The Court noted that there was insufficient evidence to establish that a bribe had in fact been paid to a public official. However, Mr. Karigar's agreement or conspiracy to pay the bribe, coupled with evidence of his belief that a bribe had been paid, was enough for the Court to issue a conviction under the CFPOA.

c. "Agreement" or "conspiracy" to bribe

Mr. Karigar argued that the CFPOA required evidence of an actual agreement to bribe between the accused and the bribe recipient. The Court rejected this interpretation, stating that such an interpretation would unduly restrict the Act, and would unreasonably require evidence from a foreign jurisdiction, possibly putting foreign nationals at risk and making the legislation difficult if not impossible to enforce. The judge specifically referred to the wording of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which Canada is a party, in coming to his conclusions on this issue.

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Instead, all that was needed to establish the act of the offence was an agreement or conspiracy with another person to pay a bribe, as well as a belief that the bribe is being or was paid.

The Court also found that because the offence involved conspiracy, hearsay evidence from co-conspirators could be admitted.

d. Risk from whistleblowers

Companies that engage in bribery run the risk of getting caught. This risk arises not only from law enforcement investigations, but also from potential "whistleblowers" both within and outside the company. In this case, the accused himself acted as a whistleblower when he apparently became dissatisfied with the business relationship, thus exposing the Cryptometrics companies and their executives to prosecution. The Public Prosecution Service, and ultimately the Court itself, did not appear to have been impressed by his change of heart on the acts of bribery, however, given that he initiated the process at the outset and carried it through for many months.

Conducting business in a way that contravenes applicable laws on bribery exposes a company to the risk of whistleblowing by any parties with knowledge of the illegal act.

e. Co-operation with authorities

This case demonstrates both the advantages and risks of co-operating with authorities. The primary Crown witness, a Cryptometrics employee who participated in the conspiracy, benefitted from co-operation as he testified under the promise of immunity. Mr. Karigar, on the other hand, blew the whistle on the bribery to Canadian and U.S. authorities, yet is thus far is the sole party to be prosecuted. It is unclear whether U.S. officials will be pursuing charges against the U.S. Company or individuals. Whistleblowers would be well advised to make the decision to come forward only after considering all of the factual and legal circumstances. As noted above, active participants in bribery schemes may find that voluntary disclosures do not, at least at a certain point, mitigate or otherwise attenuate prosecutors' efforts to obtain convictions.

f. Risks from third party agents

This case also demonstrates the need for scrutiny when hiring third party agents to secure contracts. The evidence suggested that initially, Cryptometrics did not realize that Mr. Karigar intended to pay bribes in order to assist the contract award. Businesses need to be certain that they have rigorous systems in place in order to ensure third party agents are not engaging in bribery on their behalf. A failure to do so may result in corporate liability through the criminal

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law doctrine of willful blindness, a subject we have addressed in an earlier article, available at: http://www.lexmercantile.com/uploads/Northern%20Miner%20Print%20May%20Not%20Be%20Enough.pdf .

g. Territorial Jurisdiction

This case was prosecuted under the former provisions of the CFPOA that effectively required there be a "real and substantial" link between the act of bribery and Canada, in order for the offence to be prosecuted in Canadian courts. The court found that such a link existed in this case by virtue of the fact that at all material times Mr. Karigar, a Canadian resident, was employed by or an agent of a Canadian company attempting to secure an unfair advantage for that company, whose employees in Ottawa stood to benefit from the bribery.

Recent amendments to the CFPOA have eliminated the need for a "real and substantial" link between the offence and Canada in cases where an accused individual is a permanent resident or Canadian citizen, or if a corporate accused is organized in Canada.

h. Prison sentence

A sentencing hearing for Mr. Karigar is expected to be held in September 2013. Under the old CFPOA, he faces a maximum prison sentence of 5 years. Under the amended CFPOA, the maximum sentence for bribery is now 14 years in prison.

4. How can Canadian companies protect themselves from bribery liability?

Companies will want to ensure that they have anti-bribery compliance programs firmly in place to avoid running afoul of the new provisions. Those with existing anti-bribery programs will need to make changes to their policies and procedures to ensure compliance with the new requirements.

A comprehensive anti-bribery compliance program would include:

a. **Tone from the top** - An unequivocal commitment to anti-corruption at the highest levels of the company – so-called "Tone from the Top".

b. **Anti-Bribery Policy** – Companies should develop a visible anti-bribery policy that is clearly communicated to all affected persons. We recommend a clearly worded policy that defines and prohibits bribery and corruption, requiring the keeping of accurate books and records, providing examples and guidance in areas such as gifts and hospitality,

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facilitation payments, travel expenses, and company support for public infrastructure, political and charitable contributions. The policy should be drafted taking into consideration the anti-bribery laws and case-law of any country whose jurisdiction impacts the company's operations.

c. **Risk Assessment** – Conducting a risk assessment of company operations considering various risk factors, a few examples of which include:
    - areas of operation and local customs;
    - dependence on issuance of particular licenses and other government permits;
    - identification of areas of company operations that are likely to engage in interaction with public officials or their agents, such as procurement, government relations including permitting issues and import/export operations;
    - determination of areas in which there is time pressure to accomplish a certain task i.e. obtaining licenses;
    - use of third party agents.

d. **Implementing anti-bribery strategies** – An anti-bribery policy by itself may have little impact on a company's actual operations. An anti-bribery program should be developed to implement the policy, taking into consideration identified risk factors. Some examples of needed steps include:
    - training directors, employees, managers and agents both in Canada and abroad, as well as key high risk third parties including contractors and suppliers;
    - establishing due diligence procedures in relation to agents and third parties, such as background checks and inserting anti-bribery terms into all third party contracts;
    - working with advisors to ensure that any bribery "red flag" behavior will be highlighted so that an investigation can take place and illegal practices halted.

e. **Post implementation assessment and follow-up** – Any anti-bribery program must be monitored to ensure that it is being carried out properly. Examples of steps which should be taken to do so include:
    - regular review and audit of company financials, operations and risk factors to identify and address areas in which anti-bribery policies are not being followed;
    - reviewing incidents of non-compliance with a view to introducing remedial measures.

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Sills Egsgard LLP would be pleased to discuss issues related to compliance with the new amendments to the CFPOA and to assist with improvements to company practices and procedures in that regard.