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This newsletter is designed to highlight new issues of importance in international trade and business related law. We hope you will find it interesting and welcome your comments.

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"Mr. Karigar was a Canadian businessman who was allegedly acting as a paid agent for Cryptometrics Canada (based in Kanata, Ontario) and certain other related companies."

On August 15, 2013, the Ontario Superior Court of Justice found Mr. Nazir Karigar guilty of violating the Corruption of *Foreign Public Officials Act*[1] ("CFPOA"). At the time of the decision, the CFPOA had already been amended by the *Fighting Foreign Corruption Act*[2] ("FFCA"), which received Royal Assent on June 19, 2013. However, the conduct that led to Mr. Karigar being charged allegedly occurred between 2005 and 2008. As a result, the Karigar case was decided under the prior law. Nevertheless, it still contains valuable insight that will also apply to the current CFPOA.

Mr. Karigar was charged with agreeing to give or offer bribes to Air India officials and India's then Minister of Civil Aviation, in order to secure a contract from Air India for the supply of facial recognition software and related equipment. Mr. Karigar was a Canadian businessman who was allegedly acting as a paid agent for Cryptometrics Canada (based in Kanata, Ontario) and certain other related companies.

On or about September 2005, Mr. Karigar met with Robert Bell, Vice-President of Business Development for Cryptometrics Canada in Ottawa. During this meeting, Mr. Karigar offered to help Cryptometrics Canada secure this contract from Air India, in exchange for 30% of the revenue stream.

On April 16, 2006, Mr. Karigar and Mr. Bell had a meeting in India with Mario Berini, Chief Operating Officer for Cryptometrics Canada and its U.S, parent company, Cryptometrics Corporation ("Cryptometrics USA"). During this meeting, Mr. Karigar's assistant first mentioned that Indian officials would have to be paid in order to obtain the contract. A proposal in response to Air India's Request for Proposal was subsequently prepared on behalf of Cryptometics Canada.

The sum of US$200,000 was transferred from Cryptometrics USA to Mr Karigar's bank account in Mumbai and there was strong circumstantial evidence that the money was intended for the purpose of paying the bribe. An additional US$250,000 was subsequently transferred from Cryptometrics USA to the Mumbai bank account of Mr. Karigar in order to secure the Air India contract.

[1] S.C. 1998, c.34.
[2] S.C. 2013, c.26.

The Crown based its case on two alleged bribes, one in the amount of US$200,000 paid to an Air India official and one in the amount of US$250,000 paid to the Indian Minister of Civil Aviation. However, counsel for the accused claimed that the Crown had failed to present any evidence regarding the payment of these bribes to any improper recipient. As a result, he alleged that it was not possible to establish that any foreign public official was actually offered or paid a bribe.

Counsel for the accused also claimed that, in order for the court to exercise jurisdiction over the case, the Crown was required to prove that there was a "real and substantial link" between the offense and Canada, based on the principles set out by the Supreme Court of Canada in *Libman v. The Queen*[3]. He argued that the bulk of the elements of the offense had no connection to Canada. For example, the directing minds of the proposed business transaction were Mr. Berini and Robert Barra, CEO of Cryptometrics USA; both were U.S. citizens based in New York. In addition, the dealings with Air India officials, apart from two brief visits to Kanata, Ontario, all occurred in India.

Counsel for the accused argued that a violation of Clause 3(1)(b) of the CFPOA had not been established because it requires proof that a person "directly or indirectly gives, offers or agrees to give or offer" a benefit to a foreign public official. His position was that the word "agrees" should be given its ordinary meaning so as to apply to "the agreement of two people – one to pay the bribe and one to receive the bribe." As there was no evidence that any foreign public official was actually offered or paid a bribe, counsel for the accused claimed that a violation of Clause 3(1)(b) had not been established.

The Crown argued that conspiracy to pay bribes was included under Clause 3(1)(b) of the CFPOA. In support of this position, it pointed out that Section 3 of the CFPOA prohibited the giving, offering or agreement to give or offer a bribe but did not prohibit the receipt of a bribe. The Crown also drew attention to the language of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"), which Canada signed on December 17, 1997; the CFPOA was enacted to satisfy Canada's obligations under the Convention.

Regional Senior Justice Hackland agreed, finding that the language of Clause 3(1)(b) of the CFPOA was consistent with the terms of Article 1 of the Convention, which reads in part as follows:

> 2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

[3] [1985] 2 S.C.R. 178.

"...jurisdiction over the bribery of foreign public officials may now be based on the Canadian nationality or Canadian permanent resident status of the accused, even if the offence occurred outside of Canada."

As a result, the court concluded that the use of the term "agrees" included the concept of conspiracy.

Counsel for the accused had also relied on Section 6 of the FFCA by arguing that these amendments only now made conspiracy to offer bribes an offense. The language of Section 6 is as follows:

> 6. An information may be laid under section 504 of the Criminal Code in respect of an offence under this Act — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under this Act — only by an officer of the Royal Canadian Mounted Police or any person designated as a peace officer under the Royal Canadian Mounted Police Act.

Hackland R.S.J. rejected this argument, finding that Section 6 of the FFCA implies or assumes that conspiracies are already caught by the CFPOA and simply now provides exclusive authority to the Royal Canadian Mounted Police to lay charges for those offences.

Finally, Hackland R.S.J. rejected the position taken by counsel for the accused on a policy basis. He concluded that, if the word "agrees" in the CFPOA was restricted to the acts of two parties (one to pay the bribe and one to receive the bribe), the scope of the CFPOA would be unduly restricted and its objectives defeated. Further, to require proof of the offer or receipt of the bribe and the identity of the particular recipient would require evidence from a foreign jurisdiction (possibly putting foreign nationals at risk), would make the legislation difficult if not impossible to enforce, and might possibly offend international comity.

The FFCA has now established "nationality jurisdiction" as a basis for Canadian courts exercising jurisdiction over persons accused of violating the CFPOA. In other words, jurisdiction over the bribery of foreign public officials may now be based on the Canadian nationality or Canadian permanent resident status of the accused, even if the offence occurred outside of Canada. However, as the alleged offence occurred prior to the effective date of the FFCA, it was necessary to establish a "real and substantial link" between the offense and Canada, in accordance with *Libman v. The Queen*.

Relying on *Libman v. The Queen*, Hackland R.S.J. concluded that the substantial connection test was not limited to the essential elements of the offence, as counsel for the accused had suggested. All that was necessary to make the offense subject to the jurisdiction of the courts was that a significant portion of the activities constituting the offence took place in Canada.

In finding that a real and substantial connection to Canada existed, Hackland R.S.J. relied on the following facts:

a) When the accused first approached Cryptometrics Canada, a Canadian company based in Kanata, Ontario, he was a Canadian businessman resident for many years in Toronto.

b) At all material times, the accused was employed by or acting as agent of Cryptometrics Canada.

c) Had the Air India contract been awarded, a great deal of work would have been performed by Cryptometrics Canada employees in Kanata.

For the above reasons, Hackland R.S.J. found that a sufficient substantial connection existed to confer jurisdiction over the bribery offense.

In addition, Hackland R.S.J. found nothing that would offend international comity, an additional factor mentioned in *Libman v. The Queen*. If the Cryptometrics Canada could obtain a contract through the use of bribes and not be prosecuted for it, the purpose of the Convention would be thwarted and Canada would be in violation of its international obligations. Also, nearly all of the real evidence, principal documents, and emails were seized in Canada. In addition, all of the witnesses who testified were from Canada.

Hackland R.S.J. appears to have applied a fairly liberal interpretation of *Libman v. The Queen*. Although both the accused and Cryptometrics Canada were based in Canada, none of the essential elements of the offense and only a relatively small portion of the activities relating to the offence ever took place in Canada. In fact, the conspiracy was probably not established until the April 16, 2006 meeting in India, when the proposed bribe was first mentioned.

Although the discussion of territorial jurisdiction is no longer a significant issue for offenses that occur on or after June 19, 2013, this decision suggests that courts will be inclined to find a real and substantial connection to Canada when considering offences that occurred prior to the effective date of the FFCA. ■

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